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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 2

WEDNESDAY, OCTOBER 30, 1974

Complete Proceedings on Bill S-4, intituled:

"An Act to amend the Customs Act"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

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THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Martin
Desruisseaux	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Smith
Hayden	Sullivan
Hays	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 23, 1974:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Inman, for the second reading of the Bill S-4, intituled: "An Act to amend the Customs Act".

After debate and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Langlois moved, seconded by the Honourable Senator Inman, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

Minutes of Proceedings

Wednesday, October 30, 1974.
(3)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the following:

Bill S-4 "An Act to amend the Customs Act".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Blois, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Haig, Laird, Macnaughton, McIlraith, Molson and Sullivan. (13)

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

After an explanation by the Chairman, it was *Agreed* that certain typographical and technical errors in the first reading copy of the said Bill be corrected during the printing of the third reading version.

WITNESSES:

Revenue Canada, Customs and Excise,

Customs Operations Branch:

Mr. J. N. Leigh,
Assistant Deputy Minister;

Mr. F. E. Light,
Legislation Division.

Department of Justice:

Mr. P. Wershof,
Legislation Section.

Upon motion it was *Resolved* to report the said Bill without amendment.

At 9.55 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, October 30, 1974.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-4, intituled: "An Act to amend the Customs Act" has, in obedience to the order of reference of Wednesday, October 23, 1974, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, October 30, 1974

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-4, to amend the Customs Act, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have one bill before us this morning, Bill S-4. Present as witnesses are Mr. J. N. Leigh, Assistant Deputy Minister, Revenue Canada, Customs and Excise, and Mr. F. E. Light, Legislation Division, Customs and Excise. Also present is a representative from the Department of Justice, Mr. P. Wershof of the Legislation Section.

Senator Cook was the sponsor of this bill and I have not heard any complaints about the explanation that he gave, so it must have been perfect. Mr. Leigh, would you tell us briefly what this bill is intended to do?

Mr. J. N. Leigh, Assistant Deputy Minister, Revenue Canada, Customs and Excise, Customs Operations Branch: Yes, Mr. Chairman.

The Chairman: I should direct your attention to the fact that there are a few grammatical changes to be made in the bill, mainly in the French text. Our law clerk is satisfied, as is the representative of the Department of Justice, that this grammatical correction can be made in the reprint of the bill and does not require an amendment.

Mr. Leigh: Thank you, Mr. Chairman.

Honourable senators, the purpose of this bill is to amend the Customs Act to reconcile its jurisdictional provisions with those of the Territorial Sea and Fishing Zones Act. Canadian customs jurisdiction would be extended to the outer limits of Canada's territorial sea as defined in the Territorial Sea and Fishing Zones Act. Under the provisions of the Customs Act, customs jurisdiction is limited to three miles from the coast. A recent amendment to the Territorial Sea and Fishing Zones Act, passed in June, 1970, set the territorial sea of Canada as extending 12 miles from the appropriate base lines. The discrepancies between the two acts result in legislative and administrative anomalies affecting both government and industry, as only that activity within the three mile limit is subject to customs control for goods and conveyances.

The proposed amendments to subsection 10(1), paragraph 101(*a*), subsection 192(4), subsection 205(4) and subsection 207(1), with additional interpretation provided in subsection 2(1), bridge the Customs Act to the Territorial Sea and Fishing Zones Act by the use of the phrase "Canadian waters." Thus customs jurisdiction will be extended to 12 miles.

In summary, these proposed amendments will strengthen Canada's control over its own waters by bringing the Customs Act permanently into line with the Territorial Sea and Fishing Zones Act. The amendments are in such a form that a future change in the limits of the territorial sea of Canada would not necessitate further amendment to the Customs Act.

I am open for questions, Mr. Chairman.

The Chairman: Are there any questions from members of the committee?

Senator Connolly (Ottawa West): How would this legislation be policed 12 nautical miles out?

Mr. Leigh: Vessels entering territorial seas must proceed directly to the nearest port. They would be policed by the Canadian Coast Guard and the R.C.M.P.

Senator Connolly (Ottawa West): Do many such vessels enter?

Mr. Leigh: A number of seismic vessels are now entering, in addition to a number of such craft already here.

Senator Connolly (Ottawa West): Is this true of both coasts?

Mr. Leigh: It is primarily so on the east coast.

Senator Laird: Does any treaty exist between Canada and other maritime powers by which the 12-mile limit is established in international law?

Mr. Leigh: There are some countries, I think 40 in number, that have up to 12 miles. The number continuing with the three-mile limit is about 17. I do not believe there is a treaty.

Senator Laird: Is that not the cause of some complications?

Mr. Leigh: I believe there are some complications affecting the inland waters around British Columbia.

Senator Laird: That would be a matter for international agreement. There is nothing we can do about that.

Mr. Leigh: That is correct, senator.

Senator Connolly (Ottawa West): Would that come back to the policing business?

Mr. Leigh: The policing business could very well be in effect.

Senator Connolly (Ottawa West): You mean on the west coast, where you have conflicting American and Canadian jurisdictions?

Mr. Leigh: I believe in Canada the Canadian coastguard and the RCMP would come under these jurisdictions, yes.

Senator Connolly (Ottawa West): When you get into conflicting jurisdictions with the Americans on the west coast, does it mean that there would be accommodation between the countries so that the policing would be done by one in certain areas and by another in other areas?

Mr. Leigh: My understanding is that it would be restricted on the west coast, particularly in the inland area; that our extent would be three miles rather than 12 miles.

Senator Connolly (Ottawa West): I do not know that I understand that reply. You tell me that there are relatively few Canadian vessels available for policing on the West Coast. Are there many American vessels there?

Mr. Leigh: We are not aware of the number of American vessel there for policing. Indeed, I do not believe we are aware of the number of Canadian vessels available for policing. We are aware that the Canadian coastguard and RCMP are available for policing.

Senator Connolly (Ottawa West): Surely your own problems arise out of the inadequacy of the policing. If you have now a responsibility to watch ships within the limit of 12 nautical miles from the baseline, you have the responsibility of ensuring that it is enforced.

The Chairman: I wonder whether the determination of the 12-mile limit is certain.

Senator Connolly (Ottawa West): Theoretically it may be certain, but it may be hard to find. Surely there is a responsibility cast upon the department to ensure the adequacy of the policing?

Senator Cook: It might help if the committee directs its attention to section 2(1) of the Customs Act, which says:

> —the Governor in Council may from time to time by proclamation temporarily restrict, for Customs purposes, the extent of Canadian waters and such proclamation shall not be construed as foregoing any Canadian rights in respect of waters thus restricted;

That is in the Customs Act itself. In places like St. Pierre et Miquelon, very close to Newfoundland, and other sensitive areas, the proclamation would restrict the area of the customs authority until these things are ironed out.

The Chairman: You mean they would have markers out in the water?

Senator Cook: I couldn't say.

Senator Macnaughton: Mr. Chairman, as I understand the situation, Canada claims 12 miles. It has not yet been admitted in international law, but we claim it. We are trying to police it by patrols, and so on. As a matter of fact, we are claiming from 200 to 400 miles, if we can sell it to the rest of the international world. When we come into conflict with the United States, we try to accommodate the situation; is that it?

Senator Connolly (Ottawa West): The problem, I take it, is not with the Americans. It is with smugglers, rum runners, dope runners, and people like that. That is the big concern. From reading the press, it seems there is probably more dangerous activity, likely to give problems, on the west coast than on the east coast.

The Chairman: There is a provision in the bill about boarding vessels. Suppose there is a conflict, after customs have boarded a vessel outside the 12-mile limit—how do you deal with that?

Mr. Leigh: We have a baseline. If we board a vessel, I am sure it would be within the 12-mile limit.

The Chairman: The baseline is not a straight line, is it?

Senator Connolly (Ottawa West): Yes, the baseline is a straight line. The question was, how do you determine it? I suppose there are gadgets on the ship that tell you how far away you are.

Senator Cook: It is like catching someone for speeding.

Senator Laird: What is the situation on the Great Lakes, such as Lake Erie and Lake Ontario?

Mr. Leigh: If you cross the international line, you make a report to the customs reporting station. The RCMP patrol the Great Lakes also.

Senator Laird: But it is still proposed to extend the limit there from three to 12 miles; is that right?

Mr. Leigh: This is really on the coastline, in territorial waters. I think the "inland waters" are defined.

Senator Cook: The definition for "inland waters of Canada" is set out in clause 1 of the bill.

Senator Molson: In that connection, Mr. Chairman, may I ask why the definition of inland waters is from Cap des Rosiers to the westernmost point of Anticosti Island, and not to the easternmost point? What is the magic in taking the westernmost point for our inland waters and not the easternmost point? Anticosti Island is much the same all the way along.

The Chairman: I suppose if you take the most eastern point you might reach farther out than if you are measuring to the most western point.

Senator Molson: It is wide, but it is still within the Canadian water picture.

Senator Buckwold: May I ask Mr. Leigh whether he feels this will have any significant effect on offshore drilling?

Mr. Leigh: In the way of additional costs, senator?

Senator Buckwold: Yes, additional costs to the oil companies. For example, if an oil company is drilling at a distance of at least three miles out, that company, I presume, can bring in equipment from all over the world without paying customs duty on it.

Mr. Leigh: That is right, senator.

Senator Buckwold: Under these new amendments, if the company is within the 12-mile limit, it would be subject to duties, tariffs, and so forth?

Mr. Leigh: That is correct, senator.

Senator Buckwold: Do you feel this will create any difficulties for the oil companies?

Mr. Leigh: We do not see any great difference in applying it to the 12-mile limit as opposed to the 3-mile limit. We do not anticipate any great difficulties.

Senator Buckwold: Do you feel this will have the effect of forcing drilling farther out?

Mr. Leigh: I understand the companies are already going a lot farther out now, senator. They are already talking about drilling at distances of 200 miles out.

Senator Buckwold: Has any protest been lodged by the oil companies in so far as this is concerned, inasmuch as it could be a significant factor in their costs?

Mr. Leigh: We have a list of drilling rigs located approximately 20 miles off Prince Edward Island and 100 miles southeast of Newfoundland that are actually in operation at the moment, as well as some approximately 200 miles due east of St. John's, Newfoundland. We have other Canadian drilling rigs operating in the North Sea and Morocco, as well as one departing for France and one departing for the Celtic Sea.

Senator Buckwold: In other words, what you are saying is that the rigs are beyond the 12-mile limit?

Mr. Leigh: That is correct.

Senator Connolly (Ottawa West): Where that is the case you do not collect any duties?

Mr. Leigh: That is right. If they come within the 12-mile limit, we would be looking for customs duties, or if they re-entered Canadian waters we would be looking for customs duties.

Senator Connolly (Ottawa West): In cases where they are beyond the 12-mile limit, are they on the Continental Shelf?

Mr. Leigh: I believe those beyond the 12-mile limit are on the Continental Shelf.

Senator Cook: I understand the reason for clause 7 of the bill is to give the oil companies and the government an opportunity to discuss the matter and to come to a joint decision as to when these amendments will come into force.

Mr. Leigh: That is correct, senator.

Senator Macnaughton: So, there would be no duty payable if a company decided to shift its rigs from New York to Norway outside the 12-mile limit?

Mr. Leigh: Are you talking about that move being made through Canadian waters?

Senator Macnaughton: I am assuming it would not pass through Canadian waters. Obviously, there would be no duty. However, if because of a storm they had to go into Halifax, would you jump on them?

Mr. Leigh: I do not think we would. If you are moving from point A to point B without stopping or doing work in Canadian waters, there would be no duty payable.

Senator Connolly (Ottawa West): Are you satisfied that there is sufficient protection for you in your responsibilities for administering this act with the available shipping that is in place to police it?

Mr. Leigh: We believe we are very much aware of what is going on out there, because of the requests for supplies and the movement of equipment. Yes, we are satisfied that we can control it.

Senator Connolly: Even the smugglers?

Mr. Leigh: I wish I could say I am satisfied in that respect, but I cannot.

Senator Desruisseaux: What happens around St. Pierre et Miquelon?

Mr. Leigh: We have constant RCMP patrols around that area because of its proximity to Newfoundland.

Senator Molson: I would still like an answer to my question. I do not see why the Gulf of St. Lawrence is not an inland water. I would appreciate an answer to that question. If you look at a map it looks very much as though it should be part of Canadian waters.

Mr. Leigh: I believe this was determined at the time the Territorial Sea and Fishing Zones Act came into effect. The original lines were determined by the Territorial Sea and Fishing Zones Act. We are simply following the same lines as determined by that act.

Senator Desruisseaux: Will these amendments affect the Russian fishing fleet in any way?

Mr. Leigh: I do not believe it will be any different from what it is at present. The Russian fleet is presently allowed to come in for the purpose of getting supplies.

The Chairman: Is there a motion to report the bill without amendment?

Senator Laird: I so move.

The Chairman: Is it agreed, honourable senators, that we report the bill without amendment?

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FIRST SESSION—THIRTIETH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 3

WEDNESDAY, OCTOBER 30, 1974

First Proceedings on

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Martin
Desruisseaux	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Smith
Hayden	Sullivan
Hays	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,
The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

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Minutes of Proceedings

Wednesday, October 30, 1974.
(4)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9.55 a.m. to consider the following:

"The advanced study of proposed legislation respecting the *Combines Investigation Act*, competition in Canada or any matter relating thereto".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Blois, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Haig, Laird, Macnaughton, McIlraith, Molson and Sullivan. (13)

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel; R. J. Cowling, Special Counsel and J. F. Lewis, C.A.; Advisor.

The Committee proceeded to a general discussion of the subject matter during which Mr. Cowling explained certain sections of the proposed legislation along with certain proposed amendments thereto.

Ordered:—That the list of proposed amendments be distributed to the members of the Committee together with Summaries of the following briefs:

The Canadian Bar Association;
The Canadian Chamber of Commerce;
The Canadian Manufacturers' Association; and
The Canadian Real Estate Association.

At the suggestion of the Chairman it was *Agreed* that at a future date Officials of the Department of Consumer and Corporate Affairs be asked to appear before the Committee in explanation of the legislation.

After further discussion it was *Agreed* that the Committee make Interim Reports from time to time.

At 11.25 the Committee adjourned until Wednesday, November 6, 1974 at 9.30 a.m.

ATTEST:

Frank A. Jackson,

Clerk of the Committee.

The Standing Senate Committee on Banking Trade and Commerce

Evidence

Ottawa, Wednesday, October 30, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9:55 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we now turn to consideration of the competition legislation and the provisions in relation to the Combines Investigation Act. We will not be discussing Bill C-2 as such but we will examine all the provisions of it.

With us this morning is our special counsel, Mr. Robert Cowling and Mr. J. F. Lewis, Advisor. Mr. Poissant is unable to be here this morning.

As honourable senators will recall, we had two hearings in May of this year, at which time we heard from the Canadian Manufacturers' Association, the Canadian Chamber of Commerce and the Canadian Real Estate Association. The hearings ended at that point because of the dissolution of Parliament. As part of the terms of reference to the committee on this occasion, the record of those hearings is part of the material before the committee at this time. We have notified the various people who were notified last May, that we are considering this bill under its new description, although the provisions of the bill are exactly the same as the one we had before us in May. They were informed that if they wished to file briefs or to appear before the committee they should let us know of their intentions. We have had some responses to date, and I would think that during the coming week we will certainly get more.

It would be helpful, first of all, to refresh our minds as to what went on in May and the points that were developed at that time. I do not expect members of the committee have again read the briefs that were filed by the groups who appeared at that time, and you may not have read the printed report of the last committee hearings. Our special counsel at the time prepared a summary of the points that were stressed by the three groups, and that appeared to be, up to the conclusion of those hearings, the major thrust against the bill. I will ask him in a minute or two to refresh your memories by developing this point, and then it will be a matter of record.

I think I told you at a previous meeting that the then Minister of Consumer and Corporate Affairs tabled a substantial number of amendments in the House of Commons committee, but nothing was said about them, they never got far in the hearings, and they are not included in the bill. What that means, or whether the government is now committed to the bill without these amendments, I do not know. Some of the amendments are important, others are not too significant. As we go along, we will touch on them. If they are important from our point of view, it may well be that we will adopt them as part of our recommendations.

With that, unless there are some questions, I was going to ask our special counsel to open the discussion by bringing back to your minds what went on, the stage that we reached, and the important things that developed.

Senator Desruisseaux: Would it be of some use to have a list of the proposed amendment in our hands?

The Chairman: We have them. We can distribute copies to each member of the committee. If there are no questions at this initial stage, I would ask our special counsel to open the discussion.

Mr. R. J. Cowling, Legal Advisor: Thank you, Mr. Chairman. While there are many amendments proposed to the Combines Investigation Act by Bill C-2 as it now is, or Bill C-7 as it was before, or Bill C-227 as it was even before that, I do not think there is any doubt that the most important amendments, those which the briefs that have been submitted concentrated on, are those found in Part IV.1 on page 16 of Bill C-2. This is a brand new concept in combines legislation in Canada. The old act was structured almost along the same lines as the Criminal Code, that is to say, it provided that certain things constituted offences.

Of course, a large part of the act also dealt with the powers of investigation given to the Director of Investigations, what I would call a sort of legalized fishing expedition in order to get the evidence to prosecute. Normally in the criminal law the onus is on the Crown, and there are rules against self-incrimination. However, in combines situations it was evidently thought the evidence would be so hard to get that very special kinds of investigatory powers would be needed in order to get the evidence. A large part of the bill deals with the way the government is permitted to go about getting the evidence in order to prosecute.

As I say, Bill C-2 introduces a new concept whereby, without making something an offence, the Restrictive Trade Practices Commission can, on the complaint of a person who feels aggrieved by the practices of suppliers in his field, look into the situation, and have a hearing at which the supplier concerned is permitted to attend and make representations. The commission can make a specific order, for example ordering a particular supplier, or one or more suppliers, to supply to the complainant, or even to other people in the same line of business as the complainant. If the supplier in question fails to abide by that order, he is liable to prosecution under the act, in the same way as he would have been had he committed one of the prescribed offences under the old act. In other

words, the bill provides for the creation of special offences in particular cases.

Although the briefs, in their criticism of this, may talk it in different ways, they are really universal on a number of points, and the concern is that too much power has been concentrated in the Restrictive Trade Practices Commission. The guidelines, which are set down in section 31.2 and following, are rather general and vague. The great concern of the business community was that too much discretion was left in the hands of the commission, that it could do almost anything it wanted and there was really no way of getting any relief in the courts, because the courts are loath to review decisions by tribunals of that kind which are in the discretionary area. Therefore, what these briefs stressed over and over again was the desirability of putting in some clearer conditions under which the commission should operate. That is what we were really most concerned with.

There are many other amendments proposed in the bill. I do not know whether you want me to read through them. If you have a copy of the blue book issued by the Department of Consumer and Corporate Affairs, you will find them in it and you can thus get an idea of all the amendments. However, the area to which I have referred is the one where there is most concern.

Senator Connolly: Is there a special clause that refers specifically to the order that is made by the Restrictive Trade Practices Commission as a result of a complaint? Is there one clause that deals with the orders they make following receipt of a complaint and a hearing?

Mr. Cowling: Do you mean in the sense of the consequences of disobeying the order?

Senator Connolly: No. Penalties are another matter. I am thinking about the order itself and what that order can do. Section 31.2(a) and the rest say that you can file a complaint about certain practices that violate the spirit of competition. Then there is a hearing and then an order is made. What are the limits of the order?

Mr. Cowling: I would refer you to paragraphs (e) and (f). I would say that paragraph (f) is the one we would be concerned with most often. It provides that the tribunal can:

> order that one or more suppliers of the product in the market accept the person—

who complains—

> as a customer within a specified time on usual trade terms in respect of payment,

and so on. That is where the complaint is based on a refusal to deal. Complaints can also be based, of course, on exclusive dealings. You find that on page 17 under the proposed section 31.4. On page 19 you find what kind of order the tribunal can make where the complaint relates to an exclusive dealing. It says:

> —the Commission may, after affording to suppliers against whom an order is sought a reasonable opportunity to be heard, make an order directed to all or any of such suppliers prohibiting them from continuing to engage in such exclusive dealing or tied selling and containing any other requirement...

And so on. In other words, the supplier could not be prosecuted up to that time for exclusive dealing or refusal to deal or for tied selling. Prosecution can come only after the situation has been brought to the attention of the commission and the commission has made an order.

Senator McIlraith: The order on page 16 would appear to be limited to supplying the person making the complaint. It does not enable the commission to order the firm to supply others in the trade. It is a rather extraordinary limitation.

Mr. Cowling: That is correct, several of the briefs have pointed that out and have suggested that the supplier should have the right to insist that other suppliers be hauled before the tribunal at the same time so that the commission would at least have the opportunity of ordering other suppliers to do the same thing.

Senator McIlraith: And, as well, to order the supplier to supply other outlets or retailers other than the one making the complaint, because if it is only one store that makes the complaint it would seem unfair.

Mr. Cowling: Exactly.

Senator McIlraith: The commission should not be limited in that way.

Senator Laird: Would this procedure then be something like third-party procedure in ordinary litigation? In other words, if a move is made against a supplier, could that supplier then, on something that corresponds to a third-party proceeding in a law suit, bring in other suppliers?

Mr. Cowling: I don't think the bill provides for that, senator. This is one of the amendments which we might consider making.

Senator Connolly: We have not had any evidence about the magnitude of the practice which is sought to be corrected here, have we? Perhaps I am too innocent or too inexperienced to know, but is this a real problem in the real world?

The Chairman: Do you mean the practices that are reviewable?

Senator Connolly: Exclusive dealings, yes.

The Chairman: We have not had any evidence before us so far as to the extent of them, but we know what those practices are. They are; refusal to deal, consignment selling, exclusive dealing, market restriction and tied selling. At the moment we are not in the position to say whether that is extensive or not, but we should at some stage be in a position to do so. In the first instance that may come from the department, if they have gathered information, and I would suspect that they must have.

There are many general terms used in section 31.2. It speaks of "usual trade terms." Is the commission itself going to determine what those are? Instead of letting them have that broad discretion, should there not be some guidelines in the legislation itself?

One expression that should be defined is "usual trade terms." Is the commission going to have so much experience that they can make themselves an authority on the determination of these questions? Why shouldn't the legislation do it? In other bills we have had guidelines.

We had guidelines in the bill with respect to the foreign investment review agency, and even then we were complaining that the guidelines did not go far enough; they were too general.

It would appear to me that the legislation itself should give some direction as to how the matter shall be approached and considered and weighed. Do you agree with that, Mr. Cowling?

Mr. Cowling: I agree, Mr. Chairman. For example, section 31.2(a) talks about the "usual trade terms of the supplier or suppliers of such product in respect of payment, units of purchase and otherwise." Now, the words "payments and units of purchase" are rather limited. It was suggested that the words "and otherwise" would be sufficient to bring in all of the other things which suppliers traditionally put in their agreements with their customers, such as maintenance of inventories, purchase of other products in the same line from the same supplier, merchandising, servicing and care of the product. But I think most lawyers feel that, on the application of the *ejusdem generis* rule, the words "and otherwise" would be restricted to things which were in the same class as "payments" and "units of purchase", and that does not take you very far.

The Chairman: That is right.

Senator Cook: There is a little difference between paragraph (a) and paragraph (b) of section 31.2, isn't there? Paragraph (a) says, "adequate suppliers of a product anywhere in a market on usual trade terms," and paragraph (b) says, "the usual trade terms of the supplier." What happens if they are different, or that you find a difference. "Usual trade terms" and "supplier" may be the points they are complaining about.

Senator Buckwold: Mr. Chairman, I was never able to determine from the previous hearings the real meaning of the word "product". I can foresee absolute chaos in the distribution market, if, for example, people are set up to distribute a particular manufacturer's line, which, as a particular brand name in demand, is not in good supply, although that general type of product is in good supply. I hesitate to name a product specifically.

Senator Connolly: Why not?

Senator Buckwold: All right. Let us say somebody is distributing Kodak cameras. If the product is defined as "cameras", there is no shortage of the product, but there may very well be a shortage of a given Kodak number which is new and is in demand. What is the product in that case? Is the product a camera, generally?

Senator Connolly: That is the generic term.

Senator Buckwold: Or is the product in fact the particular type of that product which somebody wants because it is in demand at that moment?

Let us say, for example, somebody particularly wants a new style of General Motors car and that the dealer says, "Look. I am handling Ford cars, but General Motors has come up with this brand new idea and I would like to get it." Is the product then what General Motors is making, or is it a car, generally? I have not been able to determine that. If it is not, as I say, I can see absolute chaos in the whole distribution system.

The Chairman: Well, Senator Buckwold, they say as one of the terms that "the product is in ample supply". You will notice that that is in (c) in clause 31.2. Now you are talking about a Kodak camera. But is it the problem that the man cannot get a Kodak camera, or is it a question of cameras generally?

Senator Buckwold: That is the point I am making.

The Chairman: What is it? The way it is left here, I suppose the commission, as a matter of interpretation, could choose whichever interpretation it wanted to apply.

Mr. Cowling: I understand, Mr. Chairman, from my reading of the reports of the Commons committee hearings held in the other place last session, that the position of the minister and the officials who testified there was that the word "product" as used in this bill could be held to mean a specific product, for example Kodak cameras, and that somebody could complain that because he could not get Kodak cameras he could not carry on in his business. He could say that the unavailability of Kodak cameras to him was adversely affecting his business, even though he could get all the Japanese or German cameras he wanted, and that theoretically, at least, the commission could order the Kodak company to supply him with their cameras. A great deal of discussion took place on this, and this is an item which is mentioned in practically all the briefs. It would appear that the minister and his officials wanted to retain that flexibility for situations where it could be demonstrated that the inability to get a particular brand name was causing real difficulty to a particular businessman.

Senator Buckwold: And yet they go on later in the same section 31.2 to say that if you cannot get it, they will allow a reduction in customs tariffs in order to make a Canadian importer competitive again in the general field of the product. I am trying to relate the two.

As I say, Mr. Chairman, this is the nature of the problem here. I can see a complete discruption of the whole distribution system. I am not talking now—and I want to emphasize this—about the monopolistic kind of thing, but about the ordinary situation where a distributor handles goods from the factory on the basis that this is his line, and he is stocking it, and somebody else says, "there's one item there I'd like to get my hands on," and the system breaks down because of the competitors.

I hope we can clarify that, because this will affect every aspect, not only from the point of view of the distributors and the retailers, but from the point of view of the manufacturers themselves.

Senator Connolly: Does it arise in a case where you have a retailer, selling, say, a line of Japanese cameras, and a line of German cameras, and who finds that there are dealers in the same area handling exclusively, say, American-made cameras? The dealer handling the Japanese and the German cameras together says, "I want to get into that American market; I want to compete there, too." It may be that he was originally commissioned by the Japanese and the Germans in such terms that he would deal exclusively in their product, and they don't want other manufacturers to have their cameras sold in his store. But the second retailer says, "There's a lot of business going here. There's a new camera out that everybody wants, and I want to be in that market."

Where is the thrust taken? Is it against the retailer? No. The retailer is the complainant. Would it be against the Japanese and the Germans? Or is it against the American who wants to have an exclusive place in the shop of a competing dealer?

Mr. Cowling: I don't know. The philosophy of combines legislation, as I understand it, is to protect the public, really, that is to say, the consumers. But this bill seems to introduce a new element, in that it attempts to protect the businessmen, or perhaps give the businessman some advantages.

Senator Connolly: Yes, but on what level? At the retail level? At the supplier level? The supplier in my example, the Kodak man, may not want to have his camera in shops where there are competing lines. He may want to have exclusive dealerships; and it may be that another dealer, with other lines, will say, "I want to have those Kodaks in my shop."

The Chairman: Senator Connolly, if, to use your word, the thrust of the bill is the protection of the consuming public, then the level at which this would be aimed should be the dealer or the retailer, not be the wholesaler, because the wholesaler would not have direct sales to the public. At least, that is the concept I have.

Senator Buckwold: I speak perhaps from some experience, because my own personal business involved the distribution of a variety of lines. The wholesaler or distributor very often acts as an exclusive distributor for a given product. I think we had this in our evidence at the last hearing.

The Chairman: He does not distribute to the public.

Senator Buckwold: No. He is distributing to dealers. Another dealer could say, "Look, there is a given line, I would like to get that specific product. I don't wan to buy the whole range, I don't want the whole stock, I don't want to have the back-up inventory. But this particular product that the factory has brought out is something I want as a distributor." He could go to the board and say, "This company refuses to sell me this particular product, and I would like to get it," and again it would be a very disruptive factor in the whole process.

Senator Molson: I think those instances are more common than we know. We might be able to get some evidence in this regard. I know of the odd incident that is exactly parallel to what Senator Buckwold has brought up. There is apparently no regard given to the way these distributorships were built up. In some cases some company goes to a person and he takes an exclusive line, and there is an awful lot of money and promotion over a period of years, and he gets this thing going well. Then the fellow down the street, who wasn't interested earlier on, but who sees this going well, now wants a piece of that, but not the whole line, just the bit that's going awfully well. He comes to the commission and they say that it is an unfair practice, regardless of the fact that the first fellow may have put ten years and thousands of dollars of his own money into developing this business. The commission says, "No. Little Joe-Joe, down the street, is quite entitled to this. It is not fair that he should not have that piece of your line as well."

The Chairman: That would appear, Senator Molson, to be the direction that this section 31.2, is taking, because it says:

> 31.2 Where, on application by the Director, the Commission finds that
>
> (*a*) a person is adversely affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,—

Now, one thing the commission may find is that the reason for the inability of the person to obtain an adequate supply of the product is an inadequate degree of competition in the marketplace. So again it is a question of what you are talking about—are you talking about Kodak cameras or are you just talking about cameras?

Senator Buckwold: I know that Senator Blois used to be involved in Stanfield's underwear—a very good brand name, by the way—and, of course, it is sold in most places. Now, there may be a dealer who handles another line, but there may be a particular brand that he wants from Stanfield, and under this setup they might be forced to sell to him. He may not buy their range or their overall line, as they call it, but just a particular number. That does not mean that there is going to be any shortage of that number. It may well be that there is plenty of that particular loom mixture available. This particular dealer wants that line, whereas another dealer may be carrying the whole range. As I read this, it means that the firm would be unable to refuse to sell him that particular number, and this in turn could create a very serious situation in the marketplace.

The Chairman: There seems to be some nonsense in that, doesn't there?

Mr. Cowling: On that point, Mr. Chairman, perhaps I was a little unfair earlier when I was attributing some remarks to the former minister. The *Financial Times of Canada* back in April sometime reported the minister as saying as follows:

> Brand names do not necessarily mean products. So a television manufacturer would not be prosecuted for refusing to supply a dealer who could buy TV sets of another make.

I think what I had in mind was some discussion which took place in the Commons committee with officials. When they were really pressed by the members of that committee on this point, they did not seem to be prepared to make quite the same concession, and the impression that I got was that the thing was rather "fudged" up and could be clarified by an amendment.

Senator Cook: Mr. Chairman, under paragraph (a) it would be no trouble at all, I would imagine, for a businessman to show that he was adversely affected. But, as you said before, many other things can come into it. A manufacturer does not want to sell to a dealer who will not give service or who is not very honest or very straightforward. Therefore, there should be a bigger onus on the dealer than simply to show that he is adversely affected. It should state that the person, without good reason, is being adversely affected. Not only must he show that he is adversely affected, but that he is a fit and proper person. There may be all kinds of reasons

why a manufacturer does not want to trust that particular dealer. Therefore, as I said before, it should state that this applies where a person, without good reason, is adversely affected. There is a larger onus on him than simply to show that he is adversely affected.

Mr. Cowling: And seriously affected.

Senator Cook: I mean that anybody who cannot get, say, Westinghouse or Ford can easily show that he is adversely affected, but then, on the other hand, he may not be a fit and proper person to handle these lines.

Senator Laird: Mr. Chairman, could I give you an illustration of this problem, using the example of that little pocket camera that Kodak put out. I got one myself. At the time they were first brought out there was a tremendous demand for them. Now, let us take an exclusive retailer for Bell & Howell who did not make that type of camera. If he were to proceed under this bill, could he in some fashion force the Kodak people to sell him the little pocket camera which was not made by any other company?

The Chairman: What right has he to be put in a position where he can really raid some other successful operation?

Mr. Cowling: I think, Mr. Chairman, that the minister and the officials would agree that that particular situation should not be covered, and that the commission should not so order. But the problem is that the act has been drawn in sufficiently wide terms that it is, at least, theoretically possible that such an order could be issued.

Senator Laird: I was interested in those words attributed to Herb Gray. What authority has he to make any findings of that kind? You can only know the answer after the case has gone to court and been decided on.

The Chairman: The simple answer to your question, senator, is that he has no authority at all now.

Senator Laird: In addition to that, the present minister has indicated in the other place that he is going to bring amendments in their committee. He has not disclosed the nature of those amendments and that handicaps us in our study.

The Chairman: It would appear from the range of this discussion that this clause and certainly some of the others require amendment.

Senator Cook: My point, Mr. Chairman, is that the person should have to show he is improperly discriminated against and not merely adversely affected.

The Chairman: I am wondering whether the expression "adversely affected" is proper terminology or whether "discriminated against" might not be a preferable term.

Senator Molson: I feel that we are somewhat in the dark as to objective of this legislation, Mr. Chairman. I am not at all clear about it. I am completely in a fog as to whether this legislation is to protect the consumer, the retailer, the wholesaler or the manufacturer.

The Chairman: Can I answer that question by repeating what the former minister said? He said that the entire bill deals with consumer protection. This brings us back to the statement I made earlier. When you are talking about a businessman who is adversely affected, is that part of consumer protection?

Senator Molson: I think not, and that is why I am making the point. I think we are mixing apples and oranges in this particular instance.

While I am on the subject, Mr. Chairman, I wonder if it would not be worthwhile to get some of the rulings that have been made in this connection, to see how this has operated in the past. I know of at least one. There were instances along the line that Senator Buckwold speaks about, where people were ordered to supply. Surely it would be worthwhile to have some of these orders made available, so that we might look at them.

Mr. Cowling: This is a new part of the legislation, and I would not think that there have been any orders of that kind in the past, because the commission did not have, still does not have and will not have—unless this bill is adopted—the kind of powers we have been talking about.

Senator Molson: The commission certainly has given orders to supply.

The Chairman: Perhaps not the commission. Perhaps it was at another level.

Senator Molson: But it has happened, and I know of one particular instance.

Senator Buckwold: This may have happened in a monopoly situation where there was only one product available that was very closely held and distributed. It may be that somewhere along the line an order was given that it had to be spread out more. I do not believe we are talking about this at all. I would agree that if we were in a monopoly position it would be very good legislation, but whenever a general surplus of products exists I say it will create a chaotic situation.

Senator Connolly: Does it not really mean that representatives of the department should appear before the committee and state, in the interests of the consumer, that certain practices are carried on which affect that interest? They should explain where and how that takes place and present appropriate legislation as a result. Surely they must give some background in the real world, of such a situation damaging to consumers, before they introduce legislation such as this.

Mr. Cowling: In my opinion, that is correct. Some consider that the effect of this bill will be to damage the consumer, who will not receive the same kind of service or quality in products, because the manufacturer has lost control over what happens once the product leaves his plant.

Senator Beaubien: Also, Mr. Chairman, this would be of great importance and very costly to the distributor who would have to deliver the service.

The Chairman: Some of the large retail outlets which are general in product have established departments known as service departments, not only to service what they sell, but to service any person who has any equipment. I could name a few establishments which have

done so. When buying equipment, service is essential. There is no use buying the equipment if the service is not assured.

Senator Cook: A dealer who keeps one or more highly-paid servicemen on his staff is more attractive to manufacturers for the handling of their products than a dealer with no servicemen.

Senator Buckwold: The thrust of the legislation is fairly simple. If everyone at the retail level had the right to sell everything, then stores of the lowest quality would buy the very best products and sell them with no mark-up, as door openers. Eventually the consumer would benefit, because of the competition. That is a simplistic view, but it is true that in the case of a particular item it might be sold at a lower price. This happens quite often. A good furniture manufacturer does not wish his product to be sold in a cut rate second-hand store, because this will eventually ruin his reputation, but the consumers' spokesmen say that should be done. Eventually the retailers will only carry that type of goods and no backup products such as ancillary products and service. Ultimately the consumers will pay for that, because there will not be the wide range of products, some of which sell better and some not so well. And this causes the raising of prices. This is where, in my opinion, the consumer loses touch with the reality of the situation.

The Chairman: There is no question about it, the bill is confusing with respect to these points. Should authority be given to the commission, while there is no reason to believe that the commission is experienced in this field, though they can call experts in if they wish. It appears to be a case in which the language that has been developed here should be dealt with in a more specific manner, so as to define in exact terms the scope of the authority of the commission.

Senator Desruisseaux: Mr. Chairman, we should remember that a quorum of that commission is two; two persons will decide.

Senator Connolly: Would it be helpful to suggest, Mr. Chairman, that the transcript of this sitting of the committee be forwarded to those who will give evidence, so that they may be aware of the considerations and give some real thought to the points which are raised?

The Chairman: My feeling would be that first we should decide whether or not we will invite representatives of the department to attend. We have done so in respect to other cases, particularly the Foreign Investment Review bill. It was very educational to discover the sources and the extent of the ability of those who generated some of these ideas. You will remember that a philosopher appeared. If we are searching for those who want these provisions, at that stage we could present them with a copy of the discussion that has been carried on, without limiting the range of the inquiries. Do you wish to carry on from there, Mr. Cowling?

Mr. Cowling: I do not know of anything further I can add.

The Chairman: I believe the Canadian Manufacturers' Association concentrated on this item and by the time we were through with them—according to my recollection, and it also appears from a reading of the transcript —we felt that "usual trade terms" should be defined. Our special counsel has devised for consideration in respect of section 31.2 language such as: "For the purposse of this section, 'general trade terms' includes policies, standards, terms and conditions of a supplier generally applicable in respect of payments, units of purchase, maintenance of inventories, purchase of other products in the same line, merchandising, servicing, care of product and otherwise."

Senator Molson: That includes servicing the product.

The Chairman: Yes, merchandising, servicing, care of the product and otherwise. This falls in line with the discussions which developed when the representatives of the Canadian Manufacturers' Association were present and certainly this is a much better definition of "usual trade terms" than simply the phrase contained in section 31.2, where "usual trade terms" is used, leaving the whole decision as to its definition to the commission. I had points of this type in mind when speaking of guidelines.

Senator Buckwold: "Usual trade terms" would be the normal manner of distribution. Because of specific conditions found by a manufacturer, it could be advantageous to him to sell to a distributor, rather than directly to a retailer. There may be such considerations as transport problems. As I read this legislation, if a retailer decided that he wished to go direct to the factory, and said it obviously affected his business and he could not make as much profit otherwise; if he were permitted to compel that factory to sell him a consignment of goods it would overturn the normal distribution practice.

The Chairman: It seems to me that your illustration indicates how the expression "usual trade terms" might be misinterpreted.

Senator Buckwold: Yes.

The Chairman: Does the expression "usual trade terms" include such a situation?

Senator Buckwold: No; "usual trade terms" means such expressions as "2 per cent, 10 days."

The Chairman: The suggested definition also means merchandising, servicing and care of the product and so on, but does not include the enlarged meaning to which you refer.

Mr. Cowling: The trouble is that whatever lies within the meaning of "usual trade terms" in paragraph 31.2(a) appears to be cut down in paragraph 31.2(b), where reference is made to the "usual trade terms of the supplier or suppliers of such product in respect of payment, units of purchase and otherwise."

Senator Buckwold: That is exactly what I said—2 per cent in 10 days.

The Chairman: When they talk about the inadequate degree of competition in the market, we get back to the question of whether it is cameras or a Kodak camera. What are we talking about in relation to "inadequate degree of competition?"

Mr. Cowling: In view of the statements made by the minister on brand names, we thought the legislation

should be in accord with the declared interpretation. Therefore we might suggest, as a definition, that "product" means "a class of product".

The Chairman: Therefore cameras would be "a class of product".

Senator Buckwold: Yes.

The Chairman: Therefore Kodak would not be included.

Senator Buckwold: The major thrust of the bill should be to prevent monopolistic distribution developing. If that happens, this act should apply. When a lot of merchandise is available in a general product, it should not.

The Chairman: May I remind the committee that when representatives of the Canadian Manufacturers' Association were before us we appeared to draw certain language from what they said on this question of "adversely affected." Our special counsel, in a draft of that particular paragraph, has suggested that:

> Where the Director has reason to believe that a person is adversely affected in a material way in carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

Mr. Cowling: In other words, we put in the words "in a material way," because as it presently reads it says:

> adversely affected—

I am reading from 31.2(a) on page 16. It says:

> a person is adversely affected in his business—

"Adversely affected" could mean adversely affected in the least little way. It then goes on to say:

> is is precluded from carrying on business—

Obviously if you are precluded from carrying on business, it is pretty serious. The other point is still there. In the case of "adversely affected," without any adjectives to qualify the word "adversely," it seems to me, theoretically perhaps, that the commission could make an order on the least little thing.

The Chairman: That may be more in line with what Senator Molson had in mind—the expression "in a material way." Is that in line with your thinking, Senator Molson?

Senator Molson: It is. I think it is important.

Senator Buckwold: I would say it must have an adjective. "Material" could mean being affected by a $100 loss of profit. However I would not go so far as to say, as in one of the other acts, "significantly material."

Mr. Cowling: You mean the word "material" might be interpreted as being monetary rather than significant.

Senator Buckwold: Yes. "Material" would apply when a man showed a loss of profit, no matter how insignificant.

Senator Cook: Mr. Chairman, I do not think we should lose sight of discrimination in this paragraph. It has to be shown that he is discriminated against.

The Chairman: The question is, what should be the role of the director and what should be before the commission before it can start to deal with the application by the director? All that 31.2 says is:

> Where, on application by the Director, the Commission finds that—

They find these things. Then it says:

> the Commission may, after affording to the supplier or suppliers of such product in the market a reasonable opportunity to be heard,

I think they have the horses mixed. It seems to me the director should be in a position of having the primary onus placed on him to establish these conditions, and the person who is brought before the commission would have an opportunity of replying.

The paragraph appears to make the assumption that there is a case, and the supplier had better come in and show that he does not fit into those terms. Do you agree?

Mr. Cowling: Yes, I agree. It was suggested that the director should have some discretion here, too. That is to say, if the complainant came to see him and said he could not get goods from so and so, the director himself, on assessing the situation, should be able to say, "I do not think you have really any case and I, the director, will not make any application before the commission on your behalf." As it reads now, there seems to be a little doubt about that.

Senator Beaubien: How would you change it?

Mr. Cowling: I would start by saying, "Where the director has reason to believe that," and then put in the factors mentioned in paragraphs (a) to (d), and then go on to say, "the commission may." In other words, give the director the power to close off an inquiry that was obviously frivoluous.

The Chairman: That is one way of dealing with it. A stronger way would be to put the onus on the director to make out a *prima facie* case before the commission, and the supplier would then have the right to come in to answer it.

Mr. Cowling: We were also going to suggest that after (d) we should put in something as follows: "the commission may on application," et cetera, "after giving the supplier the opportunity to be heard, and upon proof, the burden of which is on the director, of the existence of the fact referred to in paragraphs (a) to (d)."

Senator Desruisseaux: Mr. Chairman, how would all these things work against imported goods, when you say we cannot call in suppliers and people from the company?

Mr. Cowling: It is acknowledged that it simply does not work against imported goods.

The Chairman: The only authority that appears to be given in connection with imported goods is the case where the Minister of Finance may reduce or remit duties on imported goods so that a person who is adversely affected may be able to obtain adequate supplies in Canada. I do not know whether or not those two things follow.

Senator Desruisseaux: How would that work if, for instance, there are agreements for letting in certain goods?

The Chairman: I doubt the scope of this with regard to imported goods. That would be a very interesting point to explore with the department. We are simply recalling these matters to your minds.

I think it might be useful to have some remarks as to the effect of this bill in relation to civil damages.

Mr. Cowling: This bill purports to give an aggrieved party a remedy which he otherwise would not have, that being the right to sue a supplier and collect damages. The court decisions to this time, I think I am right in saying, have held that because the act provides a penalty by way of a fine or imprisonment, that is the only sanction that can be applied where there has been a breach of the statute, and that someone who has been adversely affected had no right to sue in court. This bill purports to change that by actually giving a right of action. It provides that an aggrieved party can sue in any court of competent jurisdiction, and it further provides that the Federal Court of Canada is such a court of competent jurisdiction So, it envisages civil actions taking place in the federal court on a party and party basis, as a result of a breach of any of the provisions of the act.

I do not know whether the committee wishes me to get into a constitutional discussion in this respect. It appears to be acknowledged that there is some question as to whether Parliament has the constitutional power to create such a remedy because it appears to be relying, for the whole constitutional basis of the bill, on the criminal law. When it then talks about civil damages, it is almost a contradiction in terms. I suppose a court would have to find that the granting of the right to sue for civil damages was somehow ancillary to the penalty which Parliament could impose to assist in the carrying out of the legislation.

The Chairman: Perhaps another way of putting it would be that the right to civil damages is incidental to the main thrust of the criminal legislation. I think you have to draw a long bow to say that a right to civil damages is incidental to prosecution. That is an issue. The way the bill is presently drawn, as I understand it, a person who has not been convicted may still be sued for damages. In our earlier discussions we thought, in any event, that the right to take any such action should only exist where a conviction has been registered in respect of criminal proceedings.

Mr. Cowling: Yes, I recall that discussion. The whole thing appears to be on rather weak constitutional grounds, and it is even weaker where there has been no conviction.

Senator Connolly: I do not wish to get into an esoteric legal discussion in this respect, but I think what Mr. Cowling said originally was quite right. The whole concept upon which the Combines Investigation Act has been based was that it was criminal law that Parliament was enacting. I cannot recall the names of the cases offhand, but, as I recall, there was a good deal of discussion in the courts originally as to the constitutionality of this act. I think finally the Supreme Court of Canada, as well as the Privy Council, came down on the side that it was, in effect, criminal law. The importance of that was very great in those days, and that was 50 years ago. Since that question was settled there has been a little weakening on the part of the public and, perhaps, on the part of the legal fraternity, as to whether or not that is important any more, and perhaps they slipped into the business of applying penalties in the way of civil damages and providing for that, forgetting that they should be thinking that they are in the field of criminal law and not civil law.

The Chairman: There is also the problem of property and civil rights.

Senator Connolly: That was precisely the basis of the attack in the courts back when the validity of the act was called into question.

Senator Buckwold: Mr. Chairman, I wish to raise what I think may be another constitutional issue, that being the right of an individual to determine with whom he wishes to do business. Under this proposed legislation, theoretically, one has to do business with anyone as long as the terms of the trade are met. Constitutionally, can I be forced to sell to someone to whom I do not wish to sell? Is it not my privilege to pick and choose my customers?

The Chairman: If I might jump in with both feet, Senator Buckwold, I would say that Parliament is not limited whatsoever in the creation of new criminal offences. The only area in which it would be limited would be where, under the guise of creating new criminal offences, they were attempting to encroach on the provincial authorities that are established under the Constitution. Do you agree with that, Mr. Cowling?

Mr. Cowling: Yes, Mr. Chairman.

Senator Buckwold: What about the Bill of Rights?

Mr. Cowling: If we turn to the new jurisdiction which this bill puts into the Combines Investigation Act, the reviewable practices, in order to get jurisdiction in that respect the commission has to find that a particular practice between a particular supplier and a particular distributor constitutes a crime. The refusal of a supplier to supply something is a crime.

Senator Buckwold: We have a house rule in our business which says that if we lose money on someone who went bankrupt we do not want to do business with him again, even if he pays cash. Under the proposed legislation he could, presumably, force us to sell to him. That is the kind of situation I am thinking about. In other words, my right to decide with whom I wish to do business, I gather, would be wiped out?

The Chairman: Not completely.

Senator Buckwold: Theoretically.

The Chairman: No, not completely. It may be that he could buy his supplies somewhere else and be well supplied, in which case, financially, he would not suffer.

Senator Buckwold: Yes, but he may want to buy the particular product which I am handling. In other words, he may want the brand name that I am handling. If that aspect of it is covered, everything is fine. It all goes back to that.

The Chairman: I should tell you that the Canadian Bar Association submitted a brief to the minister, which

was part of the material before the committee of the other place. It is pretty straightforward in its development, is it not?

Mr. Cowling: It is a good brief, because I think it includes almost all of the points made in all the other briefs combined. It speaks from a more or less dispassionate point of view.

The Chairman: I was going to suggest that possibly what we should do about the Canadian Bar Association brief is distribute to each member of the committee a summary that we have of it. The summary takes only a couple of pages, and it is right on the nose. It will be an informed view. By the time we get into the department and start to hear evidence from the public, we want to be as well informed as we can be on the points involved.

The other thing I should tell you is this. I had been thinking in terms of how far this committee would go as a matter of time in accomplishing its purpose and making interim reports to the Senate. The value of the work of this committee is underlined by the interim reports we make, because they get into the public area and get to the attention of the committee in the other place, if we get them out soon enough; they become a factor and they cannot be ignored completely. It also sounds a word of warning and cautions that, "These are the views that are held by the Senate committee. As and when the bill comes they will still be the views of the committee, so you had better be prepared with the answers."

There is the question of timing. I would like to get interim reports as we move along before the end of November, even if it means sitting not only Wednesday morning but, if we can get leave, sitting on Wednesday afternoon, and if we cannot get leave sitting Thursday morning or Tuesday morning.

I say that because of the other thing I have in mind. I think I mentioned the other day that there will be tax measures arising from the budget. I do not know whether I told the committee the other day that I had a chat with the Minister of Finance. I told him that when the budget came down I would forthwith make a motion in the Senate to refer the subject matter of the tax bills to this committee. He said, "Good. It would be very helpful to me. It would also be very helpful to everybody who would like to get home for Christmas and not have to come back right afterwards." I want to leave room, therefore, for the consideration of the tax proposals, particularly income tax.

I understand that the income tax provisions in the budget may be changed. I did not gather this from Mr. Turner; I gathered it from outside. I know that representations have been made in connection with some of those provisions in the budget. The people who made those representations anticipate that there will be amendments so as to make the application fairer, and really more intelligent. Looking at the tax bill in the form in which it is and at the budget that was brought down in May might not advance our work very much, so I think we must wait until the new budget comes down. I understand they are certainly trying to introduce it by the middle of November. I would therefore like to have a clear shot at the budget provisions by the beginning of December, and if necessary we could sit a couple of days each week. It is a matter of timing and getting it over with. There is no use in spinning it out.

Senator Cook: If we sit a couple of days continuously on the budget, it would probably be helpful. If we sit one week and then wait until the next week, we often go over the same things again.

The Chairman: I think so, too.

Senator Macnaughton: Did you say you had a summary not only of the brief from the Canadian Bar Association but also that from the Canadian Manufacturers' Association?

The Chairman: We have a summary of the C.M.A. brief. We could give you that. Do we have a summary of the brief of the Real Estate Association of Canada?

Mr. Lewis: Yes.

The Chairman: They also appeared here.

Senator Macnaughton: Why not distribute all the summaries? At this stage it would help us.

Mr. Cowling: I think we have summaries of almost every brief that has been submitted, either here or in the other place.

The Chairman: Perhaps what we should do is to put them all together in a folder and give a folder to each member of the committee. Can I say that the committee will have them before we sit next Wednesday?

Mr. Lewis: I don't see why not.

The Chairman: Then that is what we will do. I think we have had a good run at this this morning, and maybe this is a good time to cut off for today. We have brought your attention into focus again, and we should be ready to pull ahead next week. If we do not have members of the public who want to come here, my suggestion is that I should invite some informed person or persons from the department to come. I do not think at this stage we want the minister. We may want him later when we have crystallized our thinking.

Senator Beaubien: Clause 26 deals with amendments to the Bank Act. I do not remember what we thought of this the last time we went over it.

The Chairman: I think we talked about it in the spring.

Senator Beaubien: I remember vaguely that we did, last time. What minister is it?

Mr. Cowling: This would be an amendment to the Bank Act, and under the Bank Act I believe the minister is defined as the Minister of Finance.

The Chairman: That is right.

Mr. Cowling: The Bank Act has its own provisions on a combines type of thing. I think it is section 138 of the Bank Act.

Senator Beaubien: Perhaps we should look to see how important this is.

Mr. Cowling: The present bill purports to apply, at least in some degree, to the activities of a bank. In other words,

they split it up. Some of the provision remain in the Bank Act, but there are certain other things that a bank might do which would be caught by Bill C-2.

The Chairman: Quite independently of clause 26? Are you saying that some provisions of this bill, forgetting about clause 26, might constitute an offence under the combines legislation?

Mr. Cowling: That is correct.

The Chairman: We are not going to interfere with that. This is an amendment to the Bank Act, so it must be the Minister of Finance.

Mr. Cowling: That is right.

The Chairman: His inspectors make those examinations now.

Senator Cook: Are they ever going to stop making amendments to one act by means of an entirely different act?

The Chairman: I know. It is stupid.

Senator Cook: Thank God I am not practising law any more. I would hate to look it up.

The Chairman: It is certainly easy to lose track of what is an up-to-date bill or act on a particular subject.

Mr. Cowling: And we are supposed to have law reform.

The Chairman: Unless you are advised otherwise, honourable senators, we will sit on Wednesday morning next, at which time we will be hearing witnesses, either departmental or from the public. All these memoranda will be in your possession before that time.

Senator Macnaughton: I should like to bring to your attention one little fact, Mr. Chairman. The Standing Senate Committee on Foreign Affairs has agreed to sit at nine o'clock on Thursday mornings for the express purpose of facilitating this committee's sittings. In other words, if you should want to sit on Thursday, the foreign affairs committee were hoping that they could stop at 10.30 and you could then start.

The Chairman: Very well. I know we have some members on this committee who, if we were to tell them we were sitting at 10.30 instead of 9.30, would say, "Hurrah!" We will now adjourn.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 4

WEDNESDAY, NOVEMBER 6, 1974

Second Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto,"

(Witnesses: See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	Martin
Desruisseaux	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Smith
Hayden	Sullivan
Hays	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the Affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, November 6, 1974.
(5)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to further consider the following:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto".

Present: The Honourable Senators Beaubien, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Haig, Laird, Macnaughton, Molson and Walker. (11)

Present, not of the Committee: The Honourable Senators Everett and Heath. (2)

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel; R. J. Cowling, Special counsel and J. F. Lewis, C.A., Advisor.

The Committee proceeded to a discussion of certain sections of the proposed legislation during which certain objections and proposed amendments were explained and analysed in depths.

At 11.40 a.m. the Committee adjourned until Wednesday, November 13, 1974 at 9.30 a.m.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 6, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, there are certain reports I should give you at the outset. First of all, the committee suggested at the last meeting that we might secure the attendance of some of the departmental officials. The answer we have received from the department in that respect is that the officials who are acquainted with the provisions of this legislation are busy working on a revision of the amendments proposed by Mr. Gray and, as a result, could not afford to dilute their time by appearing before the committee. That disposes of the question of representation from the department at this time.

Also, the minister spoke to the Canadian Manufacturers' Association just before Parliament opened, informing them that he was proposing to introduce amendments. He told them he was aware of the amendments which had been tabled in the committee of the other place in the last Parliament by the then minister and that they were working on revision of those amendments, which he intended to table when the bill got to committee stage in the other place. I can understand that, because he would only provoke additional debate in the House of Commons if he proposed those amendments at the second reading stage.

A number of corporations to whom we have written have expressed the view that they would like to appear before the committee, but before doing so they would like to know what the proposed amendments are to be. In addition to that, we have had several organizations request specific dates, and what I am trying to do is move those dates forward. Some organizations, for example, have requested to appear on November 27, and I have suggested that the committee would be available on November 20.

The law firm of Blake, Cassels & Graydon filed a brief last year on behalf of ten different companies, and they have made a request to appear before the committee. However, they do have to go back to their clients to get specific instructions to appear before the committee. The Blake, Cassels brief is a good one, and it would be worthwhile studying it, whether they appear or not.

The committee requested a breakdown of the points made in the various briefs filed with the committee before Parliament was dissolved, and that information should now be in your files. A request was also made for a copy of the amendments tabled by the Honourable Mr. Gray in the committee of the other place during the last Parliament and that, too, should now be in your files.

As I have already mentioned, we have been informed that the departmental officials concerned with this legislation are too busy to appear before the committee at this time. That is fine. We may get to the stage where we are too busy writing a report to talk to them; I do not know.

Senator Cook: We cannot issue a writ of habeas corpus, can we?

The Chairman: We certainly would not subpoena them. I thought I should call the attention of the committee to the fact that the present minister made a speech to the Canadian Manufacturers' Association in late September, just prior to the opening of the Thirtieth Parliament. I should like to make one or two quotations from what he said in the course of that. First he said:

> I would like to think that, in 1974, most corporate leaders are aware and concerned about a broader and a more fundamental need—the need ot demonstrate to consumers, to the public at large that the free market system is still a good system—that it does work to the benefit of all—that it is not a rip-off.

At another stage he said to them, in mentioning that he was going to propose a series of amendments at the committee stage:

> Many of these amendments will take into account the well-reasoned and thorough briefs we have received from the CMA and othe organizations.

Of course, you will remember that he was talking to the C.M.A., so I suppose he was letting them know that their brief had value. He went on to say:

> For example, I will mention this only briefly for I said I would not go into legislative detail, we are aware that your Association has expressed concern about the sections of Bill C-7 dealing with refusal to sell and with the powers of the Restrictive Trade Practice Commission to order discontinuance of exclusive dealing, tied selling and market restrictions.
>
> In both cases it has been suggested, by you and others, that the wording of the present Act is constructed in such a way as to give rise to interpretations other than what we had intended. In both cases, I will move amendments that would clarify and make more precise the intent of the Act.

This is the minister's concept of the bill; that is, it is to preserve the free market and let the public know that the free market is a viable institution. It may or may not parallel the language of Mr. Gray, when he said earlier this year that this bill was intended to provide protection for the consumer.

You will recall that at the last meeting we spent some time on section 31.2, which is the refusal to deal. In the kit that you have there is a booklet, which you will all recognize by the colour, entitled, "Proposals for a New Competi-

tion Policy for Canada." On page 67 you will see comment on section 31.2. It is not very long, so perhaps I might read it:

> Section 31.2 is new. It is designed to meet the situation where, by reason of a combine (concerning which there may or may not be sufficient evidence to prosecute) or by reason of a uncompetitive situation in a trade or industry, an entrepreneur or would-be entrepreneur is himself unable to obtain adequate supplies of an article or service which is in adequate supply, on usual trade terms. Refusal to supply, in such circumstances, may result merely from the desire to protect a category of existing customers against competition from a newcomer to the market or it may result from the aggressive or innovative character of the entrepreneur, and the ability to refuse supplies may be facilitated by the tariff. The justification of this section is the desirability, from the public standpoint, of bringing about economies through new dynamic and innovative methods of production and distribution and the right of an entrepreneur to obtain somewhere in the domestic or in port market, the product in which he wishes to trade.

There you have a summation. True, we spent some time on the last day on this section. However, the more I look at the section the more I get bothered about whether there is any jurisdiction or authority in the federal government to present such a proposal, because you will note that it deals with two things. It deals with a person who is adversely affected in his business, or a person who is precluddd from carrying on business due to his inability to obtain supplies. In the first instance, if he is adversely affected in his business, the only conclusion you can come to is that he is engaged in business; he is carrying on business, and obviously he would like to move into another area of business that he thinks might be more productive for him. But is that a matter of criminal law? What this part of the new section is saying is, "Move over, you people who are carrying these other lines, because I want to get into that area." Is that a matter of criminal law? This is where the federal authority has to find its authority. Or is it incidental to the administration of the combines legislation? These are questions that have to be answered somewhere sometime.

The second part of it is this. He is precluded from carrying on business due to his inability to obtain adequate supplies. This means any person, not necessarily a person who is presently engaged in business.

My own feeling about this clause—maybe I should not express it at this time—is that I do not think it has any place in our law. Maybe some revision of it could be made. I do not know what place it has in our law to enable a man who is in business to say he is adversely affected in his business due to his inability to obtain supplies of a product anywhere in the market on usual trade terms. If he is in business he must be carrying on something, and this clause would appear to support his desire to be able to demand a product of any other line from a manufacturer or wholesaler. To me, it is certainly a new concept of law, and what relationship it has to protecting consumer. I do not know.

Senator Molson: Is there any change in the definition, in that part you read out, of the word "product"? There it seems specifically to deal with the generic. The other day we were discussing whether "product" meant the class or whether it meant the brand name. There it sounds as though it means you can get anybody's widget if you are in business.

The Chairman: There is a wonderful definition of "product" in this bill, which is:

> "product" includes an article and a service.

Senator Beaubien: ". . . and a service."

Senator Molson: That is interesting.

The Chairman: That is in section 2. There you will see a definition of "business":

> "business" includes the business of
>
> (a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and
>
> (b) acquiring, supplying and otherwise dealing in services.

The moment in a definition you use the word "includes" it means that you are escaping from the exact language of the definition. The definition is not made exclusive. They could offer evidence that would not come under those exact terms if there is a broader aspect of the meaning to the word "business", and that is the reason for using the word "includes".

Senator Connolly: That definition of "product" seems to me to go right down to the brand name, does it not?

The Chairman: Oh yes. I mean, a product is a product, brand name or no brand name.

Senator Connolly: It is not generic.

The Chairman: This is only a diversion, but I am reminded of an argument in a combines case in which the cement companies were being charged with a combination in restraint of trade. Walter Williston developed a statement as to what was cement, which everybody has picked up since. He said, "Cement is cement is cement." Here product is product is product.

Senator Laird: I should like to mention another point. In a sense, product includes services, and services include professional services.

The Chairman: Yes.

Senator Laird: This means, for example, lawyers, which I see the Canadian Bar Association takes objection to. Is there not a doubt in your mind about the constitutionality of this?

The Chairman: I thought at the last session when we were dealing with this the question was raised in the Canadian Manufacturers' Association brief, about services including professional services, and they raised the constitutional issue. I think the Canadian Bar Association raised it too.

Senator Connolly: You raised it in the memo you gave us here with reference to section 2. Perhaps we could come back to that again. I think we should pursue what you have put before us. On the question of section 31.2 you ask, "Is it criminal law for the bill to read as it does?" We probably have to ask ourselves: Can Parliament simply say, "It is criminal law because we say it is criminal law"? When we consider the Combines Investigation Act, I think perhaps the answer to that is yes. Parliament has said, "If we say it is criminal law, it is criminal law." I wonder whether we are going down the right track if we attack it from the point of view of its constitutionality. I do not

answer that question any more than you do, Mr. Chairman. I then take the other aspect of this same problem on limited selling and the prohibition against limited selling.

At our last meeting we had some rather practical input from a number of senators, particularly from Senator Buckwold who is dealing with this matter every day in his business. It would seem that the test should not be whether it adversely affects the person's business but whether there is a substantial lessening of competition by a refusal to sell.

There are other arguments you can make, but I put the question to the committee: Are we better off to consider a kind of test rather than to worry about the constitutionality of it on this particular issue? Perhaps we should be worrying about both, but, certainly, in the light of what Senator Buckwold said, the test is the thing which, in the real, practical world is going to be more meaningful. If you can get the test to be the substantial lessening of competition, then you probably have solved Senator Buckwold's problem, at least.

The Chairman: I do not profess to be an expert in competition law, senator, although I have worked in it, but my concept of it is that Parliament can create offences—and new offences—so long as it is not just a colourable attempt to invade provincial jurisdiction. That provision has been stated in many cases, even in the Oleomargarine case that I went through. But what I read to you earlier on page 67 of this "Proposal for a New Competition Policy for Canada", which was published or prepared in—When was this prepared?

Mr. R.J. Cowling, Special Counsel to the Committee: It was prepared in November 1973, Mr. Chairman.

The Chairman: Yes, and it was distributed by the Department of Consumer and Corporate Affairs and had the name of the minister on it. The point is that they attempted to justify section 31.2. They say it is new and they attempt to justify it by saying that it is designed to meet a combines situation. In other words, they are attempting to put this forward as being incidental to the administration of combines legislation. They say, "concerning which there may or may not be sufficient evidence to prosecute." So, in order to support this, they have elected the course that it is in the nature of criminal law. But that does not prevent us from taking the approach which Senator Connolly has mentioned and which Senator Buckwold talked about the other day, namely, that the section in its present form is unintelligible. I do not think any fair reading of section 31.2 would lead you to the conclusion that it was related only to cases of combines. And how do you determine whether there is a combine or not so as to support the legislation, if you say that you have not enough evidence to support a charge under the combines legislation?

I think perhaps our proper approach would be to eliminate the section and say, "If you want to make it criminal law, make it criminal law and we will have a look at it." In the form in which it is I do not know what it is—except very confusing and very vague.

I do not know how it affords protection to the consumer. It may well be that a businessman who is adversely affected in his business therefore goes to other manufacturers or wholesalers because they appear to have a line which he thinks he can make some money in much better than he can in his own line. Whether that is protection of the consumer is a moot point. As a matter of fact, it might very well increase the cost to the consumer.

As to how it is related to the free market, my understanding of "free market" is that products that the consumer wishes to acquire are freely available competitively on the market. I do not know how far it should extend, but I think of the man who is in a particular line of business and is seeking to get into another line, and the people who produce the product of that other line, or handle it or sell it, the wholesalers, say, "No. We have covered the field amply." I think of that situation and I ask why we should create a law which says that, no matter what the interest of the consumer requires, Mr. John Brown, who is carrying on the business of selling periodicals or drugs or something like that, if he wants to, can get into the business of selling cameras—not only cameras, but Kodak cameras, and the Kodak people say, "No. We have enough competitors, and, in any event, we do not think you are a good risk. We don't think that you would market this product in the proper manner to preserve the prestige of the product."

Senator Everett: But is that the operation of the section?

The Chairman: I am simply looking at section 31.2(a) and am trying to analyze it to see where it leads us, as against the statement that the minister has made that the idea is to protect the consumer.

Senator Everett: I recognize your attempt to analyze it. I just wondered whether, in the case you have given, if Kodak were to adduce evidence that the retailer or wholesaler—I do not know how he is defined here. It says a "person" here. A businessman, anyway. If Kodak were to adduce evidence that that businessman was not a good risk, was not prepared to service the product properly, was not prepared to sell it under reasonable conditions laid down by Kodak, would Kodak, in fact, be required under this section to supply him.

I should like to hear evidence. As I understand it, to date we have heard evidence from the Canadian Manufacturers' Association. They, of course, take a strong view that this section should be removed.

The Chairman: Yes.

Senator Everett: I would certainly be interested in hearing evidence from other groups who could be adversely affected by the ability of a manufacturer to refuse to supply and who, historically, have been so affected.

The Chairman: You are saying, in effect, "Have you considered the effect of the words 'unusual trade terms'?" In other words, the director can file an application with the Restrictive Trade Practices Commission saying that there has been a refusal to sell, and the basis for that would be clause 31.2(a), which reads:

> (a) a person is adversely affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

Now, with respect to that expression "usual trade terms," the Canadian Manufacturers' Association said, "Well, if you are not going to strike out the section, certainly, the words "usual trade terms' should be defined." And with that I most heartily agree.

Some of the things you said point exactly to that. That is, the man may not be a good credit risk. He may not be able to service the product.

Senator Everett: I do not disagree that "usual trade terms" might be defined, but I think probably there is a fair definition in common law on what, in business practice, constitutes "usual trade terms".

The Chairman: Yes, but you do not recognize any difference between "usual trade terms" and "usual trade practices"?

Senator Everett: I would think "usual trade terms", in this context, refers to business practices, yes.

Mr. Cowling: If I might say something, the difficulty is, I think, senator, that in paragraph (b) the wider definition of "usual trade terms" that you might infer from (a) seems to be cut down substantially, because they refer only to "payment, units of purchase and otherwise"; but if you apply the *ejusdem generis* rule—Well, I do not want to repeat what I said last time, but you get a much narrower definition.

Senator Cook: At the time the supplier is heard, has all not been found in favour of the person who is adversely affected by the commission? So what is the sense of hearing the supplier? All this has been decided.

Mr. Cowling: A *prima facie* case has been made out.

Senator Cook: All has been decided in his favour. The commission has said, "You can do this, and you can do that, and you are adversely affected," so what is the good of hearing the supplier at this stage? What is the supplier going to say when the commission has found he is willing and able to meet the trade terms?

Mr. Cowling: In other words, the statute does not set out on what basis a person might be able to defend himself.

Senator Cook: Or challenge the findings of the commission.

Senator Beaubien: Mr. Chairman, how would this affect people who have a franchise to sell automobiles, and that sort of thing? How would that work out? If I cannot sell Ford cars, I can go to the commission?

The Chairman: Well, of course, I take it that the retailer is the one who is closest to the consumer, and I would think the design of this, as put forward by the department, is to protect the consumer. Now, in order to protect the consumer, does that mean protecting the retailer who is going to be selling to the consumer? But the protection of the consumer might have to go away back to the point where goods were made, and how they went through a series of transfers and price ranges. If you limit "usual trade terms" to items relating to payment, or units of purchase, and otherwise, then you are not covering the aspects Senator Buckwold was talking about at all.

Senator Cook: It seems to me, too, that the supplier should be allowed to be heard when paragraph (b) is being considered, when the commission is considering if "the person . . .is willing and able to meet the usual trade terms . . ." The supplier should be heard at that point, and not after the commission has found that he is able to do it all.

The Chairman: Then you have to consider paragraph (d), which deals with where the commission finds that "the reason for the inability of the person to obtain adequate supplies of the product is an inadequate degree of competition in the market". Now, are you going to ask the Restrictive Trade Practices Commission to take that position?

Senator Cook: After they have made it, then the supplier can be heard.

The Chairman: Then, even though the supplier is given the right to appear before the commission, what is there left for him to say, if he talks about the nature of his products, the servicing required, the display advertising, and all that sort of thing, which is used in connection with the marketing of the product, and this person who wants to get into the business will not buy on those terms?

Senator Everett: Counsel to the committee was talking earlier about the *prima facie* presumption that is set up in this section. It would seem to me that in paragraph (d) of section 31.2, the *prima facie* case would be against the retailer/wholesaler, the way that section reads, to show that there was an inadequate degree of competition in the market. In fact, the section turns wholly around paragraph (d). If that cannot be proved, then the matter fails right there. The commission is powerless to find anything. Now, it would seem to me that a *prima facie* presumption would be that competition exists, and it would be up to the complainant to show that it does not exist, and he would have to move the presumption over to the other side before the commission could make any finding at all.

The Chairman: No. Senator Everett, you will notice that the machinery of the Restrictive Trade Practices Commission can be put into motion by the director filing an application. Now, he does not have to prove anything. The commission decides whether they are going to hear evidence or not, but they must hear the supplier, if he wants to be heard.

Senator Everett: I think we agreed on that.

The Chairman: Yes.

Senator Everett: But all I am saying is that, the way I read paragraph (d), there is a presumption that seems implied in paragraph (d) that inadequate competition does exist in the market, and it will be up to the complainant to establish it.

Senator Flynn: Not a presumption.

Senator Everett: I think it would be a *prima facie* presumption.

Senator Flynn: It has to be found. You base that on facts.

Senator Everett: I think it would be a presumption that you would have to put over to the other side.

Senator Flynn: The commission could not operate without having evidence of the fact that there is an inadequate degree of competition in the market.

Senator Everett: That is correct.

Senator Flynn: They would have to have the facts. There is no presumption.

Senator Everett: That is correct, but the onus would be on the complainant to put that evidence forward. I agree with you on that. That is one of the very main protections in this situation, because it seems to me that what the drafters of the act are saying is that in the event that adequate competition does not exist, then refusal to supply

becomes a very serious matter. In the case of Kodak, where there is more than adequate competition, the matter never arises, because Kodak does supply, and refusal to supply in terms of that situation would not bring this section into operation.

The Chairman: Yes, but in the light of the representations that have been made to us, and in briefs, and on my reading of paragraph (d), the commission is not given any guidelines for a determination of what constitutes an inadequate degree of competition in the market. What does that mean?

Senator Everett: Then perhaps the role of this committee is to suggest guidelines, and perhaps the role of this committee is to suggest what constitutes the definition of "usual trade terms".

The Chairman: I think that must be defined.

Senator Everett: Yes. I think if that is the case, then the role of this committee is to go into this section very deeply.

The Chairman: I think we have got to do something about the words "inadequate competition".

Senator Everett: We have to suggest guidelines, and not jsut say that it is *ultra vires* the federal authority, or say that this section should not exist at all; because I do not think anybody here would argue that, assuming we could agree on the term "inadequate", if there is clearly inadequate competition in the supply of a certain product there is no obligation on the part of the commission to step in and try to rectify that situation.

The Chairman: Yes, but you are making a positive assertion there—

Senator Everett: I am trying to.

The Chairman: —and we have uncertain language here. We have "adequate supplies", and we have "an inadequate degree of competition in the market," in relation to those supplies. Now, what is intended by those terms? Should there not be a guideline to the commission?

Senator Everett: If we can define one, yes. I think it makes good sense.

The Chairman: There should be guidelines. I mean, this has been a method used in other legislation in order to enable the public, and others who may be affected by it, to get some sense of what the legislation is aiming at.

Senator Everett: The only problem with guidelines, as you know, in business, is that for one business "inadequate competition" or "adequate competition" may be one thing, and for another business it may be something entirely different. As you know, we have always fallen back in law on "common business practice", purely and simply because business practices vary from industry to industry, and the moment we attempt to define what "business practice" should be we find ourselves in a situation where what is adequate for one business is not adequate for another; it is overly restrictive for one and overly free for another. I imagine that is what the drafters had in mind.

The Chairman: But then the point is this, are you going to give a free hand to the commission to interpret what are "adequate" supplies and what are not? The same consideration applies to what is "adequate" and what is "inadequate" competition?

Senator Everett: I would rather not, if we can come up with a good definition.

The Chairman: The sum total of the briefs has been directed to these two points. They say that the whole thing is too vague and too confusing and they do not know where they are at. What are "adequate supplies"? What is "an inadequate degree of competition"? Surely that is something that must depend on the product and the market situation.

Senator Flynn: I would say it depends on the consumer and whether the product is available to the consumer in sufficient quantities and at a reasonable price. In my view, it has to be from the point of view of the consumer.

The Chairman: But, you see, one of the other elements that the commission must find is that the product is in "ample supply".

Senator Flynn: That is vis-à-vis the consumer.

Senator Laird: Like eggs!

The Chairman: So you start off with the product that is in adequate supply, and then somebody is in business and is attracted to and wants to get into another business that is in adequate supply and he says, "Because I cannot get into it, I am adversely affected."

Senator Flynn: But the consumer may not be.

The Chairman: Then can you say with "ample supply" that this man who is already in business, but not necessarily in the business he wants to get into, can then complain that the product is in ample supply, or can he say that there is not an adequate supply, or, secondly, that there is an inadequate degree of competition? This is all wrapped around the words "refusal to sell". There may be many reasons for refusing to sell to a particular person. For example, that person may have a history of failures.

Senator Molson: We are still faced with the problem we were considering last week as to whether this legislation is directed towards the protection of the consumer or the protection of the businessman at the retail level or at the wholesale level. It is still unclear to me where the emphasis is or whether in fact it is directed towards the protection of the consumer to enable him to obtain a product at the best competitive price.

The Chairman: Well, there you have a problem. If this businessman who is already in business and who wants to go into another business and finds he cannot do so says that he is adversely affected, how do you relate that to the consumer? If he does get into the business, are we protecting the consumer in that regard?

Senator Molson: It is like the egg story all over again, and the consumer seemed to come off last in that omlette.

The Chairman: I think what we should possibly do is to follow what is said on page 67 in this proposal which I read to you earlier. There they attempt to put the value of this section on the situation where there may be a combine and there may or may not be sufficient evidence to prosecute in relation to that combine—"or by reason of an uncompetitive situation in a trade or industry". These are the bases on which they attempt to put forward and justify this clause 31.2. They say, "This will enable us to get at such a combination in the cases where we don't have enough evidence to be able to prosecute them for being a combina-

tion in restraint of trade". If you take them literally, and if you take what is presented literally, then maybe the wording of this section should be limited to cases where there is a lessening of competition by reason of whatever the action may be here. And maybe those limiting words should be put in there as well as spelling out the usual trade terms and giving some indication as to what should be looked at in the case of determining whether there are adequate supplies. Obviously, if the product is in "ample supply" then there are "adequate supplies", and therefore the only question that would remain would be as to whether there is an inadequate degree of competition. That would bring you right down to the situation where the basis for this would be that by reason of refusal to sell there is a lessening of competition.

Senator Flynn: Not only a lessening of competition, but a maintenance of monopoly.

Senator Connolly: Mr. Chairman, in the memo with reference to amendments, when you come to section 31.2(d) the only proposal for amendment is the addition of the word "real" before the word "reason"—"the real reason for the inability of the person to obtain adequate supplies of the product is an inadequate degree of competition in the market". I wonder whether that changes very much.

The Chairman: Could I put this idea forward to Senator Everett and Senator Flynn, in particular? With reference to competition, the degree of competition in the marketplace is not necessarily evidence of a combination in restraint of trade or in lessening competition. The nature of the product may have something to do with it. The area and the price range in which the product is moving may have something to do with it. So, putting in the word "real" before the word "reason" is the only amendment suggested by the former minister to this section 31.2(d). The "real reason" for the inability of a person to obtain adequate supplies was an inadequate degree of competition. Now all our combines legislation deals with the situation where there is a combination in restraint of trade or where by reason of agreement among manufacturers there is a lessening of competition.

Senator Everett: I would think it would be easier to show a lessening of competition than an inadequate degree of competition, so I think if you subsittuted "lessening of competition" for the words here you would indeed open up the section to a much wider degree, because it seems to me here that the person who complains has to show there is an inadequate degree of competition that exists—not just that it has been lessened, but that as a matter of fact it does exist.

Mr. Cowling: What would be the terms of reference if "less" were stipulated?

Senator Everett: We come back to what the chairman said. It will vary from industry to industry and the moment an attempt is made to define what constitutes an adequate degree of competition . . .

The Chairman: "Lessening" or "inadequate" both imply a standard base from which to operate in making a judgment.

Senator Everett: That is correct.

The Chairman: How would that be spelled out. Should it be spelled out, and should there be a standard, therefore a guideline?

Senator Everett: I am not sure that it was ever a standard in the previous Combines Investigation Act.

Mr. Cowling: That referred to "undue".

The Chairman: Yes, it did refer to "undue".

Senator Everett: Clearly, "undue" would be a matter of degree. "Undue lessening of competition" is, I suppose, the same . . .

Mr. Cowling: But the definition grew up as a jurisprudential definition.

Senator Everett: I hope that is what would happen in this case.

Mr. Cowling: This particular section seems to be insulated from the courts, not altogether, but as to findings of facts it seems to be insulated from the ordinary courts.

Senator Connolly: What facts are to be considered here? Is it franchises and franchise dealings, people attempting to break into franchise?

The Chairman: That may be.

Senator Connolly: Is that really the root of the whole thing?

Mr. J.F. Lewis, C.A., Advisor to the Committee: Mr. Chairman, in conversations I have had and listened to, I gather it is more along the lines of a conspiracy, let us say of a smaller group of suppliers or manufacturers, perhaps a conspiracy or a small "club", in which the manufacturers state they will only sell to a group of, for instance, five people. They are quite happy with such an arrangement because they know they have a good distribution system, give the proper service and rely on the usual trade terms.

Senator Connolly: Well, that is franchising.

Mr. Lewis: This "No. 6" comes into the picture and says, "There is an ample supply of sheet steel," for example. "I wish to enter this market. These gentlemen will not sell to me but I cannot prove a conspiracy." However, there is an adequate supply and an inadequate degree of competition in the opinion of "No. 6". Therefore, he lays a complaint, with which the commission agrees and issues an order. This is generally the objective of this section. Under the wording of the Combines Investigation Act at the present time a conspiracy is very difficult to prove, I suppose. Therefore this has been developed in order to make it easier, I gather, to lay a complaint which will not be so difficult to prove.

Senator Connolly: In other words, it gives the commission the opportunity to assess facts, rather than to find on conspiracy.

Mr. Lewis: I would think so, sir.

Senator Cook: Another problem which arises is, for instance, in the case of sheet steel, the market would be anywhere in Canada, going down to the consumer and building exchanges. Would the consumer have to go one mile, five miles, 10 miles? What is the territorial extent of "a market"? It says "anywhere in a market". In the case of sheet metal that could be anywhere in Canada. At least from the angle of the consumer, how big is the market? Is there one in every village? Will Toronto, for instance, contain 20 markets? Must a consumer at travel five miles

in a streetcar, or can he complain for having to travel two miles?

The Chairman: We have given this thorough consideration this morning. Senator Everett has put forward some suggestions and points, some of which might place him on both sides, of supporting and not supporting the section in its present form. We will have to agree upon which ones should be adopted. I believe, however, that there is agreement that if this section is to stand substantial revisions should be made. Certainly in section 31.2(b) there should be more required than simply that the person who is adversely affected or who wishes to enter a particular business "is willing and able to meet the usual trade terms of the supplier . . . in respect of payment, units of purchase and otherwise". That passes over the real issues in cases in which there is any limitation on the handling of a product of a certain make or brand. There are many other features that the vendor of such a product would wish to have in force. He wishes to maintain the status of his product. However, that is not one of the terms included in "usual trade terms". The "usual trade terms" would appear to be intended to include only that this person who is adversely affected announces that he is ready to meet the terms of payment, units of purchase and otherwise. The meaning of "and otherwise" is considerations of the same category as payment and units of purchase.

Senator Laird: Mr. Chairman, could I introduce one more suggestion for consideration? Have we any hope of composing a phrase equivalent to that found in the Income Tax Act, which is "in accordance with generally accepted accounting principles"? It seems to me to work rather well in that legislation. Could we introduce wording such as "in accordance with generally accepted trading practices" into this legislation? I mention this only as a subject for thought.

The Chairman: I would say that we should be just as capable of doing that as the drafters of this bill were of drafting it in the form in which they did. They say that the purpose of this section is to deal with a combines matter by in this indirect way getting at the person, whereas they cannot establish the fact that there is a combination. The main decision before us is whether there is any need for change in the language of this section. I would think, from my point of view, and I am only one person, that there is need for change.

Maybe we have discussed this point sufficiently today. We have given you copies of the analysis of the briefs which have been filed. You will note that these points are all raised, and we will very shortly be hearing evidence on them.

I suggest, however, that there are several other points which should be considered carefully today. At our last meeting we discussed the civil damages. Any person who is hurt by a violation of a provision contained in Part V, which is the combination section, may institute an action for damages.

There is another point. I direct the attention of honourable senators to section 45.1, on page 41, which says:

> A collection, compilation, analysis, abstract or other record or report of statistical information prepared or published under the authority of
>
> (a) the Statistics Act, or
>
> (b) any other enactment of Parliament or of the legislature of a province, is admissible in evidence in any proceedings before the Commission or in any prosecution or proceedings before a court under or pursuant to this Act.

In the briefs which have been filed, there is very strong protest against the making of the admission of statistics admissible without the ability to cross-examine. The basis of the preparation of those statistics may be such that they are not reliable or applicable, or that certain elements have not been considered. The briefs make pretty strong representations on that point. Is that not correct?

Mr. Cowling: Yes, Mr. Chairman. They are even more concerned, perhaps, about subsection (2), which states that one can obtain specially prepared statistics, or statistics prepared for a special purpose by the Chief Statistician of Canada. It says that even in that case the statement is admissible in evidence.

I believe it is in the next section, or in the one after that, that the right to cross-examine is in the discretion of the judge. The briefs would suggest that the right to cross-examine should be absolute, as it is for most other things.

The Chairman: Yes. Section 45.1(2), on page 41, says:

> (2) On request from the Minister, the Commission or the Director,—

one may obtain these statistics which have been prepared by:

> . . . (b) an officer of any department or agency of the government of a province the functions of which include the gathering of statistics . . .

He may:

> compile from his or its records a statement of statistics relating to any industry or sector thereof, in accordance with the terms of the request, and any such statement is admissible in evidence in any proceedings before the Commission or in any prosecution or proceedings before a court under or pursuant to this Act.

The substance of the objections we have had is that it should be made absolutely clear that there is an absolute right to cross-examine. Frankly, I cannot see how there could be any objection to the inclusion in this section of the right to cross-examine.

Senator Flynn: It would seem to me obvious that one would be able to cross-examine the person preparing the statement. It would have to be filed in evidence by someone who would be able to testify as to its authenticity. Therefore one would be able at that time to cross-examine the person preparing the statement. I agree that if there is a danger of this right being denied, we should do something about it.

The Chairman: You would have to get permission.

Mr. Cowling: The key words are in subsection (2) in proposed section 45.3, where appear the words:

> with leave of the Commission or court . . .

In previous sections it explains that it is not necessary to have a witness appear. The statement could be prepared and a document filed, and the act gives that document the quality of admissibility. However, the defendant could, with leave of the court, ask that a witness come to explain it—the person who prepared it, perhaps.

The Chairman: Or with leave of the commission.

Mr. Cowling: Yes, depending on which tribunal the case happened to be before.

Senator Flynn: If the fear is justified, then I agree with the idea; but I do not think it is justified.

Senator Macnaughton: I do not think we should take any chance on a thing like that, with the constantly increasing power of the executive.

Senator Flynn: Even if the section did not exist, I cannot see why it would not be pertinent to bring such documents as evidence.

Senator Laird: Why should there not at least be the right to subpoena?

Senator Flynn: If there is any danger that the fear is justified—

The Chairman: Section 45.3(2), on page 43, says:

> (2) Any person against whom a record or report of statistics referred to in section 45.2 is produced may, with leave of the Commission or court before which the record or report is produced, require the attendance of any person who participated in the preparation of the record or report for the purposes of cross-examination.

This is too important an issue to depend on the leave of the commission or the court, surely.

Senator Flynn: If leave were denied, it would be a question that would certainly give rise to a remedy before another court. One could proceed under the Federal Court and have the decision of the commissioner refusing leave quashed.

The Chairman: This "leave" involves discretion.

Senator Flynn: I know, but it has to determine the situation in a sensible manner.

The Chairman: In exercising discretion, the question of being able to "mandamus" someone to do something is quite a problem. Why should it be left to the uncertainties of either the commission or the judge?

Senator Macnaughton: Why should they chisel one of our inherent rights?

The Chairman: There is a right inherent in the law that one should be able to defend himself by cross-examination on any evidence put forward against him. Why should we settle for less?

Senator Walker: They could shovel in here all sorts of statistics, if there was not the right to cross-examine.

The Chairman: One could obtain statistics under the Statistics Act, or from a compilation made in a provincial government department.

Senator Desruisseaux: And they often conflict.

The Chairman: That is right.

Senator Cook: Once this is allowed to go, it immediately becomes a precedent, and the first time another piece of legislation comes along, it relies on this.

Senator Flynn: If you delete the words "with leave of the Commission or court", then you solve the problem.

The Chairman: You simply delete, "may, with leave . . ."

Senator Flynn: Yes.

The Chairman: That is one of the important points raised in the submissions we have received thus far.

Mr. Cowling: Another point raised quite often, Mr. Chairman, has to do with the court in which an accused would be tried. Under the present law, it is only with the accused's consent that he can be tried in the Federal Court of Canada, which is not a court that is used to criminal cases. The amendment in this respect, as I understand it, proposes that it would be the government's option, assuming it instigated a prosecution, to decide in which court prosecution would be carried out. The consent of the accused would not be required. There have been a number of fears expressed in that respect.

The Chairman: The trial courts of the various provinces have a history of long experience in dealing with criminal cases, as well as conspiracy cases under the Combines Investigation Act. To move that right of hearing to the Federal Court, which does not have that experience and background, would require very strong evidence, to my way of thinking, especially if the accused has no choice in the matter. Only the prosecutor could decide in which court the prosecution will take place.

Senator Macnaughton: Can you give us that reference, Mr. Chairman?

Mr. Lewis: That would be section 46.

The Chairman: Section 46 starts at the bottom of page 43, and it reads as follows:

> 46. (1) Subject to this section, the Attorney General of Canada may institute and conduct any prosecution or other proceedings under section 30, *any of sections 32 to 35 and section 38*—

And those are the combines sections. Continuing:

> *—or, where the proceedings are on indictment, under section 36, 36.1, 36.3, 36.4, 37.2 or 46.1,* in the Federal Court—Trial Division, and for the purposes of such prosecution or other proceedings the Federal Court—Trial Division has all the powers and jurisdiction of a superior court of criminal jurisdiction under the *Criminal Code* and under this Act.

Senator Flynn: What is the purpose of that? Has that been explained?

The Chairman: I do not know.

Senator Desruisseaux: The explanation for clause 23 states:

> This amendment would extend the jurisdiction of the Federal Court in relation to prosecutions under the Act to include all prosecutions on indictment under the sections enumerated in the amendment.

And clause 23 of the bill states:

> 23. Section 46 of the said Act is repealed and the following substituted therefor:—

Mr. Cowling: Mr. Lewis feels there might be a better explanation given on page 86 of the blue covered book. Would you like me to read that, Mr. Chairman?

The Chairman: Yes.

Mr. Cowling: It reads as follows:

Clause 23: This clause amends section 46(1) of the present Act to add all the new offences which may be tried by indictment to the offences that, subject to subsection 46(4) (below) may be tried in the Federal Court. This is in line with the policy whereby the Attorney General of Canada may, subject to subsection 46(4), institute, by way of indictment in the Trial Division of the Federal Court, prosecutions of all offences under the Act which are triable only upon indictment or are triable both on indictment and by way of summary conviction.

There really is not much more contained there by way of explanation. That explanation refers to a policy.

Senator Flynn: I do not know of any similar instances where such jurisdiction is given to the Federal Court. I do not see why such jurisdiction would be given on the basis of a policy.

Mr. Cowling: I think this is perhaps another shaky one, constitutionally. Criminal law, of course, is a federal matter, but the administration of justice and the courts in which criminal law is administered, clearly, comes under provincial jurisdiction.

Senator Flynn: That is an argument against the amendment.

Mr. Cowling: I suppose that any individual accused and brought before the Federal Court could raise a constitutional argument on that ground, and go all the way with it.

The Chairman: But why should he, under the circumstances? We have a practice, a policy and the law which states that trials under the Combines Investigation Act go to the superior courts of the provinces. The Constitution provides for the administration of criminal law by the provinces. Why the change? We are told in this proposal, which is put out under the authority of the department concerned, that it is the policy of the Attorney General. What has the policy of the Attorney General got to do with it?

Senator Cook: Section 46(4) states that an individual accused cannot be so tried without his consent.

Mr. Cowling: That is a point we should not lose sight of. In other words, it only applies to corporations.

Senator Cook: Section 46(4) of the present act states that an individual cannot be tried in the Federal Court without his consent.

The Chairman: That is right, and corporations have no choice.

Senator Cook: I suppose in the case of a conspiracy there could be more than one accused. I am at a loss here.

Senator Macnaughton: Why should an accused corporation not have a choice by right?

The Chairman: Are the superior courts in the provinces administering criminal law only in the case of individuals?

Senator Macnaughton: Exactly.

The Chairman: What is the difference?

Senator Flynn: Perhaps the Attorney General of Canada would tell us he can proceed more quickly before the Federal Court than before the superior courts of the provinces. That might be the justification. Otherwise, I do not see why there should be a special regime in respect of corporations.

The Chairman: Based on any experience I have had, I would say that in proceeding with a criminal prosecution of, say, a corporation the greatest length of time under the Combines Investigation Act is spent in the investigation by the director and in the inquiry that follows that investigation by the director, and that inquiry is really in the nature of an inquest. There is no such thing as a challenge on the basis of relevancy, because in my experience you are always told by the Crown, "I don't want to disclose the relevancy at this stage because I may alert the witness," and the member of the Restrictive Trade Practices Commission presiding at the inquiry will simply say, "Well, it is relevant, and you know what the penalty is if you don't answer. I have the right to cite you for contempt. True, I cannot punish you for contempt, but I can refer the substance of the matter to a Federal Court judge who can decide whether you are in contempt or not." There is the threat. It is really an inquest. I am not making any particular objection at this moment to that kind of procedure, but those are the procedures.

Then you have the preliminary hearing, then you have the trial. The conduct of all these proceedings is in the hands of the Crown; they are not in the hands of the accused, who just have to come along at the proper time, which is only when we get to the stage of trial, to present a defence. If there is any complaint that it is not expeditious enough, it is not expeditious enough because of the procedures that the Crown feels are necessary in order to develop their case. Certainly when you get down to trial, I would say the trial takes less time than all the other proceedings, and sometimes the Crown succeeds and sometimes they do not. There are many cases where the director stops short.

What we are doing this morning is just hitting the points the briefs have stressed as being points that they complain about. We have dealt with about four of them this morning.

Senator Cook: I gather the purpose of this amendment is purely for the convenience of the department.

The Chairman: Yes.

Senator Cook: In other words, if they are going to go against corporations it is much more convenient to have it here in Ottawa in the Federal Court.

The Chairman: The answer they might give on that is to say that in the Federal Court the judge would move to any one of many centres across Canada, depending on the convenience of those who are charged. It is the same as with the Federal Court in income tax cases, when the judge will go to Toronto and sit there. What is the difference between a Federal Court judge going to Toronto to try a combines case and a trial judge in the Supreme Court of Ontario sitting in Toronto and trying a combines case? As a matter of convenience, as a matter of expedition, you do not save any time one way as against the other.

Senator Cook: The department is not so inconvenienced if it is held here in Ottawa.

The Chairman: That is right.

Senator Flynn: Criminal offences under the Income Tax Act are tried in the provincial criminal courts; they do not go before the Federal Court.

The Chairman: No. I was talking about the civil end of it.

Senator Flynn: In one case you have a civil case. Here you have a criminal case.

The Chairman: Criminal cases go to the provincial courts; that is the only place they have authority to go. Are there some other points this morning?

Mr. Cowling: Another one that seems to be causing some concern is the amendment with regard to bid-rigging, which it is feared may affect the existence of joint ventures; that is to say, a partnership of corporations that is set up in order to accomplish a specific project. While it is recognized that bid-rigging should not be encouraged, it was thought that the amendment could be draften in such a way that joint ventures were not caught by the scope of the amendment.

The Chairman: Many times there are enterprises or undertakings that are beyond, say, the financial power of a particular corporation to undertake, and therefore you will find a group of contractors embarking on what might be called a joint venture; they agree on a partnership agreement for the purpose of carrying on that operation. The representation they have made to us is that joint ventures, with some limitations in language, should be exempt from this clause that deals with bid-rigging. This is section 32.2, where we have the definition of "bid-rigging." It says:

> (a) an agreement or arrangement between two or more persons whereby one or more of such persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders; and
>
> (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by collusion between or among two or more bidders or tenderers.

The joint venture is obviously a situation where two or more people in a line of work get together and agree on what will be tendered for the job. Joint venture arrangements are quite common, and are quite valuable and economic. It is sometimes the difference between getting a job done and not getting it done, or getting a job where you have to import contractors rather than being able to put together a group of contractors in Canada. Yet subsection (2) would appear to cover joint ventures. This is the concern of those who have made submissions to us.

Senator Walker: They have real reason for concern, haven't they?

Mr. Lewis: One of the suggested amendments was to section 32.2(1)(a). They have used the word "collusion." I am not sure whether this is effective or not. The *Concise Oxford Dictionary* defines "collusion" as:

> Fraudulent secret understanding, especially between ostensible opponents as in law-suit.

Perhaps the lawyers could decide what that means. That is one of their suggested amendments. They use the word "collusion" in the first line of (a) instead of "agreement" or "arrangement".

Mr. Cowling: That was in the amendment proposed by the former minister.

Mr. Lewis: Yes.

Senator Cook: They do use the word "collusion".

Mr. Lewis: The normal use of the word "collusion" in business is a little broader than that, I think. Two people getting together on almost any matter in private could be deemed to be in collusion, I would think, if there was another party who took exception to it. I do not think it means in general business that it is illegal. So I am not sure that that one word "collusion" solves the problem.

Senator Laird: From the state of the jurisprudence we had better turn to the divorce cases.

Mr. Lewis: That is a good point, sir.

The Chairman: I am sure we can find ample jurisprudence. The question is whether we should have to resort to that. Once we know what the situation is that we want to exclude from this bid-rigging, we should therefore go ahead and draft it and say so. Obviously, joint ventures which are simply schemes to defraud, or, by getting together, to increase the cost of the work for the benefit of the contractors by what may be devious means, would come under the Criminal Code. I would think that in our law, even in the Criminal Code as it exists at the present time, there are many ways to get at that. But if we take the specific case of a joint venture, as it is understood in business, and we clarify that and say that that is not "bid-rigging," then I think you would have to go that far.

It is true that a group of contractors will get together and finally work out all their estimates, specifications and everything else, and they will settle on a particular price which is the joint effort of all of these people. The feeling of the people who engage in this kind of work is that they might be caught or might be investigated under this section and that this would interfere with carrying on work in that form. I would think it might be said in relation to some jobs that it is possible to do them only as joint ventures.

Senator Walker: And the bigger they are the more likely it is that there is no other way of doing them. That is becoming more and more so with respect to joint ventures.

The Chairman: Yes. To some extent it involves sharing the risk, too.

Senator Desruisseaux: Mr. Chairman, would the reference to two or more persons have the effect of excluding the corporations that are asking them to act for them?

The Chairman: Obviously, senator, a corporation is a person. When we refer to "two or more persons" that means individuals or corporations who would get together and enter into an arrangement for the undertaking of a construction job, or something of that kind, and would settle on their price. They might, individually, be invited to tender but would say, "This is not the kind of job we can tender on, but here is a tender from the two of us in a joint venture." They would then say, "We are not going to do that, if we are going to face something in the law." Therefore it should be clarified.

Mr. Lewis: Mr. Chairman, in connection with joint ventures, I think the Investment Dealers Association were quite concerned about this in connection with public issues of securities. They have proposed a number of amendments in that respect.

The Chairman: Yes, I can see that in an underwriting situation you might have a group of people getting together to settle among themselves on what price they are going to bid as a group. That is a well recognized method of

doing business in the way of marketing of securities by a group of underwriters. I think the language should be such that there can be no possibility of confusion. If there is any fraud in the operation, we already have ample law to deal with that. We do not need it in here.

Mr. Lewis: Another point, Mr. Chairman, which is quite important, I think, is in connection with tied selling, as in section 31.4. The normal trade practice is to have what is called "requirement contracts." For example, a newspaper organization needing a steady supply of pulp and paper for its newsprint will make an agreement with the paper mill for a minimum delivery. In return for that the newspaper organization will agree that it will buy all of its supplies from that particular paper mill.

The Chairman: Incidentally, section 31.4 starts at page 17, but tied selling is developed on page 18.

Mr. Lewis: This also holds true in connection with the supply of raw materials such as iron ore, or any basic raw material. It is a normal trade practice. But there is this concern, evidenced by briefs from the Canadian Manufacturers' Association, the Canadian Chamber of Commerce and many others, that the normal trade practice will be caught under this tied selling.

Senator Everett: Mr. Lewis, are you not referring to exclusive dealing, as opposed to tied selling?

Mr. Lewis: To a certain extent it does fall within that as well, but it is more from the other point of view. The tied selling was brought up mostly by the Newspaper Dealers' Association.

Senator Everett: I thought tied selling was a requirement not to take another lateral product. I would have thought what you were referring to would be exclusive dealing, which is the requirement that you give all your business to one supplier. Indeed, you would be referring to section 34(1)(a).

The Chairman: Well, Senator Everett, on page 18 it specifically says that:

"tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that the customer to

(i) acquire some other product from the supplier or his nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or his nominee,

And then it goes on to add certain definitions. So tied selling is the type of thing you were talking about with respect to a lateral product. That is my conception of it.

Senator Everett: Yes.

The Chairman: Exclusive dealing, on the other hand, would certainly cover the situation which Mr. Lewis was talking about with respect to a newspaper company obtaining it newsprint or a refining or processing operation obtaining its ore. That would certainly fit under exclusive dealing.

Some of the representations we have had have brought in both headings, I suppose in order to be absolutely sure that their situations are not covered by either one of these definitions. Now, the representations have been fairly forceful in the submissions we have had made to us, and they have been made by responsible people. From the indications of people who say they intend, if they get the opportunity, to make further submissions to us, I expect that we will have more representations, and it certainly seems to be a subject matter that is so well known, and so well practised in business, and is justified, and would not appear to offend against the matter of the protection of the consumer, that there should at least be a clarification to exclude the kind of situation that we have had submissions on. All I am saying now is that there would appear to be reasons for excluding. I think, ultimately, when the committee hears all of the evidence, then we will have to make a decision; but I think it is fair to say that at this stage it is a subject that we should consider carefully.

Mr. Lewis: Did you want, Mr. Chairman, to mention the real estate brokers' submission in connection with multiple listing?

The Chairman: Yes. We heard one group of real estate agents, the Canadian Real Estate Association. They are concerned about multiple listings because they have a system now, certainly in the big cities, where, if you go to an agent who is in this group and you list your property with him, by agreeing to pay a higher rate of commission than if you were just dealing with this agent as a single agent to sell your property, you will get multiple listing, so that your property will be listed with a certain named group of agents, which gives you a wider exposure. They were here and they were very much concerned about this, and it certainly would appear that they would be in difficulty with their multiple listing. The question is, is there a consumer there to be protected? And if so, who is he? The vendor wants to sell his property, and maybe he is prepared to pay a little more to get a wider exposure. Now, whose interests are we supposed to look at in that regard? The bill, as it is drawn, would appear to expose the real estate operators to attack under the bill if they continue to practise multiple listings.

Senator Laird: Well, it is certainly not protecting the consumer if multiple listing is done away with. Presumably the consumer is the person who wants to sell his house, and if this is the best way—and I know from experience that it is—it is the best thing for the consumer, and all it is doing is handicapping legitimate business.

Senator Cook: It is better for the buyer, because if he goes to a real estate agent he can get a much wider choice on a multiple listing than he would otherwise. So it would seem to be good for both the seller and the buyer—at least, not harmful, anyway.

The Chairman: I thought we should bring that to your attention, because it is a business practice that is well recognized and is widely made use of by the public. I may well be, therefore, that unles the government can point its finger to abuses that hurt the consumer, whether he is the seller or the public. It may well be, therefore, that unless the government can point its finger to abuses that hurt the consumer, whether he is the seller or the buyer, it should be clear that this bill is not intended to interfere with that.

Senator Desruisseaux: There was no amendment suggested in this case by the minister?

The Chairman: Did the real estate people suggest an amendment?

Mr. Lewis: No; they just asked to be exempted.

The Chairman: They just wanted an exemption.

Senator Walker: From what clause?

The Chairman: In that connection, we also have a request from the Canadian Institute of Public Real Estate Companies for an opprotunity to be heard. We have offered them a date, and this is one of the major points of concern.

Senator Everett: I would be interested to know to what clause they refer. I would be interested, as Senator Walker, to know what clause they are referring to.

Senator Walker: What is hurting them? What clause?

The Chairman: Mr. Lewis will turn it up, and we will give it to you in a moment.

Mr. Lewis: They prepared such a thick brief, Mr. Chairman, that I did not bring it with me.

The Chairman: I may have it here.

Mr. Cowling: I would imagine, senator, that it would be the old price fixing section, and because this bill would extend the application of the act to services, that is how you get the real estate business swept into it; but it is all of those sections—section 32 and following.

Mr. Lewis: And it comes under the combine or conspiracy or agreement idea, and so on.

The Chairman: This would be an agreement in relation to services, and services are now brought in, as well as articles that are bought, under the definition.

Senator Everett: It is Section 14(1)(c).

Mr. Cowling: Clause 14(1) of the bill, yes, which amends section 32 of the act.

Senator Laird: How do the real estate people contend that that affects them?

Mr. Cowling: I think it would be because "product" is defined as being both a service and an article.

The Chairman: Are there any other points or is this a good time to conclude? I think that we have given you quite a lot to think about today. Furthermore, you will have the transcript and I am sure you will be ready to deal with any representations.

Senator Molson: Well, Mr. Chairman, if you are going to conclude today's proceedings, before we adjourn I would like to ask if we have given any thought to dealing, during this relatively quiet period of our proceedings, with section 32.3, on page 27, dealing with sports. During the course of this bill's passage, rough or smooth as it may be, I wonder if anybody is going to take a proper look at these things. I think it is an area which would be well worthwhile considering. Professional sports affect a large number of spectators and a relatively small group of participants, but amateur sports, even organized amateur sports, literally affect hundreds of thousands of Canadians, and I think it would be well worth our while just checking and analyzing the implications of these provisions and seeing whether in our view they are good or bad.

The Chairman: I thought you were going to take the larger question of the reserve clause!

Senator Molson: Well, that is just one aspect, but this goes right back down to the amateurs and the ability to transfer or not to transfer, and so on.

The Chairman: Well, I am wondering why we should take the criminal law into professional or amateur sport in the matter of agreements that may exist between a player and a club. Is that what you are thinking about?

Senator Molson: That is what I am thinking about. Of course, they have used a rather criminal term quite often in regard to professional sport in that the word "slavery" is frequently used, and I think that is rather illegal in this day and age.

The Chairman: I would not think that in the light of what we know about professional sport in this day and age there is such a thing as forced labour.

Senator Molson: Well, at $200,000 per annum and a few perquisites it is perhaps a little hard to describe it as "forced labour", but some of them still seem to be trying.

The Chairman: I am just wondering what the public concern is in relation to the subject matter of this section 32.3 on page 27 as it reaches out to "Conspiracy relating to professional and amateur sport".

Senator Molson: Well, we have to ask whether or not it is affecting the public. It may be doing so. Certainly there have been some very strong statements of disapproval as to the arrangements in leagues of even young people—midgets and those below the junior level. It seems to me to be a subject that we could spend a few hours on with advantage, because it affects in a completely different way a very, very large public in the country.

The Chairman: You are speaking mainly in connection with amateur sport?

Senator Molson: Very largely, but the whole combination of professional and amateur is quite a lot larger than would appear when one just reads the print. When we think of professional and amateur sport we tend to think that it does not apply to too many people, but I am suggesting that it applies to enough to make it worth our while taking a little interest in it.

The Chairman: I think what you have been talking about is agreements between or among groups in connection with the disposition of players. Is that it?

Senator Molson: The wording is quite broad in the section. It says:

> 32.3 (1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unreasonably—

et cetera, and this covers, I would think, any restriction on the freedom of movement of any player from the smallest organized league in sports upwards.

The Chairman: It goes further than that. If you read it it says in (a):

> (a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional or amateur sport or to impose unreasonable terms or conditions on those persons who so participate, or—

This is really getting into the discipline of players. Do we have any business in there?

Senator Walker: Mr. Lalonde will have an opinion on this section, I think.

Senator Molson: I thought he was in Israel.

Senator Walker: That is just a free trip. He should be back any minute.

Mr. Cowling: I do not know if any representations have been made by the NHL. I am not aware of any.

Senator Molson: It seems to me that when it came up before, there was very little said. I cannot really remember, but it seemed we were in danger of letting this go through without somebody going into it fully. Now, as written, it may be ideal, I do not know, but I think it affects a sufficiently large number of people that it might be worth our while hearing from the CAHA or the football people or the basketball people or even golfers.

The Chairman: Maybe we should extend an invitation to all the professional sports organizations.

Senator Molson: Well, not only professional organizations, Mr. Chairman. I think the amateur organizations may be more adversely affected.

Mr. Lewis: Mr. Chairman, when the first bill came out it was called the Competition Act. That was three years ago. The Canadian Institute of Chartered Accountants put in a brief and they did discuss at that time this clause connected with professional and amateur sport. The institute wrote to Clarence Campbell, President of the NHL, and received back a very fine letter explaining the reasons and the pros and cons. I think it would be a very good idea if we asked Mr. Clarence Campbell to write a memo on the subject or to ask him if he would even like to appear.

In the context of time, the greatest concern was the restriction on amateurs playing for an amateur team, of which I will not mention the name, which is affiliated with an NHL team. It restricted any boy in that particular city, village or town from playing or graduating to any other team except where that team was located in the same city, or another city. He might not wish to live in a particular city in the United States, but would prefer to play for a Canadian city or another American city. However, the restriction was on a vertical or horizontal basis, not necessarily in the same city, but any other NHL team.

Senator Molson: I think you will find that many of these restrictions have disappeared with the abolition of the farm system from the NHL. It is perfectly true that when the farm system existed a player from pre-junior age could be tied up all the way through his career. However, the abolition of the farm system has made an enormous difference as far as hockey is concerned. There are, of course, other sports in addition to hockey. We always think of hockey because it is the most popular, but there are many other sports to be considered. In my opinion the field is wide enough that we might consider how to go about this. Whether it would b e preferable to have Clarence Campbell or a representative of the NHL, Mr. Chairman, I would like first to consider a little.

The Chairman: That can be solved by writing to each of them.

Senator Molson: I think we should consider it first.

The Chairman: You are not suggesting the WHA, are you?

Senator Molson: I have not yet personally begun to believe that they have quite achieved the status of an organization that should be heard here. Maybe they have, and I am somewhat non-objective, but I do not consider them to have as yet contributed anything to hockey.

On the other hand, the Canadian Amateur Hockey Association, the Ontario Hockey Association and the Western and various other leagues in addition to the NHL have made very great contributions to the development of hockey. So far, in my opinion, the WHA has been deriving benefit from hockey, rather than doing any creating. I therefore have some reluctance.

The Chairman: Of course, that is correct.

Senator Laird: Mr. Chairman, is this a proper subject matter for legislation, in any case, or should it be a matter of collective bargaining, as is carried on between the professional baseball players and the owners?

The Chairman: Perhaps it belongs more properly in the field of provincial legislation. Why would the elements of contracts between players and clubs be made a matter of criminal law?

Senator Cook: Of course, this is such a new situation and it is one in which we could be assisted by a representative of the department. As a starting point, we could ask him to explain the reason for it.

The Chairman: We will write and ask them if they wish to make representations.

Before we adjourn, I must make reference to the fact that time is marching on and we may have witnesses appearing next week. On the other hand, I notice that the Minister of Finance has announced that budget night will be November 18. We have a very necessary task to perform in reviewing as quickly as possible the tax bills or legislation which will be contained in the budget. As I told you before, I learned from discussion with Mr. Turner that he would be very happy for us to carry out this review because, in his opinion, it would be helpful. I agreed, and in addition to being helpful it might make the Christmas recess a reality. In other words, there would not be pressure on to keep us here all through Christmas.

Discussion has taken place in the Senate with respect to its sittings. We may have to face a situation in which we must contemplate sitting for some time on Tuesdays and/or all day on Wednesday, with leave of the Senate, in order to accommodate this time schedule.

Senator Molson: Might we not sit on Wednesday evenings?

The Chairman: Yes. We have done so in the past and had good hearings, with full attendance. These are all possibilities and we can only effect our objective as long as we keep our membership.

Senator Desruisseaux: Do you propose to sit, Mr. Chairman, on Tuesday afternoons or mornings?

The Chairman: No; I was thinking of Tuesday afternoons or evenings. We accomplished a great deal in consideration of tax bills when we sat in the evenings commencing at 8 o'clock and carrying on until 10 or 10:30.

Senator Walker: Wednesday is the night, also; it is free.

The Chairman: Yes. There seems to be a feeling that traditionally Wednesday night is the night of freedom. I

am ready to work if the members of the committee are, so we must think of these considerations.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 5

WEDNESDAY, NOVEMBER 13, 1974

Third Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses:—See Minutes of Proceedings)

28244—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
*Flynn	*Perrault
Gélinas	Smith
Haig	Sullivan
Hayden	Walker
Hays	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, November 13, 1974
(6)

Pursuant to adjournment and notice the Standing Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to further consider the following:

"The advance study of proposed legislation respecting the *Combines Investigation Act*, competition in Canada or any matter relating thereto."

Present: The honourable Senators Hayden, Beaubien, Blois, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Laird, Lang, Macnaughton, Molton and Walker—(13)

Present, not of the Committee: The Honourable Senators Everett, Godfrey, Manning and Petten—(4)

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel; R. J. Cowling, Special Counsel and J. F. Lewis, C.A., Advisor.

Witnessess

Mr. A. J. MacIntosh, Q.C.,
Blake, Cassels & Graydon, Barristers, etc.

Mr. J. W. Younger, Q.C.,
Vice-President, Secretary and General Counsel,
The Steel Company of Canada Limited.

Mr. J. F. M. Douglas,
Vice-President, Eastern Region,
Cominco Ltd.

Mr. F. G. Felkai,
Blake, Cassels & Graydon, Barristers etc.

NOTE: The above-named delegation represented the following corporations: Abitibi Paper Company Ltd.; The Algoma Steel Corporation Limited; Canada Packers Limited; Cominco Ltd.; T. Eaton Co. Limited; John Labatt Limited; MacMillan Bloedel Limited; The Molson Companies Limited; Moore Corporation Limited; Noranda Mines Limited; Power Corporation of Canada Limited; Simpson's Limited and The Steel Company of Canada Limited.

Mr. Clarence Campbell,
President,
The National Hockey League.

At 12:35 p.m. the Committee adjourned until Wednesday, November 20, 1974 at 8:30 a.m.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 13, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, the first representations this morning will be made by a group representing 12 or 13 different and substantial companies on whose behalf a joint brief has been filed. Those appearing are Mr. A. J. MacIntosh, Q.C., as head of the Blake, Cassels & Graydon firm; Mr. J. W. Younger, Q.C., Vice-President, Secretary and General Counsel of The Steel Company of Canada Limited; Mr. Kenneth A. F. Gates, Vice-President and General Counsel of The Molson Companies Limited; Mr. J. F. M. Douglas, Vice-President, Eastern Region, Cominco Ltd., and Mr. F. G. Felkai, also of the Blake, Cassels & Graydon firm.

Later, when we conclude this hearing, we expect that Mr. Clarence Campbell, who, as you know, is the President of the National Hockey League, and Mr. W. J. Fanning, Vice-President of the Montreal Baseball Club, will be appearing in connection with the section which deals with professional and amateur sport. I expect that they will be dealing mainly with professional sport. We have scheduled a meeting for next Wednesday for representatives of amateur sports. I should mention that the reason next Wednesday was chosen, rather than today, for them to appear was a matter of their choice and we were able to meet their wishes.

I will now call on Mr. MacIntosh.

Mr. A. J. MacIntosh, Q.C., Blake, Cassels & Graydon, Barristers: Mr. Chairman, I should correct the record. Unfortunately, Mr. Gates was unable to attend this morning.

I do not know whether you wish me to read into the record the companies for whom we are appearing this morning, Mr. Chairman.

The Chairman: I think that would be a good way to start the record so that it will be perfectly straight.

Mr. MacIntosh: My name is Alec MacIntosh. I am appearing as counsel for Abitibi Paper Company Ltd.; The Algoma Steel Corporation, Limited; Canada Packers Limited; Cominco Ltd.; T. Eaton Co. Limited; John Labatt Limited; MacMillan Bloedel Limited; The Molson Companies Limited; Moore Corporation, Limited; Noranda Mines Limited; Power Corporation of Canada, Limited; Simpson's, Limited; The Steel Company of Canada, Limited.

Mr. Chairman and honourable senators, if it meets with your approval, I propose to make a short statement as to some points in our brief which we think are fundamental, and then my colleagues and I will be glad to answer questions which you may have.

The first point I would like to make deals with the powers of the commission. We are concerned that the powers given to the commission are in some cases very broad and are not subject to any guidelines as to their exercise. In such cases it will be impossible to know what the law requires until the commission has decided a substantial number of cases.

The problem is illustrated by section 31.2 of the proposed legislation. Under that section, the commission may order that supplies be made available to a person, for example, a wholesaler, if the wholesaler,

> . . . is adversely affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

Secondly, if he

> . . . is willing and able to meet the usual trade terms of the supplier or suppliers of such product in respect of payment, units of purchase and otherwise,

Thirdly, where

> . . . the product is in ample supply, and

And fourthly,

> the reason for the inability of the person to obtain adequate supplies of the product is an inadequate degree of competition in the market, . . .

The earlier hearings in the Senate have illustrated some of the problems with this section. The problem which seems to us to be fundamental is that there are no guidelines given to the commission to guide them as to what is adequate competition. There are no criteria to be applied in determining whether competition is or is not adequate, and there certainly may be different views as to this question. For example, in 1960 Mr. Justice McRuer, in dealing with a merger case involving Canadian Breweries, found that competition in the parts of the brewery market which were not regulated was adequate because of the competition of two independent brewers. They had somewhere between 35 and 40 per cent of the market, whereas Canadian Breweries had at that time about 60 per cent of the market. In that case he found that that was adequate competition. On the other hand, the Justice Department of the United States, in dealing with the Sherman Act, has adopted a policy as to mergers inidicating that if one is proposing a merger which involves as much as 5 per cent of the market, that constitutes

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a danger to competition, and that competition in that case may be inadequate if that merger is permitted to proceed. So there certainly may be very different views as to what degree of competition is adequate, depending on one's economic point of view.

It could be concluded that competition was adequate in a market if, for example, there were ten firms in the market, each of which was making an independent decision as to pricing and as to whom it would sell to. Each one of those firms might, for its own reasons, decide that it was not going to sell to a particular wholesaler or a person seeking to be a wholesaler. This decision might be made because the company decided that it had sufficient distributors in the particular market, and that any addition to that number would simply add to its cost of distribution and, ultimately, to the public cost for that product. If that decision is made independently, and without collusion, it may be regarded as a market decision, arrived at in a competitive industry operating to achieve reasonable distribution costs. A commission taking such an approach would conclude that a potential wholesaler should not obtain supplies by an order of the commission in the absence of any evidence of collusion. But there certainly is another view, and that other view is the mere fact that a person wishing to obtain supplies in a market as a distributor should have a right to do so, and the fact that he cannot obtain supplies is evidence that there is an inadequate degree of competition.

There can, of course, be many variations of those two views; but under the legislation no one would really know when adequate competition exists, or how you determine the question. The answers to this problem will only become known as the commission decides a number of cases.

I submit that such a law leads to uncertainty. No one can give advice to a manufacturer or a distributor or a retailer as to what the law means, because the legislation does not contain any guiding principle to direct you as to what considerations are to be taken into account in determining whether competition is adequate. It is our submission that Parliament should determine the law by establishing guidelines for the tribunal.

It has been said that the subject is so complex and the fact situations so different that questions of this nature must be left to a group of skilled experts. I submit that the problem is that there is no commonly held body of principles on which experts agree. In fact, experts disagree in this field, and do so rather violently; but the tribunal, over a number of years, by its decisions, will determine the guiding principles to be applied in deciding this question. If these may be established by a tribunal over a period of years, it is submitted that they may be established now by Parliament; and if it turns out that they are wrong, or they need revision, then that may be done also.

In our brief we have suggested that no order should be made by the tribunal where there is substantial competition in the market. If that type of competition exists, then it is our suggestion that the market be allowed to operate. If Canada has more distribution units than a competitive market dictates, we submit that there will be a loss of efficiency. Canada now has a difficult distribution problem, and the cost of distribution and service will only be increased if there is an excessive number of distributors. The provinces are now becoming concerned with questions of service, parts availability, and product availability, and the Ontario Law Reform Commission has just issued a report indicating that manufacturers must do better in this field. Accordingly, if manufacturers are to provide the desired level of service, they will have to be more careful about the choice of distributors than they perhaps have been in the past.

It may be that the tribunal will take all these factors into consideration. It may only make an order where it is convinced that no substantial competition exists. It is, however, free to make whatever decision it sees fit as to the adequacy of competition under the proposed legislation. Therefore, the application of this law, and its interpretation, will depend on the composition of the commission, and the economic views which each member may hold.

I note from the minutes of the proceedings that some honourable senators have already raised questions as to what the word "product" means. It seems to us that under the present legislation it may be defined narrowly, as suggested here, and that if I, as a distributor, want to buy Kodak cameras, I can make an application, and perhaps obtain Kodak cameras, even though I have other cameras available to me, and even though the Kodak company decides that it is not in their interest to add another distributor in the area which I am seeking to serve. Also I believe that under the proposed legislation the usual trade terms would only include such matters as units of purchase, terms of payment and matters analogous to that, and that accordingly a manufacturer may not be able to insist on such things as a distributor's stocking a certain level of inventory and having parts available so that he may provide service.

Honourable senators, for a few moments I wish to turn to consider the question of strict liability. There are a number of offences in this legislation, as it exists today, and under the proposals where a person may be convicted, even though he has no guilty knowledge or intent or was not negligent. For example, section 36 of the present legislation dealing with misleading advertising creates an offence which may be committed although one has no fault or blame. There is an exception in the case of a newspaper because a newspaper is entitled to publish an advertisement which may otherwise be misleading, but if it does so in good faith, then it will not have committed an offence. But any other person who publishes such an advertisement in good faith will have committed an offence. Thus, for example, if a retailer relied on a manufacturer for information as to the prices at which a product was ordinarily sold, and published an advertisement stating that fact and that fact turned out to be wrong, then that retailer would be guilty of an offence even though he was not negligent and even though he took all possible precautions to be sure that the information was accurate. The ambit of section 36 will be greatly enlarged by the proposed amendments.

The Chairman: The misleading advertising clause is found on page 30 of the bill. It is clause 18.

Mr. MacIntosh: The problems created by strict liability offences have recently been considered by the Law Reform Commission of Canada, headed by Mr. Justice Hartt, and it has made five recommendations as to the place of strict liability in the criminal law. It is our respectful submission that these recommendations should be applied to the Combines Investigation Act. I shall read the recommendations because they are relatively short:

(a) That whether or not strict liability should have any place in the criminal law, the law must be clarified so as to make it plain whether any given offence is one of strict liability.

(b) That real crimes must always require mens rea, that guilt must always depend on personal responsibility, and that strict liability here should have no place.

(c) That the law of real crimes continue to be based on and require mens rea.

(d) That regulatory offences should require some kind of fault, that guilt for such offences should depend on personal responsibility and that strict liability here should have no place in principle.

(e) Negligence should be the minimum standard of liability in regulatory offences, therefore an accused should never be convicted of a regulatory offence if he establishes that he acted with due diligence, that is that he was not negligent.

Now, honourable senators, an illustration of how this operates can be seen by looking at clause 36 on page 30 of the bill. Let us suppose that a retailer imports goods and the manufacturer gives him information as to the product which is imported and as to what performance can be expected from that product. The retailer has had past experience with this manufacturer and he believes, with reason, that he can rely on what the manufacturer tells him, so he uses this information in his advertising and perhaps in in-store displays. The information must not only be literally true, but it must be presented in such a way that when you look at the statement as a whole it is not misleading in any material respect. So any person preparing such a statement has to be very sure that it is accurate. The onus here is similar to that which you would find in securities legislation. At this point that man, who has not acted negligently in any way, can be convicted of an offence and, although it is perhaps unlikely, he could be sentenced to two years in prison. I submit that liability without fault which can result in imprisonment is fundamentally unjust, and therefore it is our submission that the recommendations of the Law Reform Commission should be applied to this legislation.

Senator Connolly: Could you give us an example of the kind of misleading representation on a label or in advertising—and I differentiate the two—where there is a mis-statement of fact so serious that it would involve or justify a two-year jail sentence? For example, I cannot imagine that it would apply to a mis-statement of fact in respect of a grocery product, or some other small item. What is the objective of the legislation on this point?

Mr. MacIntosh: I hope I did not mis-state myself. I did not want to put this too highly. I suggested this was a possibility but I do not consider it to be a practical possibility. I should make it very clear that in the prosecutions that have taken place under this section jail sentences have not been imposed because of this offence. Instead, fines have been the usual sanction applied by the magistrate. I cannot really understand, sir, why an offence of this nature would be sufficiently serious to call for a two-year jail term.

Allow me to respond to that by giving an example in which I think the offence would be very serious. We have recently had such publicity in Canada about electric kettles which are supposed to contain lead. There is some dispute as to how serious a problem that is. Let us suppose, however, that I as a retailer know that a particular batch of kettles is contaminated with lead and I sell those to an unsuspecting public. Then it seems to me that a person who did that might well be sent to jail. However, in that situation it seems to me that a magistrate might impose a very serious penalty because he was convinced that I as the retailer had deliberately foisted a dangerous article on an unsuspecting public.

The Chairman: Yes, but Mr. MacIntosh, there are two situations. One is if the law becomes what the bill would make it, then the judgment of the court must be exercised in weighing the degree of responsibility. That would not be any way of defence, but by way of mitigation of sentence.

Mr. MacIntosh: I quite agree.

The Chairman: As I understand the working papers of the Law Reform Commission, they recommend not only that there must be fault or negligence established, but that there be a reverse onus—in other words, that the onus should be a matter of defence.

Mr. MacIntosh: That is correct.

The Chairman: Not a matter that the Crown must establish, but at least the Law Reform Commission recommendation does permit the person who is charged to raise a defence of due diligence and therefore no negligence. Under the existing law and as it is proposed in this bill, that representation can only apply to the degree of sentence.

Mr. MacIntosh: You have made my point, sir.

Senator Macnaughton: If I understand your position, you say the Law Reform Commission established certain rules, or re-stated rules which most of us have accepted all our lives. Now this is a chiselling, a derogation from those rules, which is making it too tough and is upsetting the general principles which we have observed for generations.

Mr. MacIntosh: Senator, I would not put it quite that strongly. The report of the Law Reform Commission on this subject was issued recently, during this year. Certainly during my practice of law there has been an increasing tendency to make a number of offences strict liability offences. The arguments in favour of this were examined by Mr. Justice Hartt. They are that there are certain matters in which the interests of society are so paramount that liability should be strict.

The second point is ease of prosecution. I must say, having acted for the defence in these cases, the latter consideration does not find much favour with me, because most defence counsel have a record of losing these cases, never mind what the onus is. The work of the Law Reform Commission on strict liability contains a complete review of what has happened and these are the recommendations which were made for consideration by the public.

It is our position that these principles should be applied to this particular legislation now that the Law Reform Commission has made these recommendations.

Senator Connolly, I do not know whether I answered your question satisfactorily.

Senator Connolly: I think we all agree that the tests contained in pages 2, 3 and 4 of your brief are very valid. I just wonder whether either the draftsman has threshed the thing too far, whether we should include a clause which requires proof of *mens rea*, or whether, in fact, in general law the commission would be obliged to find *mens rea* before they found that there was an offence.

Mr. MacIntosh: Under the existing law relating to misleading advertising, senator, the authorities are quite clear that due diligence is not a defence and there is no doubt that convictions may be made even though a person has exercised due diligence.

Senator Connolly: Could you cite authorities on that point, because I think that if the draftsmen and the sponsors of the bill were confronted with that, it would be the focal point of this whole discussion.

Mr. MacIntosh: I will be glad to provide you with a series of authorities on that point, senator.

I submit that the need for the application of these principles is particularly great in the case of the Combines Investigation Act. It has been said by some of those who are charged with the administration of this act that it is difficult to define these offences precisely, with which I agree completely. It is possible under this legislation to have cases in which neither prosecution nor defence knows whether a crime has been committed until the court has made its finding.

In my opinion no better illustration of the indefinite nature of the legislation could be given than the section which it is proposed to introduce for clarification of the term "unduly". This appears on page 24 and amends section 32 of the act. I am using this only for purposes of illustration:

> For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1),—

Subsection (1) is the section which makes it an offence.

> —it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

The concept of "undue limitation of competition" has been a feature of the Combines Investigation Act and its predecessors in the Criminal Code since the year 1889. At this stage, after scores of decisions and years of administration, it is evidently thought necessary to have a clarifying amendment. In those circumstances—

Senator Lang: If I am correct, those words you have just read come from a judgment of the Supreme Court of Canada concerning the definition of "undue competition."

Mr. MacIntosh: Senator, what happened was that one judge in the Supreme Court of Canada gave a judgment indicating that it was a possible way of interpreting the legislation. In fact, that interpretation was subsequently rejected.

That judgment was in the Fine Paper case. It was given within the last 10 years. My sole point is that there is still uncertainty as to the meaning of "undueness" some 50 years after the legislation was enacted.

That is why, in my opinion, it is very important that in legislation of this kind the recommendations of the Law Reform Commission should be applied, because it is difficult to state this law precisely.

Senator Connolly: Let us get back to your example of the electric kettle. I suppose that example could be multiplied to include the automobile and aviation industries—almost anything where the public is likely to feel there is a possibility of danger.

I wish to make two points. First, I do not suppose that when electric kettles were first made, and the product was developed to the point where they used lead, they realized that kettles could be dangerous to users. I do not suppose they advertised the product as being good for one's health. The only advertising would be that the kettle boils water quickly or, in the case of a car, that the steering gear enabled one to guide the car in one direction or another. I do not think the advertising said anything about safety.

If they simply advertised them as new products on the market, and perhaps in an undeveloped and unsophisticated stage of the art, does it mean that if products are found to be defective, those who produce them are committing offences under the bill as drafted?

Mr. MacIntosh: It depends on what they say about a particular kettle. You asked me for an illustration, senator, of where it might be possible for a magistrate to impose a two-year penalty—what the reason might be. It depends entirely on the representation. We have seen cases—not kettles, but in the case of motor vehicles—where representations were made as to the safety of the product. Then obviously a person, under this legislation, is directly responsible for what he says.

We have no quarrel with that concept, where a person is negligent or careless. Our quarrel is in the case where he does exercise due diligence and still makes a misrepresentation.

Senator Macnaughton: If I understand you correctly, you are saying that we are asking for an impossible standard in the development of new products. We do the best we can with the best scientific information we have. Even then we may make a mistake.

Mr. MacIntosh: Senator, I do not think that human beings have advanced to the stage where we are immune

from making mistakes. It does seem to me to be an abuse of the criminal law, and to bring the criminal law into disrepute, to convict a man for a criminal offence, as opposed to a civil sanction, where he is without fault.

Senator Walker: The basis of the criminal law in getting a conviction is *mens rea*, and this is getting right away from that.

Senator Connolly: This is a key point and the thrust of your argument. Most of us would agree that it is a reasonable way to approach this problem. The policy behind consumer legislation is the protection of the consumer. What you are really saying is that we do not bring the criminal law into it when it can be done some other way. If there are, in fact, criminal acts—all right, let them be decided in the normal way that crimes are dealt with.

Assuming that to be the case—and perhaps it is unfair to ask you this question—have you an amendment that might cover the propostion you developed in the early part of your brief?

Mr. MacIntosh: I understood, from talking to the chairman, that the Senate is preparing some amendments. We have been looking at some amendments, and I shall be glad to submit an amendment to the counsel for the Senate for his consideration.

Senator Connolly: That is good. We need all the help we can get.

Senator Walker: It almost becomes absurd when a two-year jail sentence is possible for a mistake which a person does not know has been made.

Mr. MacIntosh: That is what Mr. Justice Hartt found. In fairness, the Law Reform Commission made a study of how this legislation is enforced, which indicated that administrators felt they should proceed only where they think there is fault.

The criticism that Mr. Justice Hartt and his fellow commissioners made of that position was that it should not be a question that is left to the discretion of an administrator; that it is quite wrong that the law should theoretically put a person in a position where he could be sent to jail for two years without any fault at all.

Senator Laird: Someone should have the discretion. If discretion is to be exercised, I would sooner see it exercised by a judge than anyone else.

Mr. MacIntosh: I certainly agree with that.

The Chairman: Of course, you have to add that there should be the opportunity to put in a defence.

Senator Laird: Yes, but once the show is over, if anyone is going to exercise discretion as to punishment, it should be the judge.

The Chairman: That is right.

Mr. MacIntosh: What we are suggesting, senator, is that the defence be open of showing that due diligence was exercised.

Senator Laird: Yes.

Mr. MacIntosh: We turn now to the application of section 36. This appears on page 30 of the bill and purports to deal with misleading advertising. In fact, it deals not only with advertising, but with any statement that is made as to the performance of a product not based on an adequate and proper testing of that product. It seems to us that there is certainly a place for a section of this type in respect of the sale of consumer goods. Today, consumers are not in the traditional position that we learned in law schools of willing purchaser and willing seller, with some bargaining power on each side.

Senator Connolly: Caveat emptor.

Mr. MacIntosh: Of course, senator, the law has relieved against that for a very long time now. In many cases, the consumer is put in a position where he signs a contract prepared by the manufacturer, the retailer or the distributor, with the consumer having no input into the terms of the contract. It seems to us that there is a material difference between that type of contract and a contract, say, for a rolling mill where you have my friend Mr. Younger on one side and someone such as Senator Godfrey on the other.

As this legislation is presently drafted, it applies to representations to the public, and the term "public" is not defined in this legislation. The term "public" has been used in the case of secuurity legislation, for example, and the concept of the phrase "to the public" has always been thought of as a representation made to one person with the intention that it will be made to some segment of the public. However, there are people who are charged with the administration of security law who believe that a representation to the public may be a representation made to one person only. So that this legislation could conceivably be applicable not merely to the sale of consumer goods, but to the sale of the most sophisticated equipment possible to one buyer.

Recently, the U.S. Congress passed legislation respecting warranties and guarantees. That legislation was limited in its application strictly to consumer goods. The Ontario Legislature recently passed legislation which, in effect, prevented the exclusion of those warranties which are implied by law in favour of a purchaser under our Sale of Goods Act, which means that no longer can clauses excluding the warranty of merchantability be taken out of a contract limited to consumer goods. The Ontario Law Reform Commission has been studying this problem and has indicated that this legislation should be limited to consumer goods. It is our suggestion, which is developed at some length in our brief, that section 36 should be changed so that it is applicable to the sale of consumer goods, with no application to commercial transactions between people whom we submit are capable of looking after themselves.

The legislation, as it is presently drafted, states:

> "36.(1) No person shall, for the purpose of promoting, . . . a product . . .
>
> (b) make a representation to the public—

And I do not know what "to the public" means.

> —in the form of a statement, . . . of the performance, . . . of a product that is not based on an adequate and proper test thereof,—

That would be an impossible test in respect of many commercial contracts. For example, we recently drafted a contract relating to the sale of a plane which has not yet been produced. It is the custom in the industry to have in such contracts statements as to the performance. It would be impossible to sell the plane unless that was the case. It is quite impossible, however, at the time of the drafting of the contract, to make statements that are based on an adequate and proper testing of the product, because the product does not yet exist. It seems to us that legislation of this type should be limited to the case where it is really needed, that being in respect of consumer transactions.

The Chairman: What you are saying is that once you get out of the field of consumer goods the whole matter should be left to civil law.

Mr. MacIntosh: Yes.

Senator Connolly: It would be based on the contract between the parties.

The Chairman: Yes.

Mr. MacIntosh: Mr. Chairman, we deal with a substantial number of other points in our brief. I have tried to deal with the matters which seem to us to require some explanation. I would be delighted, as would my associates, to answer any questions and deal with any other points in the brief about which you or members of the Committee may have some questions.

Senator Laird: Mr. MacIntosh, I should like to go back to the observations you made right at the beginning with respect to guidelines. Are you at all afraid of too much rigidity if there is an attempt to put guidelines in this legislation? Have you given any thought to that and, if so, what are your feelings in that respect?

Mr. MacIntosh: We have certainly realized there is a problem about rigidity and that the factual situations do differ. We are asking for a very minimum in the way of guidelines. What we have said, substantially, is that in a case where it is demonstrated that there is substantial competition in the marketplace, that the market should be allowed to govern, and that the commission should only interfere where it can be established that there is not substantial competition.

We feel that such a guideline is quite different from simply saying to the commission, "You make an order whenever you think there is inadequate competition." If I am arguing a case where it is open to me to show there is substantial competition in the marketplace and, as a result, no order may be made, that provides me with a basis on which to persuade the Commission as to when it may make an order. If, on the other hand, I am faced with a situation where the commission decides that the guidelines issued by the U.S. Antitrust Division are useful and that if you have a situation where there are even as many as 20 participants in a market, each of them with 5 per cent, construed as being an inadequate degree of competition, then it seems to us that that gives the Commission a discretion which is far too large.

I think what we are talking about, Senator Laird, is the manner in which economic conditions in Canada are to be organized. There is a good deal of economic literature indicating that it is desirable to have, in any market, a very large number of participants, so that no single one of them may have any material influence in the market. I suggest that this may be a very desirable situation in a country like the United States, and an appropriate goal for them. Five per cent of the United States market is equivalent to about one-half of our market in Canada. The State of California has a population that is about equal to our market. Accordingly, I have a fear that economic concepts that have been developed in a country which has a market ten times our size could be applied to this country, and that if this question is left without some guidelines—and we are asking really a minimum—we can have a situation where decisions of great economic impact will be made by people who are either economists or lawyers, like myself, and I suggest that sometimes they should not be making public policy in this particular area.

Senator Laird: I agree.

The Chairman: In a number of places in your brief you suggest a test, that the effect of what is being done is lessening competition.

Mr. MacIntosh: Yes, sir.

The Chairman: Is there a difference between that and using the phrase "benefit to the consumer" or "lack of benefit to the consumer"? Do those phrases mean the same thing?

Mr. MacIntosh: I think that "benefit to the consumer" migh mean the same thing to you, sir. The problem I see is that you have a commission that will be enlarged. At this point we do not know what the make-up of that commission may be. There certainly are economists who would argue that the greatest benefit to the consumer would be achieved by a market situation in which no participant had as much as, say, 10 per cent of that market.

The Chairman: Maybe I did not clarify my question. Actually lessening of competition may be a benefit to the consumer.

Mr. MacIntosh: I see. It may be in some cases. The reason I am hesitating is that when I first acted in combines cases there was a theory, which was very prevalent, as I am sure you know, that agreements made by people who were free to sit around a table and fix prices could be to the benefit of the consumer. That was a concept with which I entirely disagreed, and therefore I am afraid of that concept, because I agree that there can be cases where theoretically lessening of competition could be to the benefit of the consumer. However, having seen that concept used to justify, in some cases, price fixing agreements I am afraid of it.

Senator Laird: By the way, following that up, I was interested to see that you said there is no commonly held body of principles governing business. By way of comparison, in the tax field decisions can be based upon commonly accepted accounting principles. Would it not be possible to find some similar formula in this situation?

Mr. MacIntosh: It is sometimes said that lawyers that if you have four lawyers in a room you will have six opinions!

The Chairman: Some of them take both sides.

Mr. MacIntosh: Right. I plead guilty to that. If that is true, it is also true of economists that if you have six economists in a room you will have at least nine opinions.

Senator Laird: I agree one hundred per cent.

Mr. MacIntosh: That is why I do not think it is possible to apply a standard of commonly accepted business principles or commonly accepted economic principles.

The Chairman: It appears to me that in section 31.2, which is "Matters Reviewable by Commission", the provision is much too broad. For instance, it would permit an importer, who suddenly was running short of supplies, that he could import, to complain to the director that he was not able to get supplies from some Canadian source. There seems to be an element of unfairness there, that a man who is carrying on business in Canada, and who depends for his source of supply by importing from other countries, can, when that supply dries up or becomes more difficult, complain to the director that his business is adversely affected due to his inability to secure supplies in Canada.

Mr. MacIntosh: I agree with you completely, Mr. Chairman. I think Mr. Younger has some experience with this, and perhaps you would permit him to make some comment on it.

Senator Connolly: It is touched on in your brief in any event.

Mr. MacIntosh: Yes, it is.

Senator Connolly: Before Mr. Younger speaks, perhaps I could say this. You touched on a great many key points in the brief. Have you actually sat down and considered some specific amendments that you can let us have?

Mr. MacIntosh: Yes, sir.

Mr. J. W. Younger, Q.C., Vice-president, Secretary and General Counsel, The Steel Company of Canada Limited: Perhaps I could say this in connection with the question put to Mr. MacIntosh with respect to the scope of section 31.2. Professor Donald Thompson of York University—and on this particular point I agree with Professor Thompson's analysis of the legislation—has said that in his view it is quite possible under the legislation for the tribunal to come to the conclusion that there is an inadequate degree of competition in any highly concentrated industry in Canada, and that includes probably every manufacturing industry except the furniutre industry; and that, having come to that conclusion, the legislation is designed to force the major supplier in each of those industries to supply importers, people who will not carry a full line or a full inventory of goods and are using that supplier as a supplier of last resort. That statement was made at a session at York University at which some of the departmental officials were present, and they did not deny that that was the effect of the legislation.

The Chairman: Then perhaps you would instruct me on this too. I should like to know what you have to say about this. Section 311.2 begins, "a person is adversely affected in his business." That presumes that he is then carrying on a business. He may see some other supply that, if he could get it as part of his business operation, would give him a more successful business. Such action is possible by such a person under this section. Would you approve of, for instance, a limitation that would limit his business and his ability to complain to the commission about lack of supply in relation to his business to the supplies that he is then dealing with in his business?

Mr. MacIntosh: Yes, I would. It seems to me that you have other sections that are designed to achieve a freely competitive market. If there is a monopoly or a quasi-monopoly, then there are sections in here which deal with that. If Mr. Younger and I are agreeing together to deny you supplies, then there are sections which deal with that. Therefore, it seems to me that this could be limited to a person's existing business.

The Chairman: Then if you go on in that section, the alternative is that a person who is precluded from carrying on business, due to his inability to obtain adequate supplies of a product, may complain to the director and then the director makes application to the commission. If in the statement he is precluded from carrying on business, that means any business.

Mr. MacIntosh: I think so.

The Chairman: He may not even be in business but he wants to get into business. But if you put in the word "his"—"is precluded from carrying on 'his' business"—then you are dealing with a de facto and actual situation of some person who is in a position of saying that he has been hurt.

Mr. MacIntosh: Perhaps I should not make a departmental point, but I think what they would say is that there are situations where people in this country did not have an opportunity to enter a business and that there should be some method of permitting those people to enter a particular business. There is no doubt that there are cases where people have tried to exclude others from business. I have had experiences of that kind where those in an industry decided they were very comfortable there and they tried to impose practices on suppliers to prevent a newcomer from being sold. Of course, there is a remedy for that because that agreement is illegal. I did want to make the point which I think is in the mind of the department, as to the reason and need for a section of this kind.

The Chairman: Then it is your interpretation, and I agree with it, that a man who is not carrying on any business may suddenly look out over the field and say he would like to get into the business of selling Kodak cameras, and he may make demands and he cannot secure supplies and, therefore, the director applies to the commission and the commission may very well issue an order that this man must be supplied with Kodak cameras by one or more suppliers who are presently in the business.

Mr. MacIntosh: I agree with that, Mr. Chairman. I note that in the earlier proceedings, senators have raised the meaning of the word "product".

The Chairman: Yes.

Mr. MacIntosh: And it does seem to us that that word should be defined so that it deals with the generic product rather than a specific product such as Kodak.

The Chairman: That it deals with cameras instead of Kodaks.

Mr. MacIntosh: Yes, that is correct.

Mr. Younger: Mr. Chairman, could I give you an example of exactly the sort of thing you are speaking about? I am in the steel business, and one of the ways in which products are distributed in the steel business is that the mills will not sell to people who place only very small orders. That type of person is handled through steel warehouses or steel service centres. We had a case a few years ago where a chap wanted to establish a steel warehouse in a rather remote area where the market was quite small. He had gone to all three of the major steel producers in turn—there was no collaboration between them—and each one in turn said to him, "Look, we have our own distributors in that area, we have adequate distribution, all that that market area can stand. If we were to take on another steel warehouse in that market the only effect would be, one, that it would increase our distribution costs because each shipment to each customer would be smaller, and, secondly, it would increase our manufacturing costs because the orders would come in in smaller quantities and we would have more broken runs, and so on." Each one in turn came to the same conclusion. That man complained to the Combines Investigation Branch against us—because we were the last person to refuse him—and the Combines people I think would very much have liked to prosecute us, but there was no provision in the legislation then under which they could force us to sell.

This is still the situation in the United States. Unless there is some other illegal activity such as a combination in restraint of trade, a supplier has the right to choose his own customers, to choose his own method of distribution, which will be the most economic one. But under this legislation I believe that we might well have been forced to supply that man.

The Chairman: And if this bill becomes law and if these particular provisions we are discussing are in the law, you may in the future, if you take such action, be prosecuted.

Mr. Younger: Precisely. That is what I would be afraid of.

The Chairman: Do you not think that this term "usual trade terms" should be defined, Mr. MacIntosh?

Mr. MacIntosh: Yes. I noticed that in your proceedings. It seems to me that if it is not, it should be. I agree with the statement by your counsel that if this is not defined, then, as it presently reads, it may be quite impossible for a manufacturer, in circumstances where such an order is sought, to say, "Well, I am prepared to sell to that man, provided he carries an adequate stock of spare parts, providing he carries an inventory." And this is becoming most important, because now there are four provinces in Canada which have legislation dealing with agricultural machinery, which impose an obligation to provide this type of service and to provide an adequate stock of spare parts. So the manufacturer can no longer look with impunity on the distributor who is unwilling to carry an inventory.

The Chairman: The phrase "usual trade terms" is not defined in a broad way which would enable a manufacturer or supplier to refuse supply on the ground that this man has not any facilities for servicing.

Mr. MacIntosh: That is correct.

The Chairman: Or his credit is not good. If his credit is not good, I think he may be refused.

Mr. MacIntosh: Yes.

The Chairman: A suggestion that has been made by our consel on the phrase "usual trade terms", as to a definition, is this—and I am wondering what you think of it:

> "Usual trade terms" includes any standards or terms and conditions of a supplier generally applicable in respect of payment, units of purchase, maintenance of inventories, purchase of other products in the same line, merchandising, servicing, care of the product, and otherwise.

Mr. MacIntosh: That certainly seems to meet the problem, sir.

The Chairman: Do you think there should be a limitation imposed on the commission in dealing with this subject, that they have to conclude that it is in the public interest that a person be supplied wih this product?

Mr. MacIntosh: Well, someone once said, sir, that "beauty is in the eye of the beholder" and after many years of dealing with the concept of "public interest" I think it is even more elusive than beauty.

Mr. Younger: Mr. Chairman, what would you think of a wording like this:

> "Usual trade terms" includes any standards or conditions established by the supplier as a condition of accepting such a person or a customer as a customer of the supplier provided that such standards or conditions do not, to the knowledge of the supplier, constitute part of a practice of discrimination between such person or customer and competitors of such person or customer in like circumstances.

The Chairman: Now it is in the record and we can study it. Obviously, at this stage there could not be any expression of opinion—although there might be, as I am only one member of the committee.

Senator Cook: Except, Mr. Chairman, you will remember that we felt there should be some element of discrimination before that term was used.

The Chairman: Yes, we did discuss that. Possibly when I asked Mr. MacIntosh about public interest I may have had in mind the public interest as to whether there is a discrimination.

Mr. MacIntosh: Right.

The Chairman: That might be a matter of public interest.

Mr. MacIntosh: We will submit suggestions as to amendments, sir, so that you may consider them.

Senator Connolly: If I may come back to Mr. Younger's example, Mr. Chairman, subject to what has just been said about making more precise the phrase "usual trade terms," would Mr. Younger like to comment on the application of section 31.2(b) to the example he has given? That reads:

> (b) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of such product in respect of payment, units of purchase and otherwise.

Does Mr. Younger feel in that example, if there was a complaint laid by the man who wanted to become a distributor—I guess that is the easy way to say it—that he had a defence in view of the words "the units of purchase and otherwise", and that it was an impractical kind of thing for his company to agree to in the circumstances that he describes? Would he feel that there is enough there to escape condonation?

Mr. Younger: Not necessarily, because it might well be that such a person would be prepared to establish a line of credit at a bank. He might well be prepared to place at least his initial orders in the quantities in which we were willing to sell, but the inevitable result would be a further fragmentation of the market so that sooner or later, probably after the initial orders, each of the steel service centres in that particular market would start placing smaller orders and this would increase costs of distribution and manufacture.

Senator Connolly: The words used there are "the usual trade terms of the supplier." If you established the criterion—you know, you are going to deal in the practical world. You are not going to talk theory. And you know what your trade terms are and why they are that way. It seems to me that you may have a defence there that is foolproof.

Mr. MacIntosh: Senator, if I may. I think you may be right. What troubles us, and I think what also has troubled your counsel, is that a court in looking at that section might limit its application, might limit the words "and otherwise" to matters which are analogous to conditions as to payment and conditions as to units of purchase. In other words, the *ejusdem generis* rule might apply. That is why we have suggested that it be made quite clear, and not be left to a court, that the *ejusdem generis* rule has no application here.

Senator Connolly: And your proposed amendment would take that into account.

Mr. MacIntosh: It would deal with that, yes, senator.

Senator Everett: You say that the *ejusdem generis* rule might apply, Mr. MacIntosh. How would that apply to paragraph (a) of section 31.2 on page 16?

Mr. MacIntosh: My comments were really directed to paragraph (b), sir, dealing with "the usual trade terms".

Senator Everett: The real operative clause, Mr. MacIntosh, is "usual trade terms" in paragraph (a), is it not? Does the effect of paragraph (b), in which the *ejusdem generis* rule might apply, apply to paragraph (a)?

Mr. MacIntosh: I think you could argue that, senator. My point is that I like to have these things settled so they are clear, because I have always found the application of the *ejusdem generis* rule was rather uncertain.

Senator Everett: I agree that it is uncertain. I just wanted to clear the point that the *ejusdem generis* rule, uncertain as it is, probably does not apply to paragraph (a); that, if it applies at all, it applies to paragraph (b).

Mr. MacIntosh: I certainly think that is arguable, sir. I am not certain what a court would do.

Senator Everett: Indeed, none of us can be sure, but we can at least isolate "usual trade terms" now, outside of the *ejusdem generis* rule.

Mr. MacIntosh: I do not think I would go that far, and that is the reason I am suggesting that it be made quite clear whether the *ejusdem generis* rule applies or does not apply in the whole of the section.

Senator Everett: Could I just change the subject for a moment? On page 21 of your brief, in the last sentence of the first paragraph you say:

> It is submitted that a manufacturer in determining whether he wishes to sell to a particular distributor, wholesaler or retailer is interested in maximizing his sales and, accordingly, where he has a number of competitors, he is unlikely to exclude any potential purchaser unless he believes that the addition of such a purchaser will in effect penalize the effective marketing of his products.

On page 22 of your brief the first sentence at the top of the page reads:

> It is submitted that if the market system of allocation is to be displaced, it would be preferable to determine with some precision the undesirable results to the public interest in such an allocation.

Then again on page 23, in the middle paragraph, you say in the last sentence:

> In such circumstances, if there is substantial competition among the suppliers of the product and substantial competition in the market sought to be served, there would seem to be no reason for interfering with the allocation of resources by the market process.

It seems to me that you have enunciated three separate concepts in the space of two pages.

Mr. MacIntosh: I may have done that.

Senator Everett: One is that the manufacturer should make up his own mind because he is a reasonable human being who is not going to restrict the distribution of his product. Therefore, he should be under no restriction other than a conspiracy with other manufacturers or other suppliers.

Mr. MacIntosh: Yes. That is conditional upon a situation where there is competition. I qualify that: where he has a number of competitors. I would only say that, senator, if there is substantial competition.

Senator Everett: Fine. I accept that. I suppose that is what you imply.

Mr. MacIntosh: It may well be that it is not properly phrased.

Senator Everett: The second concept is that if you are going to interfere with the market system, then let us do it by some means of precision; in other words, let us have a precise definition of what constitutes interference. Mr. Younger gave a precise definition of what he felt was "usual trade terms". So here you are suggesting precision in the definition. I do not agree with that, although I think you will agree that it might be pretty difficult to get precision in that sort of situation.

Mr. MacIntosh: Senator, if I might? I have tried to be as brief as I could in this brief. What I am suggesting is that the market, if it is a competitive market, is a valid way of allocating resources and setting up a method of distribution. I am suggesting that if one is to say, "Well, the market should not operate even where there is substantial competition," then it would be well to find out why it should not operate. Let us see the circumstances and the evil that is created by the allocation of resources and the establishment of a distribution system where competition is operating. That is really all I was trying to say.

Senator Everett: I think I understand that, and thank you for explaining it to me. Then your concept, really, is one of what is a definition of "substantial competition".

Mr. MacIntosh: Yes.

Senator Everett: You pass over the concept of "limit unduly competition". If you are concerned about the definition being "substantial competition", why do you ignore the "limiting unduly competition", which I think has a lot of jurisprudence surrounding it?

Mr. MacIntosh: If this section were to be administered by a court, and not by a tribunal, then I would be advocating the use of the term "unduly"; because it does seem to me that after some 60 years or so we now have some idea of what it means in certain situations. It has been suggested that one reason for going to a tribunal is that the tribunal will free itself of jurisprudence, and it seems to me that in appearing before such a tribunal I would be in a better position if I had the term "substantial", because at least then I think that even though there is a very limited right to go to the federal court in respect of the decisions of such a tribunal, if you had a situation such as we have in many industries in Canada, where there are eight or nine participants, and they are all seeking custom in that market, it would be very difficult for the tribunal to say, "Ah well, that competition is still inadequate in our view;" or, "What you are doing is undue in our view."

Now, obviously I would like to have as precise a test as possible, but it has been explained to me on several occasions why you cannot have a precise test; and really, I am looking for a few crumbs at this point.

Senator Everett: Well then, your test is "substantial competition".

Mr. MacIntosh: That is right.

Senator Everett: So your position would be that precision is not possible, and I agree with that, but that you have to accept "substantial competition" as being the closest you can get to the position you are in.

Now, let us assume that you were in the position of a supplier who was refused supplies, you brought an action before the commission, and the question of paragraph (d) of section 31.2 came up. If it read "that there is substantial competition in the market," would not the onus be on you to show that substantial competition did not exist? Whereas the way it reads now, you would under "inadequate degree of competition" merely have to make the allegation, and the onus would shift to the supplier. I am sorry. No. I phrased that the wrong way around—absolutely the wrong way around. I would have to reverse it.

Mr. MacIntosh: I understand. Well, let me make one comment. I have been involved before the Restrictive Trades Practices Commission and the courts, defending a number of these cases, and I have not found that onus has much to do with the result. I am not particular where the onus lies. What I am seeking is the principle that if it can be established that there is substantial competition, then, after it is all over, the commission should not make an order.

Senator Everett: Is there a definition of "substantial competition"?

Mr. MacIntosh: No, and I do not think that is possible. Senator, I think what I am seeking is that among a mass of economic theory Parliament, in some way or another, will indicate where its bias lies so that we do not have a commission that says, "Well, there is no adequate competition in any industry in this country, because in most of the industries in this country there are fewer than, let us say, 20 participants." That is an entirely possible economic view.

Senator Everett: I just find it difficult, unless you have some more hard evidence, to understand why you like "substantial competition" rather than "inadequate degree of competition."

Mr. MacIntosh: I think "substantial competition" at least is a question of fact, and I can start with some statements in the courts as to when substantial competition does exist.

Senator Laird: There is jurisprudence on it?

Mr. MacIntosh: Well, at least in the Canadian Breweries case that I referred to earlier they looked at the competition in the market and found that it was substantial.

Senator Cook: What was the market there—the whole of Canada?

Mr. MacIntosh: The whole of Canada; but it was looked at on a province-by-province basis as well.

Senator Everett: So there is jurisprudence on this point.

Mr. MacIntosh: There is some. I do not want to mislead you, senator. It is not great. I quite agree with your comment that if you take the test of "substantial lessening of competition" it will still leave considerable discretion in this commission; but it will have less discretion, I suggest, than it has now.

The Chairman: Are there any other questions?

Senator Molson: Mr. Chairman, I should go on record as being a director of one of the companies on behalf of which Mr. MacIntosh is appearing here today. Having done so, I would like to ask this: We were talking earlier of some of the effects of the present bill perhaps being better limited to consumer products. In this particular bill there is no definition of "consumer products". Is there an accepted definition of "consumer products", so that that would apply if there were any limitation?

Mr. MacIntosh: I will be providing amendments, senator. There are several definitions. There is one that is used in some provincial legislation, for example. In September of this year, the United States Congress passed a law in which they defined "consumer products" as "personal property distributed in commerce and normally used for personal, family or household purposes." There are other definitions as well.

Senator Molson: That is in the United States?

Mr. MacIntosh: Yes.

Senator Molson: At the moment there is none generally accepted in Canada that you know of?

Mr. MacIntosh: Well, I do not have the definition, but the same concept has been applied in some of the consumer legislation.

The Chairman: Any other questions?

Senator Everett: Would it be possible, Mr. Chairman, for Mr. MacIntosh, when he provides his amendments, to provide some of the jurisprudence on which we could arrive at a conclusion that "substantial lessening of competition" is the correct definition?

Mr. MacIntosh: I can give you the Canadian Breweries case, and I will do that. That is the only one that comes to mind at the moment.

Senator Walker: That is the 1958 case, is it?

Mr. MacIntosh: Yes.

The Chairman: I take it what you mean, Senator Everett is that in the definition to be forwarded wherever there is a background of jurisprudence it would be referred to.

Mr. MacIntosh: Yes, Mr. Chairman.

Senator Everett: Would it be possible also to give us your concept of the operation of such a provision as opposed to the inadequate degree of competition?

Mr. MacIntosh: Well, I think it would leave the commission with a discretion, yes, and I cannot assure you as to how that would operate. But what I really want to achieve is that if I can establish that there is a significant degree of competition in the market, then that the market would be left to operate.

Senator Everett: Would it be possible for you to give us your view as to how it would operate as opposed to being inadequate? It seems to me to be crucial to us in making a decision that you have a view on this, because words taken out of context are nothing more than words, so if you could give us your view on this it would be very helpful.

Mr. MacIntosh: All right.

Senator Buckwold: The question I want to ask may have been asked already during my absence, so if it has been I hope you will excuse me. I want to deal with section 36.2 on page 33 under the heading "Double ticketing". My question could probably be answered by you as representative of the T. Eaton Company insofar as it deals with mail order catalogues. If you look at section 36.2(1)(d) you will see the words:

> (d) contained in or on anything that is sold, sent, delivered, transmitted or made available on behalf of the supplier to members of the public.

I want to ask about this as it applies not just to the product but to advertising material, and with special reference to catalogues. If we take this as it reads now, am I correct in understanding that if a price is given that price cannot be changed until another such catalogue is issued? Do you interpret that in that way?

Mr. MacIntosh: Senator Buckwold, in all fairness I have not considered that problem. It is my understanding that counsel for the Retail Council of Canada does consider that your interpretation is correct, and it was also my understanding that the Retail Council were to make submissions as to amendments to this legislation on the question of double ticketing and a number of other matters mentioned here. There is, for example, the question as to what a market is and to what "advertising a particular product" is. This is a very significant question in that it is used in two different senses in two different clauses of the bill.

Senator Buckwold: I though Eaton's in particular, and you are representing them here, would be very very interested in this.

Mr. MacIntosh: I have talked to Mr. Jones, who is counsel for the T. Eaton Company, and on issues of this kind they are making their representations, as I understand it, through the Retail Council. I shall certainly reply to your question, but I should like to consider it, and therefore I should like to reply by mail.

Senator Buckwold: I think that in the end, if this is to apply to catalogue sales, then it is quite possible that the consumer will then end up by paying much more than he might otherwise have done. I say that because if a company is putting out a catalogue for some months ahead and is bound by that price for that period of time, then in order to protect itself they are going to take a larger mark-up to make sure that they will not be seriously hurt. So that in the end the legislation could defeat the very purpose for which it is designed.

Senator Walker: In view of Mr. MacIntosh's opening suggestion, that due to the uncertainty of the legislation there are no guiding principles, and his suggestion that Parliament should determine the law by establishing guidelines, do I understand it that you are going to ask Mr. MacIntosh for his views as to what the principles of the guidelines should be?

The Chairman: I thought I had done so, but if I have not, then I say to you now, Mr. MacIntosh, that we would like to get your indication of guidelines.

Senator Everett: Mr. Chairman, with respect to clause 31.4(2), and I mention this for the record, is the brief suggesting that paragraph (c) be the only one applicable and that paragraph (a) and (b) be removed? This is on page 19 of the bill and is dealt with at page 29 of your brief.

Mr. MacIntosh: Yes.

Senator Everett: You are suggesting that paragraphs (a) and (b) be removed?

Mr. MacIntosh: Yes, and that the question be one of substantially lessening competition.

Senator Everett: Then with reference to clause 38.(6), are you suggesting that that should be removed?

Mr. MacIntosh: Yes. We are suggesting that that should be removed entirely because it is my submission that that section as presently drawn will have an application which goes far beyond what is required to avoid resale price makings. I should be glad to give you further examples but that clause provides that:

> (6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or without Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons.

I can think of two or three ready illustrations as to where that would apply. It is quite common to have geologists or people who are, say, flying a territory bound to provide their services for a particular period to me, and during that period they are not free to act for Mr. Felkai or Mr. Younger or any other person. Now this clause as presently drawn will prohibit such an arrangement. There may be 50 other people capable of providing that service. What I am trying to achieve in having that particular geologist or aircraft service committed to me for that period and not free to act for anybody else is that I will share my know-how, so to speak, inevitably with a person in that position. So, it is essential, if I am going to do that, that there be a relationship of trust and confidence. I have found that agreements as to trust and confidence are very difficult to enforce. You never know how it will work out. The easiest thing to provide is that for a particular period he is my man.

If I may give two or three other illustrations, Mr. Chairman, because I think this is important, one of my partners has just completed drafting a contract for services from a manufacturer. I do not want to identify the situation more than that, but in this particular city there are 10 other manufacturers who can provide this particular service. The business had to make a choice as to whether it was going to have this service provided in-house or whether they were going to go outside to a small businessman and have him do it. But it is an essential service, analogous to that of the lack of a horseshoe causing the battle to be lost. They would possibly have to close down their plant in the absence of this service. Their contract contained a provision that the particular service would not be provided to anyone else. The firm seeking that service provided the financing in order that this small businessman could obtain the material necessary to make the service available. In my submission that has nothing to do with competition. There are many others who can provide the service, but it is essential to have it available because otherwise the main plant may not be able to operate.

Another situation comes closer to my heart. As lawyers and other professionals we experience situations in which we are obliged to act only for one person in a particular industry. The position of trust and confidence must exist and we cannot be permitted to make the type of information we ordinarily receive available to anyone else in a particular industry. The world is a wide place; there are a great many lawyers and it does not seem to me that if I commit myself to act for one client that competition might be severely affected. This is one of these absolute prohibitions which, in my judgment, in an attempt to cure one situation has very great unintended side effects.

Senator Everett: What would you do about that particular situation which is clearly, of course, the very large and powerful retailer who by threat or otherwise induces a supplier not to supply others?

Mr. MacIntosh: It seems to me that it would be necessary to start using a rifle in such a situation. That can be done by an amendment dealing with a case in which a person has that type of market power and is directed towards a situation wherein it is perfectly obvious that the retailer is in a position, because of his market power, to injure competition in that particular field.

Senator Everett: Do you intend to prepare an amendment along that line, or would you be willing to do so?

Mr. MacIntosh: I had no thought of doing that, but we will take another crack at it.

Mr. Younger: If I may, I would like to offer one or two other examples, which will point up the seriousness of section 38(4). I recollect a case a few years ago in which a company manufacturing a type of valve or pipe fitting of some description in the United States came to my company informing us that these pipe fittings in certain sizes were not manufactured in Canada. The manufacturing company was prepared to erect a plant in Canada which could employ a number of workers in the manufacture of these items. They proposed that our company should supply the pipe blanks which, as I recall, they machined or threaded at a later time. They offered to supply the dies for manufacturing these but, because they intended to enter the market in Canada, did not want our company to use the dies to supply others. We had to agree that for some period of time we would not supply pipe blanks

in these sizes to anyone else. That seemed to be a fair enough proposition, but it would be prohibited by this section.

Similarly, while there is no representative here from Noranda today, the president of Noranda told me, in discussing this brief, that there have been situations in which a number of small mines, which cannot afford their own smelters, asked Noranda to build a custom smelter in a certain area and service all the small base metal plants in that area. In the event that Noranda can be induced to do this, they will only do so on the basis that those smaller concerns will ship all their output to that smelter.

Mr. MacIntosh: Mr. Chairman, if I may, there is one short point I would like to make and I do so because of a discussion which took place during this committee meeting. The right of cross-examination is dear to the heart of any lawyer and, in my view, it is absolutely vital in criminal cases. Under the proposed amendment there will be no right of cross-examination at all if evidence is adduced prepared under the auspices of the Chief Statistician of Canada, because once that evidence is adduced it becomes evidence of the facts alleged therein. The only right of cross-examination which applies in the case of statistics is under section 45.2 in the case of a collection of statistics prepared by sampling methods by the Director or, indeed, by someone on behalf of the defence. Cross-examination as to that evidence may be permitted by the commission or the court.

In my submission the right of cross-examination should be absolute. The mere fact that statistics have been prepared by a government department does not ensure their accuracy. As we point out in our brief, we have just finished a case in Ontario in which the judge rejected statistics from that source on the grounds that they were too inaccurate to be probative for the purposes for which they were being used. We have seen the spectacle, of course, of governments being unable to agree as to their own statistics.

Thank you, very much, Senator Hayden and gentlemen, for giving us such a good hearing.

The Chairman: Thank you very much, Mr. MacIntosh, together with your supporting cast.

Senator Walker: Does Mr. Felkai have any submissions?

Senator Laird: He just sat there and said nothing.

Mr. F. G. Felkai, Blake, Cassels, Graydon, Barristers: I have nothing further to offer, thank you, senators.

The Chairman: Honourable senators, we have as our next witness Mr. Clarence Campbell, the President of the National Hockey League. He will speak to the question of professional sport as this bill seeks to cover that field.

Mr. Campbell, you know the purpose of the invitation extended to you. We would like to have the benefit of your views on the section of the bill which deals with professional sport and seeks to bring it under the scope of the bill.

Mr. Clarence Campbell, President, The National Hockey League: Thank you, honourable senators, for the invitation. In making my preparation for this appearance I had some anxiety and concern over what might be needed in the way of background material to support the position I would like to assert on behalf of professional hockey.

In that connection, I do not pretend to act or speak for anyone else, although I have had consultations with counsel and representatives of the Expos baseball club who will be similarly affected by the legislation.

Perhaps it would be useful to review the changes which have occurred in the pattern of operation, at least during the period that I have been in charge of the affairs of the National Hockey League—if only to illustrate the enormous changes which have taken place in the conduct of the business.

When I first became associated with the National Hockey League back in 1936 it was not a very formidable organization, but I was grateful to it for the opportunity to moonlight from an unproductive legal practice. My gratitude eventually extended to the point where I was prepared to abandon the law, except as it might be necessary for what I am now doing.

Anyway, there were notable changes. There were eight teams when I started in 1936. By the time I had served for three or four years, and completed a stint in the services overseas, the number had contracted to six, and it remained that way for at least 20 years.

Senator Connolly: Which were the two that were dropped?

Mr. Campbell: Of the two that fell by the wayside, one was by choice. The Montreal Maroons disappeared by choice of the owners, and the New York Americans disappeared by default, basically associated with the incarceration of a fellow by the name of Bill Dwyer, who left unpaid bills in charge of one who is now a distinguished Canadian citizen, "Red" Dutton. "Red" became tired of paying the bills, and by 1942 gave up the ghost when promised a franchise in Brooklyn some day. The "some day" never arrived and "Red" went back into the construction business.

Anyway, from 1946 until the middle 1960s, the league had many vicissitudes, including the prospect at one time —in the middle or early 1950s—almost of dissolution, when two things adversely affected the league greatly. One was the Korean War, and the second was the advent of television, which took the people's money because they had to pay for their television sets before they could afford to go to a hockey game—which was quite reasonable. In any event, it did create some considerable problems for us, and undoubtedly delayed expansion of the league—which, I think, was a logical thing to have happened long before it did.

The choice exercised by the governors at that time was that we should spend a few years making sure that we had a good solid league from which to expand, so that if there was falters along the way there would be a good strong structure that would not collapse from its own weight.

It took about four to five years to effect that reconstruction—notably in Chicago and Boston, which, during the middle and even late 1950s, required assistance from the other members of the league.

Finally, in 1967 we reached a position with respect to expansion, and it was decided that we should adopt the concept evolved by Mr. Branch Rickey, who had endeavoured to establish what is known as the Continental League, that was going to be a third baseball league.

The concept was that it did not wish to be competitive, in the first instance. He realized that there were many proprietary interests existing in both the American and National Baseball Leagues which were going to be very difficult to displace, and that the only way this could come to pass was with the full cooperation of the other two leagues. Unhappily for his scheme, this cooperation was not forthcoming, and it led eventually to the partitioning of his group and the first expansion that baseball had had for a very long time.

Our expansion was generated on the principle that the new teams should compete primarily among themselves. We realized at once that we could not run a separate league for them, as he had planned to do, under the guidance of a baseball commissioner who would be in charge of all three leagues.

We had to adjust to our concept, so that we could have the benefit of competition among the new teams competing among themselves, but, at the same time, they would be sufficiently integrated to have the full aura of a major league. That was the big cry at the time, and has been ever since—the clamour all over America for participation in major league sport.

We have had a number of expansions since then. In fact, the process is still in progress. But that is only secondarily relevant to the problem here. What I would like to emprasize at this time is the relationship between the players and player development during this period of time.

When I first came to the league in the 1930's the source of talent was largely from the senior amateur teams. The total rosters required were very limited. There were six teams in the league by that time—but that was not brought about by a normal type of expansion. It was produced by the dissolution of two other leagues, and simply by the transfer of the member teams from their site of operation on the West Coast and in Western Canada to east of the Mississippi River. So it really was not an expansion of the National Hockey League. It was a sort of consolidation of existing professional hockey in places where it was more viable. That is all that really happened.

At that time the salaries increased somewhat and made it easier to acquire the talents of players. It was not until much later—in fact, in the very late thirties—that any relationship developed between professionals and amateurs.

In those days the Canadian Amateur Hockey Association was an infinitely more powerful organization than the NHL and dominated the entire hockey spectrum. There seemed to be a strong feeling among the players that professional hockey really did not hold a very bright prospect.

Some were successful, of course, but as one hockey player said later on, "Playing hockey in the National Hockey League was sort of a pleasant interlude between going to school and going to work." That is what the league was like until 1947, at which time the first efforts were made to have the employment of hockey players generated into something in the nature of a valid career. That was achieved, primarily, through the introduction of a pension plan. The pension plan was very modest in its beginnings, but by 1957 it had taken a great hold. It had gone through its growing pains and was, by that time, a very sound plan and one which generated great profits for the players, far beyond what had been projected at its inception in 1947.

Senator Connolly: Was it a contributory plan?

Mr. Campbell: Initially, yes. When it was first introduced the players contributed a fixed amount of money, being $900 per year, which was the amount then allowed by the Canadian government as a deduction for income tax purposes. The league provided a certain amount of its facilities for the operation of the plan. At the inception of the plan, I do not think the owners had the same degree of confidence in it as others had. In the first instance, the owners' contributions ran about 60 per cent of the players. It was not a fully matched contribution in the early stages of the plan. However, in 1957, the tenth anniversary of the plan, the contributions were completely matched, and continued to be until 1970, at which time the plan became non-contributory—that is, the players no longer contributed towards the plan, and that has continued to the present time; the plan is fully funded by the clubs.

The National Hockey League players' pension plan is perhaps the single greatest factor in the success of the National Hockey League, at least in its recruitment facet. Both the players themselves and their parents have been enormously influenced by the strength of the pension plan concept in the National Hockey League and, as a result, the recruitment of players has not been a difficult task.

Coinciding with the arrival of the pension plan was the full recognition of another plan in respect of recruitment or player development at the amateur level. What that plan amounted to was the formalization of what had been done for quite a number of years informally, that being that each individual professional club made it a practice to sponsor amateur teams, mostly juniors, financially and, in some instances, the actual operation of the clubs. Through a league agreement, each club was entitled to have two sponsored teams, with protection from raiding by their partners of the players of those teams.

This sponsorship of amateur teams amounted to a reserve list of a negotiation list, if you like, and there was no effort made until about 1966 to modify that practice in any way. Because of that practice, the clubs with the best sponsored junior teams were most likely to have the best talent once those juniors became available to play in the professional league.

We began to realize that this was not a very equitable arrangement about the mid-sixties, at which time arrangements were made whereby, subject to certain priorities relating to the ethnic origin of players, there should be an internal draft of the unsigned amateur players. That program was in operation in 1967 when six new teams were added to the NHL. Obviously, it was not possible to provide the same opportunities for the sponsorship of

teams across Canada for 12 teams as it was for six. In the first place, the established clubs were reluctant to give up what they already had, and certainly the new teams would have found it impossible to develop or find corresponding sites of operation for their sponsorship efforts.

With those things in mind, combined with the fact that there had been a number of complaints that the National Hockey League was dominating the amateur picture too strongly and the suggestion by the officials of the amateur clubs that they could do a better job in the way of player development if left alone, in 1967 the whole concept of sponsorship was completely abandoned. In its stead came the concept of the universal amateur draft. Coinciding with that was a change in our attitude and in the attitude of the amateur league, that the players should not be approached until they had achieved their twentieth birthday. Up to that time they were available for the NHL at the age of 18 years.

Senator Connolly: If I may interrupt you for a moment, I take it that while you abandoned the sponsorship of amateur teams in 1967, some, if not all, of the clubs in the NHL continued to have minor league professional teams?

Mr. Campbell: Yes, at the professional level. The professional situation is entirely different, in that all of the players in that league are under contract. There was no effort made to allocate unsigned or uncommitted players. They were all signed to standard player contracts.

The change in the age limit for signing juniors provided an enormous fillip to the development of hockey in Canada. There is no doubt about its impact. It was probably one of the most progressive steps ever taken in the development of the game of hockey. With respect to the player's own development, it ensured his reasonably complete physical development. In other words, a young player, particularly if he was on the small side, was not pitched into the maelstrom of tough, competitive National Hockey League games. Also, it ensured a much greater degree of emotional stability and maturity of players coming into the National Hockey League. This was perhaps more noticeable to those who were not so involved in directing the individual teams. A star player coming from the junior league into professional hockey finds it difficult to go into the professional dressingroom where everyone is established, at least in his terms, and, as a result, he is worried. He sits on the bench, plays very little and, eventually, assuming that the situation prevails for some time, he is sent to the minor leagues to play, if only to get himself back into some kind of reasonable condition. All the time, of course, competition for the services of these players was regulated entirely by the universal draft in reverse order of the competitor strength of the clubs.

I do not want to expand on it now, but it also meant very substantial benefits to the amateur teams and to the Canadian Amateur Hockey Association. If you would like to have some indication of what that could mean: since May 1, 1967, the National Hockey League has paid to the CAHA or its member clubs $8,400,000. There is no restriction, no restraint, on the disposition of those funds at all, none whatever.

The Chairman: No *quid pro quo.*

Mr. Campbell: There is no *quid pro quo* of any kind. There are some things that I would not consider to have a particular dollar value; they have administrative value. For instance, one of the things that is important is that we play reasonably uniform rules, because the training of the players requires that. During several periods we experienced a great deal of difficulty about the defection of professional players for the purposes of reinstatement. This was in the tough days of the 'fifties, when the amateur teams used to outbid us for the services of the players who wanted to retire from professional hockey, become reinstated and play for the amateur teams. In fact, in some instances they earned greater salaries than they ever earned as professionals. That is an observation that probably has some other significance as well.

Senator Connolly: If it is not appropriate, do not answer this question. You said that some $8 million has been transferred.

Mr. Campbell: $8,400,000.

Senator Connolly: Can you say, in a general way, what proportion went to the CAHA and what proportion went to the teams?

Mr. Campbell: There is a very complicated system of distribution. Up until 1973 it was the practice of the National Hockey League to grant what is called a development fund. This averaged out during that period of time at approximately $550,000 to $600,000, which went straight to the CAHA for its own allocation, whatever it wanted to do with it. The other portion of the money was in the form of draft payments. First you made a payment with respect to a draft claim, which sort of established your lien on the services of that player. You still had to sign him to a contract; he was under no obligation whatever to sign with you. He did have the disadvantage that if he wanted to go to the major league the only club that could deal with him was the club that drafted him. At least, that would be so for a period of a little over a year; for roughly a year and a half the club had that lien.

In that connection, it should also be observed that once we knew we were going to have expansion we were very keen, of course, to have the quality of the competition at the lower echelon maintained. This is one of the great dividends of that decision in 1967, that the quality of play and the general maturity of all those taking part was enormously improved. The number of players who came up, who were capable of sticking in the competition, was infinitely greater, and we had fewer disappointed players. It is true that some of the teams were not as strong as they might have been, but the player did not have the disadvantage that the pre-1967 player had, that he had to beat out an established team. He then had the opportunity to play with a team that genuinely wanted his services, so that was a big plus.

Senator Connolly: Does the existence of Hockey Canada have any bearing on your submission to the committee?

Mr. Campbell: Did it have?

Senator Connolly: Will it have?

Mr. Campbell: This is a personal opinion, but I do not believe myself that Hockey Canada has very much impact on the operation of hockey in Canada, save in international relations. I do not think it has. I think its programs, as initially developed for coaching clinics and certain publications, things of that kind, were undoubtedly of great value, and they have since been assigned to other people who are perhaps in a better position to carry them out. I do not think it would be accurate to say that Hockey Canada will have much impact on the game, other than its most recent activities associated with international hockey.

Senator Connolly: Even at the amateur level?

Mr. Campbell: Even at the amateur level. Most of the functions it undertook when it was first formed have been absorbed very largely by the Canadian Amateur Hockey Association.

The next development, which was very traumatic in its effects for all concerned, was the advent of the World Hockey Association. There is no point in my expanding on that—I am sure you are sick of reading about it—

The Chairman: That is right.

Mr. Campbell: —except to say that it had the effect of making a lot of players—in fact, all of them I guess —pretty rich. At the time the expansion took place in 1967, the average salary in the National Hockey League was about $22,000.

Senator Molson: That is a little more than a senator gets.

Senator Beaubien: Just over.

Mr. Campbell: Don't let that disturb you as much as what is to come next. For the 1973-74 season—I do not have the figure for 1975 as yet—the average salary in the National Hockey League for 20 players in 18 teams was $60,528.

Senator Buckwold: That is more than a Cabinet minister gets.

Mr. Campbell: Plus $8,000 per man of fringe benefits arising from pension contributions, bonuses and playoff awards.

Senator Molson: This has nothing to do with any sponsorship?

Mr. Campbell: No, there is no such thing. No professional National Hockey League team has any way at all of pre-empting the services of any player in advance of his turning professional—no way. There is no way that can be achieved.

Senator Laird: You spoke about the advent of the clubs accepting the full responsibility for funding of pensions when the universal fund was instituted.

Mr. Campbell: No, it was later than that. In 1967 and later we w re still operating on an equal contribution. By 1970 the league agreed to assume all the cost of the pensions.

Senator Laird: Even if it only assumed a portion of the cost in so far as your amateur is concerned and the draft, when does his pension scheme start?

Mr. Campbell: The day he starts to play.

Senator Laird: Amateur?

Mr. Campbell: No, professional only.

Senator Laird: That is what I wanted to get at.

Mr. Campbell: And it is a very short vesting period. He only has to qualify for 210 games and he has a fully vested pension.

Senator Laird: But as an amateur he has no right to any pension?

Mr. Campbell: No, he has no pension benefits at all.

Senator Connolly: Those pensions become payable at a given age?

Mr. Campbell: Yes, they do. They are all calculated on the basis of the pension being available at age 45. It is deferrable to as late as age 65 and, more recently, up to age 71, by tax regulation. But in case you would like to know what the relationship would be between a pension calculated at age 45 and one at age 65, the formula is 3.19 times as high at 65 as it is at 45. The current benefit that is payable to a player is $500 per season of play. In other words, that is his pension $500 per year of play. So a ten-year man would be in a position where at age 45 he would have available $5,000, and you multiply that by 3.19 and you have what his pension is at age 65. These pensions also carry full death benefits, over $100,000. At certain stages they grow progressively.

What has happened is that these pensions have become so important to the players that they have had another effect, that is, they have tended to extend the player's career. They do not have that effect by themselves; they have it by reason of the fact that his anxiety is to get as many years in as he possibly can—just like anyone else.

Senator Laird: So Gordie Howe could now be collecting his pension as well as his salary?

Mr. Campbell: Yes, if he chose to do so; if it was in his interest to do so, he could.

Senator Laird: I should have asked him when I was at dinner with him the other night.

The Chairman: Mr. Campbell, after listening to the recital of the history of the development of professional hockey, there are a couple of statements made in these "Proposals for a New Competition Policy for Canada," and I thought I would read them to you and see what your answer is. One is:

> The practices which the new section is designed to control are chiefly undue restrictions upon the choice of a player when he graduates from amateur to professional sport . . .

What comment have you to make on that?

Mr. Campbell: Let me say that up to the time the World Hockey Association arrived on the scene the

restriction was based on what seemed to be an equitable principle for the application of talent, namely, the universal draft was conducted in inverse order with the standing of the teams. There may be some sentimental attachment in so far as a player is concerned, who may wish to go with one team in particular, but other than that the average salaries of the member clubs were just about uniform. The result was that the players themselves quickly realized that their expression of preference to go with one or another team was a pretty empty thing as far as they were concerned. They really did not have much choice. I heard very little complaint about the fact that they had to go with the club to which they were drafted.

The Chairman: They add that here as well and they say:

> and upon his choice of teams to play for . . .

Mr. Campbell: That is right. I agree that it would be difficult to say that you have not restricted his freedom of choice. I think that is right. But I think that the total conduct of the game, on an equitable basis and on a balanced competition basis, necessitates the limitation that is imposed by the universal draft. Certainly, up to the time the World Hockey Association came on the scene we had very little difficulty about that, and since they have been on the scene there has been no restriction at all; they are perfectly free to sign outside the league if they wish.

The Chairman: The universal draft does not interfere with the right of a player to negotiate his contract with the particular club?

Mr. Campbell: No, not in any way. There are no limitations at all imposed on the bargaining. In other words, there are no salary limits or anything of that character.

The Chairman: Then it goes on to say this:

> Of particular concern are contracts imposed upon players which are self repeating and bind a player indefinitely to any team to which he may be, from time to time, assigned.

Mr. Campbell: Yes. That was a fair indictment of the position of the National Hockey League during the course of our litigation with the World Hockey Association. At that time we had a requirement that every player sign a standard contract which provided for an option for the renewal of that contract, on terms to be mutually agreed upon or by arbitration. The player was obliged to extend to the club an option for one year. The difficulty he had was this, that while it sounded like it was only one year the position was that the league required that he be under contract all the time, so the result was that there was an automatic renewal. What has happened, as a result of the litigation that we had, is that now the option is only for one year and there is no obligation to renew it at all. He has the right, and so has the club, to give one year's notice of termination. He can exercise it immediately or he can wait a year and demand a contract for the next year at, if he exercises his option, the salary he got last year. The club, if it wishes to exercise its option, must tender him a contract which is acceptable to him. There has been an enormous change in the basis of the conduct of signing players. That evil, if such it can be described as, certainly has disappeared completely from the scene now.

The Chairman: Then, in justifying one of the provisions of the bill, this is said:

> It also directs the court to have regard to the desirability of maintaining a reasonable balance among teams participating in the same league, because if the affiliation of players to a team were to be determined only by the pocket-books of the teams, the wealthier teams would end up with all the best players and the league would not be viable.

Mr. Campbell: That is correct, that has been a fundamentally acknowledged fact, and that subject of restrictions on employment in sports has been the subject of an enormous amount of legislative inquiry in the United States. I know I have taken part in at least five of them. I must make some comment about that later. It is not confined solely to the salaries of the players or the conditions of their employment. There are a number of other factors which are pretty well recognized to be necessary for the effective operation of a professional league—that is, to keep it viable.

The Chairman: It is hardly necessary, I think, to have a court order in order to see to it that that balance is maintained. It is in the best interests of the league.

Mr. Campbell: Yes. I would hardly think it necessary at all. In fact, the thrust of my observations here today will be directed primarily to the question of the anomaly of this being included in an anti-trust provision at all. I will certainly come back to that, but perhaps it would be better if I now directed my observations in a little more logical sequence.

This legislation was, of course, the product of the advice of the Economic Council of Canada in 1969, which recommended the extension of the Combines Investigation Act to the service industries, and among the host of businesses designated are included all recreational services, including professional sport.

The strange thing is that although almost everything else in the report was documented in one form or other, there was no data or rationale in support of this aspect of the recommendation, and there is none contained in the report. It is therefore impossible to discover from the report by what reasoning professional sports could possibly be expected to function under the statute in its terms, the main function of which is to prohibit the conspiring, combining, agreeing or arranging between two or more persons or organizations to prevent or lessen or limit competition in any facet of business.

That latter expression is not in the statute, of course. It is just my way of lumping together the purposes for which the Combines Investigation Act became effective legislation. Of course, I assume that if Bill C-2 is approved, it will apply to service industries as well, and professional sport is included as being one.

No professional sports organization could possibly continue to function under such a law, because the object of

the legislation is the elimination of the weak and the less efficient in skills or material resources. Such a philosophy would simply eliminate the competitors to the point where there would be no one left to carry on the competition, which is the major objective of all professional sports. The major portion of all professional sports legislation and regulations consists of the establishment of rules to ensure balanced competition, not to eliminate it. It is hard to conceive of a single regulation or rule in professional sports which is not basically in direct contravention of the literal text of the Combines Investigation Act. And it is for this reason, honourable senators, that I should like to impress on you, if I possibly can, that in my judgment, and in the judgment of those with whom I am associated, the proposed section 32.3 is—I should not say "ill conceived," but it is so out of harmony with the concept of anti-trust legislation that I find it most difficult to understand how this particularly odd section was thrust into an enormous piece of legislation such as the amendments to the Combines Investigation Act, and for a purpose not normally thought to be the main objective of that legislation, which is the welfare of the public. If there is any single piece of legislation I have read for a long time that is designed for the protection of the individual, as distinct from the welfare of the public, this has to be it, because everything in it relates to the removal of any limitations on the part of the individual player, and goodness only knows he has ample recourse to redress any difficulties he may encounter in the course of negotiating his contract.

I should like to observe that it has been recognized for 50 years in the United States, where anti-trust laws have always applied to service industries, that any professional sports organization must have the right and legal authority to make regulations with respect to five basic requirements of its operations without which it is impractical, if not impossible, to function. These objectives are: one, the equalization of competitive playing strengths; two, the employment selection or eligibility or reservation selection or assignment of players' contracts—because that is one of the items which make the first one possible; three, the right to operate within specific geographic areas; four, the preservation of public confidence in the honesty of the sports contest. That may seem a little obscure. You may wonder why that is included. Well, the answer is that if they do not have that authority, what happens is that, when the sports authority takes some action to preserve its own integrity, the charged party simply goes into court and gets an injunction to prevent the sports organization from enforcing its discipline, and, as a result, the one thing that it is set up to do is destroyed. The fifth item that requires authority is the regulation of telecasting and broadcasting rights. Anyone who has followed the problems which we have had and are having—in fact, the problems all sports organizations in the United States are having at the present time—will know that perhaps the most serious is the appropriation—and I say this literally—the literal appropriation of private property to be given away by legislative bodies without compensation. This is a very serious thing. I hope that we will be free of that risk here.

In the United States the so-called black-out bill was passed by the United States Congress. It simply allows the appropriation of private property without compensation of any kind. We endeavoured to circumvent that problem by another piece of legislation to give to the sports organizations the equivalent rights which are given to a first performer or first producer in the form of a copyright bill. It could not be done. Apparently, it was desirable that the legislature should be free to give away somebody else's property for political purposes.

Quite obviously, none of the minimal requirements for a professional sports league could exist under the text of the Combines Investigation Act if extended to service industries including professional sports, unless some kind of exemption or exception were provided in the text of that law. The best way, I say, to provide the exception is, if there is an abuse—if there is an abuse—arising from the unfairness or unreasonableness of the terms under which a player can find employment, then the legislation should provide to the player the means by which he can restore his position, because he has easy access to the courts. It is immediate and there are no criminal proceedings required, and certainly not the enormous amount of cumbersome activity that is necessary for a prosecution under this act. If this legislation is to be enforced under the provisions of the Combines Investigation Act, then I just shudder to think of the amount of effort that will be required for professional organizations, and I dare not dream of what the amateurs will have to put up with when six disgruntled citizens, who, because they are Canadians and are prepared to sign an affidavit, can put you, literally, on inquiry. It is monstrous to think that anybody could ever believe that that could work. What is required, if anything—and I emphasize, "if anything"—is the passing of legislation for the protection of the individual; but let us not have it in this context at all. It is not necessary, and certainly it is not a thing which the Combines commission is equipped to do at all. This, to me, simply means that somebody had an idea that at some time or another players had been abused or misused in some fashion, and this got inserted into the bill by some means—I do not know how; but, in any event, I think it is singularly inappropriate in this context.

The Chairman: The provisions are antiquated now.

Mr. Campbell: Yes. And they have no application to the current situation, in any event.

Senator Molson: The choice of the player to play for any team that he wishes is limited, in the first instance, by the draft; but at the same time as that happens there is an enormous compensation for that player. It is true there is that limitation, but he immediately gets into a salary situation which, in part, is a compensation for that. Other than the one-year option, that is really the only limitation on the question of the player's choice.

Mr. Campbell: The only limitation; there is no other.

Senator Buckwold: You have indicated, Mr. Campbell, in so far as professional hockey is concerned, the background that makes this particular legislation really unnecessary. Would the same be true of professional baseball, professional football and other professional sports, where they may not have the degree of player protection that you have?

Mr. Campbell: Well, I am fairly familiar with the procedures. We are almost in parallel with baseball with regard to the type of procedures we have on the acquisition and disposition of players. The CFL has one provision that we do not have, and that is the right to play out your option without compensation to the club. The background of that is very simple. The position is that a very large number of the CFL players come from the United States, and for this reason, if they were subject to any restriction as to where they could sign to play elsewhere within the CFL, they would just go back home. It is a very simple problem for them. That, however, would not be any good for hockey because if we had a situation where a player could play out his option without compensation to his club, it would destroy our own people very quickly.

Certainly we allow a player to play out his option, the same as they do in football. However, if he elects to play for another club, and that club chooses to acquire his services, then in fairness they must agree to pay compensation, which is established by arbitration. That is the pattern of our present means of preserving to the club its property rights in that player's services, or, in the alternative, compensation for those services, so as not to allow the rich club to swallow the poor club. The method of arbitration is calculated almost to dictate an agreed settlement in advance, because a high-low arbitration is a frightening thing.

Let me illustrate. Supposing a player from the Montreal Canadiens decides he is going to play out his option, and he does—and he is free to go with any team he likes, and is free to leave the league if he wants to—in case he signs with another club within the league the two clubs must then try to resolve what a suitable player compensation would be—in other words, some form of trade. If they cannot agree, then the arbitrator has the right to select which of the two offers he thinks is the more reasonable, the team acquiring or the team losing. These things, incidentally, are secret. There is no way, once you get to arbitration, that you can renegotiate. Once you are committed to arbitration the situation is that you do not know what the other party may have demanded. For instance, suppose he is going to Rangers, the Canadiens may say, "All right. We think this player is the appropriate compensation," and it may be Walt Tkaczuk. That is the most valuable player the Rangers have. They may not think he is worth that amount, but that is their problem. If they take one player from one club, they have to be prepared to negotiate an appropriate adjustment for their loss.

Senator Connolly: On the matter of compensation as between the two clubs competing in this case, is there any thought of trying to compensate the club which loses this player to another club, let us say, in terms of money rather than in terms of fair exchange?

Mr. Campbell: Money is declared to be the last resort. The terms of reference of the arbitrator are that wherever reasonable—and you have to keep in mind that some clubs do not have players of the requisite ability—dollars shall be the last resort.

Senator Buckwold: The act actually says that:

> Every one who conspires, combines, agrees or arranges with another person...

to commit the so-called offences. That involves a combination with another person. From what I gather, this does not normally happen—in other words, you are dealing with your player; you are not conspiring with anybody else.

Mr. Campbell: No, but I am sure that what is intended, senator, is that the governors shall not make rules that make that possible. In other words, this prohibition is intended to proscribe any activity on the part of those who run the league to set up an unfair arrangement. They are not talking about individual players in this section, or at least, I do not believe so.

Mr. R. J. Cowling, Special Counsel to the Committee: "Person" could be another club or the league. "Person" includes, by definition, a corporation, for example.

Senator Buckwold: I realize that. But if everything is as lily-white as you say it is, what is the matter with this particular section?

Mr. Campbell: Well, in the first place, it only has one type of sanction, and in order to establish that there has been a violation you have to go through all of this combines investigation procedure, which I think is ill-conceived for this purpose, in any event. That is one point. The second point is that this involves criminal proceedings, which surely are not necessary.

Senator Buckwold: Every business is faced with the same problem.

Mr. Campbell: Yes, I agree, and I think that the dimensions of the problem for industry may be such that there is no other way. But surely the only person adversely affected, when you are talking about players, is the player himself, who is quite capable of acquiring whatever indemnification and compensation he thinks necessary by the ordinary courts.

The Chairman: Yes, he can go to the courts.

Senator Cook: Did you say that if any six people signed an affidavit they could be investigated?

Mr. Campbell: Yes.

Senator Cook: What is that reference?

Mr. Campbell: That is clause 8, the first line. He has no option; he has to do it; it says he "shall".

The Chairman: Mr. Campbell, we have had some valuable evidence from you to assist us in our understanding of the dangers and the embarrassment that may be inherent, without any foundation in the existing operation of professional hockey to justify the need for this. So I was wondering, and this is not because I want to rush you, if there are any other points you would like to touch on at this time.

Mr. Campbell: If I had come here to suggest amendments to you, then we would take a long time.

The Chairman: You speak of suggesting amendments, but I think that, if anything, it could well be that our thinking might be in the other direction, as to whether there is any need at all for this.

Mr. Campbell: That is precisely the thrust I should like my remarks to have.

The Chairman: I thought that was the point you were talking to.

Mr. Campbell: You are quite correct. I could go on and discuss some other inconveniences and inconsistencies and things that are not appropriate at all, but basically the way to cure this, in my opinion, is to excise it from the act entirely. Then, if there is some legislation needed to do the things proposed to be done under this bill that is the kind of legislation that should be provided by whatever jurisdiction is appropriate.

Senator Cook: Would you know if there is any demand from the players for this legislation?

Mr. Campbell: I do not know of any such demand. The players have been in a pretty good market in the last few years.

The Chairman: I do not think they have any complaints.

Senator Molson: The players also have their association, which is quite powerful, with a very active and athletic spokesman.

Mr. Campbell: And very competent. Plus the fact that there are other problems that one must keep in mind. Our relations with the players collectively are controlled, in part, by the National Labour Relations Board in the United States, which is another protection for them that is just enormous.

Senator Connolly: Would the players' organization take up a situation in which a player might be able to complain that his opportunities were limited unreasonably to participate as a player or competitor in amateur or professional sport?

Mr. Campbell: I really do not know. I think that is a matter that should be discussed with the association itself. I do not know whether they would want to have this as an extra arrow in their quiver or not. They certainly are not unarmed. It may be that they would like to preserve this as well. I do not know.

Senator Connolly: If, for example, a member of a team, a man actually playing in the NHL, was handled in a way prohibited by clause 32.3, then, perhaps within the structure of the players' organization he might find a remedy. But I was wondering whether a player who has not in the NHL but who wanted to be in the NHL would have any remedy through the organization.

Mr. Campbell: He would have to be a member to have any activities on his behalf.

Senator Connolly: I wonder whether the thrust of this was not against the idea of an exclusive club existing in the NHL and this player not being allowed to get in.

Mr. Campbell: His getting into the league is a matter of his having the necessary skills to excite the interest of a member club. Once he is in, the very first day, he is automatically eligible for membership in the players' association and all the benefits that go with it. He has no waiting period or anything of that nature.

Senator Molson: A last question, Mr. Chairman, if I may. Does the players' association agree to the standard form of contract?

Mr. Campbell: They always have done until this last one. Of course it was greatly to their advantage to have the litigation and they emerged from it in an enormously improved position. I do not know whether they would want to do anything more than that. Perhaps I did not understand your question correctly.

Senator Molson: I simply asked if they accept the standard form of contract.

Mr. Campbell: Let me put it this way, they have a mixed reaction. Perhaps I can illustrate it in this way, that they complained about the reserve clause in the standard players' contract and that has been a matter of debate for upwards of 15 years. However, that has now been clarified, but not entirely to their satisfaction. The reason why we have a standard player's contract now that stands the test of time—or, at least, it stands the test of the law for the moment—is because they permitted their labour relations position to break down, and they allowed the 60-day period to go by which enabled the league to proceed unilaterally. And we adopted the contract. The part they objected to has nothing to do with the reserve clause. The objection is apparently to the equalization, but the equalization has never been a problem with the hockey players. What has happened is that the players' association, in combination with those of football and basketball, in the United States, wished to attack the whole question of equalization, and it is being attacked in the courts there. In that respect, and in so far as they are part of the United States congressional lobby for the purpose of challenging the equalization provisions, naturally they are not going to agree to these provisions in our contract, or the ones which they have at the moment. The best indication I know of their individual reaction to the equalization provision is that we have a total of some 400-odd players who were all on the old contracts up to the start of this season. As of the day before yesterday 304 of them had signed new contracts.

The Chairman: Thank you very much, Mr. Campbell. You have been very helpful to us.

Mr. Campbell: I appreciated the opportunity to be here. Thank you.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 6

WEDNESDAY, NOVEMBER 20, 1974

Complete Proceedings on Bill C-27, intituled:

"An Act to amend the Customs Tariff"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hays
Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, November 19, 1974:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Benidickson, P.C., seconded by the Honourable Senator Lamontagne, P.C., for the second reading of the Bill C-27, intituled: "An Act to amend the Customs Tariff".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Benidickson, P.C., moved, seconded by the Honourable Senator Croll, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, November 20, 1974
(7)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to consider the following:

Bill C-27, "An Act to amend the Customs Tariff".

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Blois, Buckwold, Cook, Desruisseaux, Flynn, Gélinas, Haig, Laird, Macnaughton, McIlraith, Molson and Walker. (15)

Present, but not of the Committee: The Honourable senators Benidickson, Everett and Manning. (3).

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

WITNESS:

Department of Finance:

Mr. J. Loomer, Director, Tariffs,
Tariffs, Trade and Aid Branch.

Following discussion, and upon motion of the Honourable Senator Buckwold it was *Resolved* to report the said Bill without amendment.

At 10.20 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

November 20, 1974

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-27, intituled: "An Act to amend the Customs Tariff" has, in obedience to the order of reference of Tuesday, November 19, 1974, examined the said Bill and now reports the same without amendment.

Respectfullly submitted.

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 20, 1974.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-27, to amend the Customs Tariff, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have a fairly full agenda this morning. It is proposed that we deal first with the two government bills that were referred to us—namely, Bill C-27, to amend the Customs Tariff, and Bill S-17, to amend the Explosives Act. I know that we will move fairly quickly on these, and then we shall be ready to hear representations from the Canadian Real Estate Association and the representatives of amateur sports—all of which we expect, without undue speed, to finish by 1 o'clock.

Now, for our consideration of Bill C-27, the Customs Tariff bill, we have Mr. J. Loomer, Director, Tariffs, and Mr. R. Catellier, Tariffs—both of the Tariffs, Trade and Aid Branch, Department of Finance.

Mr. Loomer, I take it that you are going to begin with an explanation of this bill. I must say that looking at it, it looks rather like the Book of Numbers. All you have done—and we may have something to say about this later—is to list a tremendous number of tariff items without any identification of the subject matter of each item.

Mr. J. Loomer, Director, Tariffs Division, Tariffs, Trade and Aid Branch, Department of Finance: The subject matter, Mr. Chairman, appears in the schedule to the bill.

The Chairman: Well, be that as it may, would you like to take over at this point and deal with the bill and the items?

Mr. Loomer: Perhaps at the outset I could make a short general statement.

Honourable senators, I do not think there is a great deal I can add to what Senator Benidickson said on second reading of the bill, but perhaps I can briefly restate the intent of the bill. I think the best way to do this is to look at the bill in two parts, the first part covering clauses 1, 2 and 5 and Schedules I and II, which relate to the temporary tariff reductions first introduced for an initial period of one year by the Minister of Finance in his budget of February 19, 1973. These reductions affect the wide range of consumer food and non-food products for which the average reduction of the Customs Tariff was about five percentage points. The bill provides that most of these reductions should be continued until June 30 of this year, and the tariff items affected are set out in Schedule I to the bill.

For raw and refind sugar, which are listed in Schedule II to the bill, the period for the temporary cuts is extended until June 30, 1976.

The second part of the bill includes clauses 3, 4 and 6 and Schedules III and IV to the bill. They provide free entry for a two-year period for petroleum products such as gasoline, aviation fuel, heating oil and diesel fuel.

I think that is really all I can say of a general nature, but I shall be glad to answer any specific questions that honourable senators may have.

The Chairman: We would prefer that you start dealing with the numbers and explaining the items represented by them in the two classifications you have given us.

Senator Benidickson: Mr. Chairman, before we proceed with that, may I clear up one or two matters contained in the *Debates of the Senate*? Mr. Loomer and I have had some discussion in connection with this since I made remarks of sponsorship of this bill. On November 14, 1974, at page 262 of the *Debates of the Senate*, I indicated I had read the debate on second reading and in Committee of the Whole in the other place the week previously, on November 7, as reported at page 1176 of the *House of Commons Debates*. At that page Mr. Jack Cullen, Parliamentary Secretary to the Minister of Finance, stated in connection with Bill C-27 that on October 3, 1973 the Minister of Finance tabled in that place a ways and means resolution which would be reported in the *Votes and Proceedings* of the day. I requested from our distribution office, prior to studying the bill, a copy of the ways and means resolution referred to by Mr. Cullen and dated October 3, 1973. I was informed that the House of Commons did not sit on that day, so there is some confusion in that respect.

The Chairman: I think the date is October 1.

Senator Benidickson: They did supply me with a copy of the *Votes and Proceedings* for October 1 and October 2, each of which contains ways and means resolutions.

I thought that perhaps Mr. Loomer might make some reference to that. In a telephone conversation yesterday he referred to another ways and means resolution, dated October 23, 1974, which I have not yet been able to obtain from our distribution office because last year's papers are in another building, but I believe it will be provided. Mr. Loomer can tell us something with regard to the relationship of those ways and means resolutions to the discussion.

I raise the point, Mr. Chairman, because there may be persons interested in these items and there is confusion in the *House of Commons Debates* on dates referred to in *Hansard* of the other place and then again by myself.

Honourable senators will recall that during the debate last Thursday Senator Connolly indicated that, when we were presented with simply a copy of the bill as passed at the third reading stage in the House of Commons, we had here for our use, debate and study inadequate information. I will report upon what has developed since then, when this bill is reported and we arrive at the third reading stage in the Senate.

Mr. Loomer: With respect to the point raised by Senator Benidickson, the date was October 23, and that was the day on which the minister introduced the ways and means motion which provided for the removal of the duty on petroleum products, the items contained in Schedules III and IV to this bill. So October 23 is the correct date, senator.

Senator Buckwold: May I ask a brief question, for clarification? The bill contains three schedules, involving three sections. One expired in June, 1974, the general list. Are there any changes in that, or does this bill merely extend it?

Mr. Loomer: No, that part ran out on June 30, 1974, senator.

Senator Buckwold: Yes, I realize that, but are we extending it?

Mr. Loomer: No, it expired as of June 30, 1974.

Senator Buckwold: It has expired?

Mr. Loomer: Yes.

Senator Buckwold: The second section, relating to raw and refined sugar products, will expire in June, 1976?

Mr. Loomer: Yes.

Senator Buckwold: I gather that there are some changes in those schedules?

Mr. Loomer: I am sorry, but are you referring to the minister's statement?

Senator Buckwold: No, I am just looking at the act.

Mr. Loomer: There are no changes in this act.

Senator Buckwold: If we approved the schedules until 1976 under the previous bill, why would it be re-introduced?

Mr. Loomer: This is the first time this approval has come before the Senate.

Senator Buckwold: I see. That portion of it was not included in the list before?

Mr. Loomer: No. You are thinking back to what was provided in the budget of 1973, I suppose.

Senator Buckwold: Right.

Mr. Loomer: No; that was a separate bill. This extends those reductions until June 30, 1974, or June 30, 1976, so it is a separate bill entirely.

Senator Buckwold: Are the tariff schedules, then, the same?

Mr. Loomer: There were some items dropped from the original list.

Senator Benidickson: Which means that in some cases we are reverting to a higher rate of tariff.

Mr. Loomer: Yes.

Senator Benidickson: Than was reduced by the February, 1973 budget.

Mr. Loomer: That is correct, senator.

Senator Benidickson: I hope you will indicate later the prominent items in this list and their possible trade value. They are consumer items, and I think particularly of fruits and vegetables.

Mr. Loomer: Yes. All the products in Schedules I and II are consumer items, food or non-food. Clause 1 and Schedule I to the bill provide for the extension of most of the tariff reductions on consumer goods which were introduced by the budget of February 1973.

Senator Benidickson inquired as to which products were excluded. These were basically certain fresh fruits and vegetables, canned fruit, canned citrus juices, certain types of industrial tires and electrical lighting ballasts. These were the main products which were excluded which were in the February 1973 budget.

Senator Benidickson: But you have had second thoughts about that. What I mean is that the Minister of Finance in his budget of February 1973, in an inflationary period when food costs were rising, took some pride in these proposed reductions in tariff items in connection with fruit and vegetables. He was hopeful that in due course they would affect pricing for those products on the shelves of the supermarkets, et cetera. With respect to some of them, what we are asked to do here means a return to the rates which were in effect prior to February 1973. In other words, we are raising tariffs again.

Mr. Loomer: I prefer the phrase "restoring tariffs."

The Chairman: Yes.

Senator Benidickson: "Restoring tariffs," that is right. However, I must say that I was given the invitation to sponsor this bill at rather short notice, Mr. Chairman. I have not been noted for sponsoring bills in which tariff items might be increased and usually have been on the other side of the argument. I therefore wanted to obtain an explanation of the increase in rates.

I understand that the subject of tariffs on food and vegetables continues to be studied by the Tariff Board, an impartial body, subsequent to my speech. However, we are asked to restore these tariff rates with respect to only certain of the items involved in the February 1973 budget because of some disturbance to trade. My surmise is that this is due in large part to a freight rate situation which exists in the United States, in a form with which all senators are familiar because it exists here. Let us consider the freight rates in connection with citrus fruits and vegetables from southern parts of the United States. If shipped in bulk, the freight rates would be very much less than those that would apply if those products were processed or packaged and canned. In consequence it might be advantageous for a canner or packer to trans-

port those products from the southern United States to a border point in the United States and simply incur an increased freight rate from the United States-Canada border into Canada. This would be comparable to the cost from a canning operation on the Canadian side of the border, and would result in hardship and would probably be deleterious to existing production in a canning or a packaging plant in Canada, or harmful to any proposed expansion of such operations in Canada. Am I correct in that, Mr. Loomer?

Mr. Loomer: Yes, I think that is a factor. We had representations from a number of grower associations and food processors pointing out that in certain instances they were faced with higher costs and were meeting very little competition. There was real concern about the viability of their operations if the duties were not restored. The minister looked at the representations and decided that in certain instances he would restore the rates of duty to what they were before February 1973.

Senator Benidickson: Having in mind that, in the meantime, the Tariff Board inquiry as to recommendations for rates continues?

Mr. Loomer: Yes. The minister asked the Tariff Board to review almost the entire schedules on fresh and processed fruits and vegetables.

Senator Buckwold: I am confused about the dates. This schedule expired in June 1974. Did the tariff then go up on all items of fresh fruits and vegetables?

Mr. Loomer: Yes, they did go up on July 1.

Senator Buckwold: So that any changes in the tariff schedule would have been reflected in prices at this time?

Mr. Loomer: Yes. The minister, in his budget of February 18, introduced a number of these tariff reductions for a further period; but between July 1 and November 19 the rates did revert back to what they were prior to February 19.

Mr. Chairman, I do not quite know how you want me to deal with the schedules. There are so many items here —fresh meats, canned meats, fresh vegetables, processed vegetables... Did you want me to go through them item by item?

The Chairman: No. We can do that. We can read the numbers and relate them to the schedules. The emphasis seems to be on questions dealing with consumer items.

Mr. Loomer: Yes, and these are all consumer items, either in the food or non-food area.

The Chairman: With respect to them, in some cases their rates have been restored to what they were at an earlier time, and in other cases they have been lowered.

Mr. Loomer: Yes. The reductions were continued for a further period.

The Chairman: That has about the same effect, does it not?

Mr. Loomer: That is right.

The Chairman: Would you list the items, or give us the ones that account for the major revenue, which have the lower rate provided for in this bill. Where shall I find those—in schedule II?

Mr. Loomer: No, in schedule I.

The Chairman: What are the particular items—the ones that are substantial?

Mr. Loomer: In trade terms? Do you want it in groups?

The Chairman: By numbers. It should take only a moment to run through them.

Senator Benidickson: The only difficulty is, we are not provided, here in the bill—without looking at the ways and means resolution in the *Votes and Proceedings* of the House of Commons of October 1—with an indication of what the rates were previously.

The Chairman: When you say "we are not provided," we are provided here, because each member of the committee has before him a copy of the *Votes and Proceedings* of the House of Commons of October 1.

Senator Benidickson: We are provided with it today, but we did not have it available on second reading debate, which is a deficiency.

The Chairman: But I could not control that.

Senator Benidickson: I shall speak about that on third reading.

Mr. Loomer: Fresh pork—are you speaking about dollars in terms of trade?

The Chairman: Yes, if your expression "terms of trade" covers volume.

Mr. Loomer: It covers dollars. That is item 704-1, on the basis of 1973 imports.

Senator Benidickson: Here it is called 8704-1. I am looking at page 6 of *Votes and Proceedings*.

Mr. Loomer: It is page 5. Are you looking at the *Votes and Proceedings* or the bill?

Senator Benidickson: At the *Votes and Proceedings*. I am looking at that because only by so doing can you see what the rates were prior to February 20, 1973.

Mr. Loomer: Then it is on page 3—item 704-1.

Senator Benidickson: Yes, I see it.

Mr. Loomer: Canned beef, 800-1, is fairly significant. Confectionery, item 2300-1; rice, 6300-1; onions, 8717-1—

Senator Benidickson: Let us take 2300-1, referred to on page 4 of the ways and means resolutions tabled on October 1. Are we proposing in this amending bill to drop a reduction in the most favoured nation tariff rate provided for in February 1973—a drop from 15 to 10 per cent?

Mr. Loomer: That is correct, senator. Bananas, 9800-1 is a big trade item.

Senator Benidickson: We do not grow bananas. Are we restoring the duty of 50 cents?

Mr. Loomer: No, sir; we are taking it off.

Senator Benidickson: As was proposed in February 1973? That is a continuation?

Mr. Loomer: Yes. Everything in the bill is a continuation of what was proposed in February 1973.

Senator Molson: What banana countries would there be under the general tariff, if any?

Mr. Loomer: I doubt whether there are any, senator.

Senator Walker: So all this was proposed before then?

Mr. Loomer: Yes. It was originally proposed in the budget of February 1973. As I mentioned earlier, this bill continues these tariff reductions, with certain exceptions that I referred to. It is continuing the same reductions.

Senator Benidickson: But, in some instances, going back to the pre-February 1973 rates?

Mr. Loomer: Yes, but those items do not appear in the bill.

Senator Benidickson: They are dropped?

Mr. Loomer: That is right.

The Chairman: If we are going to devote some time to an item by item consideration of these tariff items, the preferable course might be to appoint a small subcommittee to review and report back to the committee.

Senator Molson: That will take a week.

The Chairman: If it is the wish of the committee that an item-by-item study be undertaken, then I think the right way to do so would be to appoint a subcommittee.

Senator Benidickson: Mr. Chairman, I am no longer a member of this committee. I am simply trying to make the effect of this bill clear to members of the committee. It is not my intention to propose a detailed item-by-item examination, but if that is the wish of the committee, then it can do so.

Senator Walker: Surely these items have been gone over again and again by someone. Are we the committee to go into the individual items, or are we to use a broad scale in arriving at a decision on this matter? It seems odd that this committee should be asked to deal with all of these items individually.

The Chairman: The principle has been stated, and from that principle the committee can get almost full information as to what items are maintained or restored at the earlier rate and what items represent reductions. The question I put to Mr. Loomer related to the substantial consumer items that might be affected, and he was in the process of relating those to us. I take it that would not cover many items, Mr. Loomer.

Mr. Loomer: Mr. Chairman, there is about $600 million worth of trade covered by this bill. What it boils down to is the definition of "substantial." Where do we cut the figure off?

The Chairman: Perhaps the easiest way of going about it would be for you to go into them and then, if the committee feels it will take some time, we will stop and appoint a subcommittee. If you can give us the list, at least it will be on the record for members of the committee to read.

Mr. Loomer: Very well. Once we get out of the food sector a large item is films. This is covered under Item 18702-1 and represents about $15 million in trade terms. Next, we have pharmaceuticals and drugs. There are several items covered, the most important of which is item 22001-1. This is a very important item, covering almost $34 million worth of trade.

Senator Walker: And why has that been included?

Mr. Loomer: This came into effect in the fall of 1973, the purpose being to reduce the duties on what were considered to be important consumer products.

Senator Buckwold: They are not increased; they are simply continued?

Mr. Loomer: The reduction from 15 per cent to 10 per cent is continued, yes.

Senator Buckwold: Mr. Chairman, it seems to me that you were on the right track. This bill proposes changes in the tariffs of only a handful of items. Other than those few items, the tariff changes which came into effect in February 1973 and carried through until June 1974 will remain the same. As has already been indicated by Mr. Loomer, an increase is proposed in respect of fresh fruits and vegetables, and a few other items.

Mr. Loomer: Perhaps I could recapitulate what has gone before. In the fall of 1973 the minister introduced a number of temporary tariff reductions which were intended to run for one year. Prior to their expiry on February 19, 1974, he introduced a new ways and means motion which came into effect on February 20, 1974, continuing most of the reductions until June 30, 1974, except in the case of raw sugar and refined sugar, which will run to June 30, 1976. The effect of this bill is to pick up the period from February 20, 1974 to June 30, 1974, and to continue the reductions for that period of time with the exception, again, of sugar, which runs to June 30, 1976.

Senator Buckwold: The point I am trying to bring out is that this is really not a complicated bill.

Senator Molson: Let's get on with it.

Mr. Loomer: Item 32603-1 deals with containers and represents about $21 million worth of trade. There are two items covering spectacles and frames, 32700-1 and 32800-1, covering about $22 million worth of trade. There are a number of items covering large appliances, such as refrigerators, stoves, washers and dryers. These start at item 41505-1 and run through to 41545-1, with one exception.

Senator Walker: I do not want to hurry you, but perhaps you could tell us the significance of that and then go on.

Mr. Loomer: This represents a reduction of 5 per cent, senator, and I think the significance is the same in each case, that being to reduce the duties on consumer products, both in the food sector and the non-food sector.

Senator Walker: And you are highlighting what you consider to be the important items?

Mr. Loomer: Yes, in trade terms.

Senator Molson: Were there any representations made with regard to domestic appliances?

Mr. Loomer: There were, yes.

Senator Molson: Without going into details, can you tell us the gist of those representations?

Mr. Loomer: Simply that the industry would be adversely affected by these tariff reductions.

Senator Molson: Was there any suggestion that a loss of jobs would result?

Mr. Loomer: There could be a loss of jobs in the longer term, yes.

Senator Walker: What hearings were held prior to arriving at these reductions?

Mr. Loomer: The department received written representations from parties concerned and meetings were held with company officials to discuss any representations we received.

Senator Walker: And I take it the department investigated all these matters?

Mr. Loomer: Yes, we requested any information which we felt was pertinent.

The Chairman: Continue, Mr. Loomer.

Mr. Loomer: Replacement automotive parts are dealt with on page 22 of the ways and means motion, being item 43829-1. This item covers trade close to $200 million.

Senator Benidickson: And this is quite apart from the Autopact?

Mr. Loomer: Yes. These are replacement parts. They are not covered by the automotive products agreement. On page 23, bicycles, tariff item 43900-1 covers about $60 million worth of trade.

Senator Benidickson: This would continue a reduction of 10 per cent?

Mr. Loomer: Ten percentage points, under the MFN tariff. On page 25, item 44500-1, electric light fixtures; it covers about $34 million worth of trade. On page 27 there are two tariff items covering cameras, 46205-1 and 46210-1, covering about $29 million.

Senator Benidickson: Japan is a most favoured nation, I see.

Mr. Loomer: Yes.

Senator Desruisseaux: Is the United States included in the most favoured nations?

Mr. Loomer: Yes.

Senator Walker: What other countries are?

Mr. Loomer: I think all the major trading countries in the world are covered. Either they get the most favoured nation or they get the British preferential.

Senator Benidickson: Is Russia a most favoured nation?

Mr. Loomer: Yes.

Senator Desruisseaux: How long have they been a most favoured nation?

Mr. Loomer: Russia?

Senator Desruisseaux: Yes, approximately. A few years?

Mr. Loomer: More than a few years. I think it was the late 'fifties or early 'sixties. I am not sure of that.

Senator Beaubien: Is there any nation that is not most favoured?

Mr. Loomer: Yes, there are a few, but they do not have much in the way of trade.

The Chairman: Maybe that is why they are not most favoured.

Senator Walker: Mongolia? Never mind.

Mr. Loomer: East Germany is one.

Senator Flynn: Why?

The Chairman: That may be a policy question, and I do not think Mr. Loomer should answer it.

Mr. Loomer: On page 29 there are two items covering furniture, 51901-1 and 51902-1; the imports are close to $100 million.

Senator Benidickson: What are we doing there?

Mr. Loomer: On wooden furniture the rate was reduced from 20 per cent to 15 per cent; on metal furniture it went from 17½ per cent to 15 per cent. Most of these rates came down to 15 per cent.

Senator Benidickson: Why on page 29 of the *Votes and Proceedings* of the House of Commons on October 1 is item 61816-1 underlined?

Mr. Loomer: That was a new item introduced to restore the duties on what are called solid tires, which are used for industrial purposes, which are made by small Canadian manufacturers. It was included in the item for tires that appears above it. They were pulled out of that and the duties restored to their previous level.

The Chairman: You have a separate tariff item?

Mr. Loomer: It is a separate tariff item, but they would not be included in the general item for tariff.

Senator Benidickson: What is the volume or value of that item?

Mr. Loomer: I do not have a figure on that.

Senator Molson: With regard to items 51901-1 and 51902-1, are there not substantial exports of these things from Canada? Wooden furniture for example?

Mr. Loomer: Yes. I think they are specialized furniture, which is exported. There were exports of around $50 million.

Senator Molson: That is $50 million against $100 million.

The Chairman: Not bad.

Mr. Loomer: Another major item is 61815-1, tires and tubes, which covers trade of about $149 million. I think that accounts for the major items.

The Chairman: You also referred to schedule II, or schedules III and IV.

Mr. Loomer: Schedule II covers sugar and related products.

Senator Benidickson: Mr. Chairman, before we leave the consumer items in schedule I, I should like to ask a general question. Not much reference was made in the budget speech to tariff changes. On the other hand, when one quickly looks at the ways and means resolution presented with the budget of last Monday night, November 18, there are a great number of tariff items, which I have not had an opportunity to examine page by page. Are any or many of the items we are talking about in this bill also referred to in the new budget?

Mr. Loomer: Many of the items in this bill are re-introduced in that budget.

Senator Benidickson: In general, what are they proposing to do—to maintain rates, as in this bill, or to increase or reduce rates?

Mr. Loomer: For the ones that appear in the notice of ways and means motion the proposal is to re-introduce the reductions, generally speaking, that are in the bill before you now.

Senator Benidickson: And that have a temporary result in what we are doing today? They have an expiry date?

Mr. Loomer: The expiry date is June 30, 1976.

Senator Benidickson: In instances where these same items will again come before us as a result of the new budget, by and large they are extensions of the reductions?

Mr. Loomer: Yes. With some exceptions, that is right.

Senator Desruisseaux: I understand that a lot of briefs were presented making representations about the tariffs.

Mr. Loomer: Yes.

Senator Desruisseaux: Approximately how many of these briefs were considered favourably? What percentage?

Mr. Loomer: I think it relates to the items on which temporary reductions were not continued. The briefs we got on certain fresh fruits and vegetables, processed canned fruits, tires, which I mentioned, and citrus juices were considered favourably in terms of the bill before you, and the temporary reductions were not continued.

Senator Desruisseaux: There were recently some news items concerning sugar beets coming in from the United States at lower prices than farmers here were able to sell at—at least in Quebec, where I saw the news. Are you aware of that?

Mr. Loomer: No, senator, I am not aware of that. I think sugar beets are covered in a separate item in the tariff and are not included.

Senator Desruisseaux: My question is this: How does the anti-dumping legislation affect these items?

Mr. Loomer: That is a separate piece of legislation. This does not in any way affect any action that people might want to ask the government to take under the anti-dumping legislation, which is a separate piece of legislation. People usually go to the Department of National Revenue and lodge a complaint.

The Chairman: You have dealt with schedule II. What about schedules III and IV?

Mr. Loomer: Schedules III and IV provide the free entry for a two-year period of petroleum products, such as gasoline, heating oil and diesel fuel.

Senator Walker: What were they before?

Mr. Loomer: If you look at the ways and means motion, page 41, it shows the rates that were in effect prior to October 24, 1973.

Senator Benidickson: It may be, Mr. Loomer, that you have already explained this. Why would October 24, 1975 be underlined? Was it an extension of an item?

Mr. Loomer: That was an extension of an item that was due to run out on June 30, 1974 and it is being extended to the same period as the rest of the petroleum items.

Senator Benidickson: Is it eliminating any?

Mr. Loomer: On the products described in schedules III and IV.

Senator Walker: There would not be any petroleum fuel oil coming in from Britain, would there?

Mr. Loomer: There might be some coming in from some of the other Commonwealth countries, like Trinidad.

Senator Walker: But it is free right across the board?

Mr. Loomer: Yes.

Senator Walker: As a result of an earlier budget. It is just an extension of elimination of any duty.

Mr. Loomer: No, this relates back to that ways and means motion, that you referred to, that was tabled on October 23, 1973.

Senator Benidickson: Which is a relatively new practice. Not long ago, we seldom had a ways and means resolution that was not attached to a formal budget presentation. But in the last two years, senators will recognize, by the references that have been made this morning, that quite a number of ways and means resolutions have been presented in the other place, unrelated and on different dates than when formal budgets were presented by the Minister of Finance. This is a new practice, as far as I know.

The Chairman: Freedom of Parliament, I suppose, senator. Now, honourable senators, this would appear to take us through the bill.

Senator Buckwold: Mr. Chairman, I am prepared to move approval of the bill without amendment.

The Chairman: Are all honourable senators in favour?

Hon. Senators: Agreed.

The Chairman: Those to the contrary? There is none. The bill will be reported without amendment.

Thank you very much, Mr. Loomer for coming here today.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 7

WEDNESDAY, NOVEMBER 20, 1974

Complete Proceedings on Bill S-17, intituled:

"An Act to amend the Explosives Act"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hays
Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

Ex officio members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, November 19, 1974:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Barrow, seconded by the Honourable Senator Godfrey, for the second reading of the Bill S-17, intituled: "An Act to amend the Explosives Act".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Barrow moved, seconded by the Honourable Senator Riley, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, November 20, 1974.
(8)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10.20 a.m. to consider the following:

Bill S-17 "An Act to amend the Explosives Act"

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Blois, Buckwold, Cook, Desruisseaux, Flynn, Gélinas, Haig, Laird, Macnaughton, McIlraith, Molson and Walker. (15)

Present but not of the Committee: The Honourable Senators Benidickson, Everett and Manning. (3)

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

WITNESS:

Department of Energy, Mines and Resources:

Mr. E. J. Fraser, Chief,
Explosives Division.

Following discussion, and upon motion of the Honourable Senator Beaubien it was *Resolved* to report the said Bill without amendment.

At 10.45 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

November 20, 1974.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-17, intituled: "An Act to amend the Explosives Act" has, in obedience to the order of reference of Tuesday, November 19, 1974, examined the said Bill and now reports the same without amendment.

Respectfully submitted

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 20, 1974.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-17, to amend the Explosives Act, met this day at 10.15 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have Mr. Fraser here. Mr. Fraser, do you have an opening statement?

Mr. E. J. Fraser, Chief, Explosives Division, Department of Energy, Mines and Resources: No, sir.

The Chairman: Would you tell us the scheme of the bill, the reason for it and what it does?

Mr. Fraser: Mr. Chairman and honourable senators, the purpose of the amendments is three-fold. The act has not been amended since 1954 and there are several housekeeping changes which are required to modernize the legislation. There are certain changes which are required to control more effectively the distribution of explosives. Historically, the act has been employed strictly to provide public safety. With the proposed changes, particularly those dealing with purchase and possession, we hope to provide more effective controls over the safety and security of explosives. It is proposed also to seek authority to regulate the use of fireworks and explosives in certain blasting operations that are under the jurisdiction of the Parliament of Canada. Do you wish me to go over each change?

The Chairman: No. You can tell us generally in what direction the amendments go. I notice that quite a number of them are in the penalty provisions.

Senator Molson: Right at the beginning, the term "explosive" is redefined. Is that a change?

Mr. Fraser: Yes. The change in the definition is not to change the intent but to remove some of the obsolete terms from the old definition, such as "gelignite" and "fulminates of mercury" which are no longer applicable. In the explanatory notes printed on the opposite page to the new text, you will notice that the definition is about the same. The definition up to now has been that the word "explosive" included "every other substance made, manufactured or used with a view to produce a violent effect by explosion, or a pyrotechnic effect, and includes . . ." certain examples. Previously we used such examples as railway track torpedoes, gelignite, blasting gelatine, gun cotton, fulminates of mercury. These have been replaced. "Fulminates of mercury" has been replaced by "lead azide". Gelignite and some of these others have been replaced by the generic term "dynamite" and are included in the same category. But the intent of the definition is unchanged.

Senator Molson: Thank you.

The Chairman: Dealing with this in the way I suggested, you do have a new definition of "explosive", updating the definition. What I was asking you was the direction of the other amendments. It appeared to me that a substantial number of them are in the direction of penalties.

Mr. Fraser: There is a general provision for increasing the penalties. Under the present act the penalties have been in existence since the original act was brought into force in about 1920. The penalties are minimal under the present act and this is just to bring them up to date.

The Chairman: What, if any, prosecutions have you had under this Explosives Act?

Mr. Fraser: So far this year we have had 15 prosecutions. Of those, 4 are outstanding and 3 have been dismissed. The total fines were $475. Many of the fines levied were in the order of $10 or $25, and many people feel that they would prefer to violate the act and not provide safety features.

The Chairman: So your first plan is to translate the dollars in the earlier penalties provision to bring them up to date, having regard to the reduction in the value of the dollar, is that right?

Mr. Fraser: Yes.

The Chairman: Have you increased the imprisonment provisions?

Mr. Fraser: No. I think they are the same. It is not our intention to employ the act to combat crime. That is for the Criminal Code. The Explosives Act is an act for public safety; it is designed to ensure safety in manufacture, storage and transportation. All explosives either imported into or manufactured in Canada must be authorized and subjected to exacting tests and specifications to ensure that they are safe and reliable for transport and use here.

The Chairman: Yes, but what about the broader aspects of distribution? By that I mean what we might call unauthorized distribution.

Mr. Fraser: We are seeking an amendment in paragraph 4(n) to expand our control over the sale of explosives to include the purchases and possession of explosives. At the present time we have very adequate controls over the manufacturer and vendor, but we have little control over the purchaser of explosives, and we wish to extend our controls into this area to ensure that the person who purchases explosives knows that he has a responsibility to safeguard these explosives and keep them under reasonable control.

The Chairman: When you say you are seeking an amendment, what do you mean? Do I understand you to say that you are proposing something further than is in the bill now?

Mr. Fraser: Oh, no, sir; it is in the bill now.

Senator Macnaughton: Mr. Chairman, I have a simple question, but it could be explosive! Clause 11 on page 11 says:

> Sections 26 and 27 of the said Act are repealed and the following substituted therefor:
>
> "26. The powers conferred upon the Minister by sections 6, 9, 11, 12 and subsection 25(2) may be exercised by any person designated by the Minister."

Ministerial discretion on a plane of designation is pretty wide. Does this mean that the minister must personally authorize something in writing, designating A, B or C to exercise his powers? Or is it really giving power to the deputy minister and all the way down the line?

Mr. Fraser: Actually, the minister delegates responsibility under sections 6, 9, 11, 12 and 25(2) to certain people such as the chief inspector of explosives, and these have to do mainly with the issuing of licences for the storage, importation and transportation of explosives.

The Chairman: Senator Macnaughton, the only amendment there is to add another section to the designating authority of the minister. That is section 12, which gives the minister the power to order, or delegate some person to order, a cessation of use, where there is a special danger; but the power to designate has been in the act fo some considerable time.

Senator Macnaughton: I certainly do not object to the power to designate, but it is the possible improper or, shall we say, wide use of the discretion that I am concerned with—and this has no reference to this bill.

The Chairman: The too wide discretion?

Senator Macnaughton: The too wide, yes. I suggest that we should watch it in the future.

The Chairman: I would think that here, where the safety of the public is the important factor, the minister may not be able to go to all these places and do all these things himself. He may have to act very quickly, however, and, therefore, under these sections he designates some person to do what he has authority to do.

Senator Macnaughton: I do not mind at all, so long as there is some control.

Senator Molson: Mr. Chairman, is there any overlap between the federal jurisdiction and the provincial jurisdiction with regard to licensing of storages or magazines or the handling of explosives or anything else?

Mr. Fraser: This act does not apply to magazines or explosives under the control of the Minister of National Defence; nor does it apply to a magazine on a mine or quarrie if it is covered by adequate legislation of a province for the control of explosives.

Senator Molson: There is such legislation?

Mr. Fraser: We exclude from our definition of a magazine any place on a mine or quarrie that stores explosives for the mine or quarrie which is under provincial jurisdiction, so there is no duplication there.

The Chairman: If a magazine is not under provincial authority, then you have the authority under this act.

Mr. Fraser: That is quite true.

Senator Buckwold: Perhaps you could expand a little on the relationship of this act to the military, right from the issuing of a contract to provide explosives for military purposes under the Department of National Defence. Are you in control of the factory in so far as this act is concerned?

Mr. Fraser: Yes, sir.

Senator Buckwold: Until it moves into the magazine stage?

Mr. Fraser: Until it comes under the control of the Minister of National Defence it is our responsibility.

Senator Buckwold: What type of supervision do you have over the manufacture of fireworks for public retail sale? Do you test all these products? Do you have any control over what goes into them?

The Chairman: I think that comes under the Hazardous Products Act, does it not?

Mr. Fraser: No, sir, it comes under the federal Explosives Act. Fireworks are included in this act.

Senator Buckwold: I should like to know the kind of supervision that is involved here. For example, if a fireworks manufacturer decides that he has a new "school house" to burn down—you recall the old ones we used to have,—does he have to submit that new design to you first for some kind of approval or do you have any other form of control over the production of that product?

Mr. Fraser: Yes, the control over fireworks is the same as the control over any explosives. Anybody who wishes to manufacture an explosive in Canada or import an explosive into Canada must make application to the chief inspector for permission. He must submit a complete, detailed composition, a statement of composition, forward samples which we test and, if the product meets our specifications, then we recommend this to the minister as an authorized explosive. Every firework item is tested for design, composition, safety and reliability, as are all ammunition, blasting explosives, detonators and blasting accessories. We test all these. We have the same control.

Senator Buckwold: Is there a continuing test, then? Once you approve a product for import, for example, and it is brought in year after year, do you check the shipments as they come in?

Mr. Fraser: We are not a quality assurance laboratory. We try to establish that the product is manufactured to a good, safe standard. We do what we call a certain amount of "routine run-of-work tests." If our inspectors are at CIL, for example, on the dynamite line, they will take samples and we will submit those to what we call our "run-of-work tests." The same is true of explosive entering the country. Occasionally, we will take samples to ensure that they are up to the previous standards or up to the standards they met when they were originally authorized.

Senator Buckwold: Do you have any problems with fireworks, as we know them?

Mr. Fraser: We have had to reject quite a number over the years, yes.

Senator Buckwold: Would those be mostly imported fireworks?

Mr. Fraser: Mostly imported, I would say, yes.

Senator Walker: In other words, you make spot checks here and there after originally approving of the article.

Mr. Fraser: Yes, sir. We have a very small staff, and we cannot do quality control work, but we do spot checks.

The Chairman: Are there any other questions?

Senator Barrow: Mr. Chairman, in the debate on second reading Senator Macdonald had a number of, not questions, but, rather, reservations. I see he is not here today. One of those reservations, concerned the definition of "magazine." He wanted to know what that was. Another one was in connection with accidents, and his concern was as to who was responsible for investigating them. The third one was in connection with section 21(2). I will read the section.

> No person shall be convicted under this section of having an explosive in his possession if he establishes that he manufactured, imported or purchased the explosive in accordance with the requirements of this Act and the regulations.

He wanted to know exactly what was the portent of that particular section. Mr. Fraser might just expand on those three points.

Mr. Fraser: I believe that Senator Macdonald was concerned that section 21(2) was grounds for prosecution, whereas it is really for the benefit of the accused. It provides him with an ironclad defence. It is not grounds for prosecution.

Mr. Chairman, could we ask our legal counsel from the department to speak to that point, since it is a legal matter?

The Chairman: Are you satisfied, Senator Barrow, with that?

Senator Barrow: Yes, I think perhaps if the legal counsel of the department were to speak to that it would be satisfactory.

Mr. James Lyon, Senior Legal Adviser, Department of Energy, Mines and Resources: Honourable senators, the department shares the concern which the senator who is not present had expressed. The section referred to actually draws attention to a particular stuation, and in drawing attention to it may have led to a misinterpretation. The section was intended to have quite the opposite effect from the one which is the subject of the senator's concern. This section provides a defence, not grounds for prosecution. The offence is contained in section 21(1), in more general terms than are used in section 21(2). This provides to an accused who has in his possession certain explosives, an ironclad defence, if he can demonstrate that he manufactured, imported or purchased them in accordance with the act and the regulations.

The Chairman: I would think that whether you had this provision in the act or not it would be a good defence to any charge of having explosives in your possession if you said, "I manufactured, imported or purchased the explosives in accordance with the requirements of this act and regulations." The only issue would be the question of fact: Did you or did you not?

Mr. Lyon: It would be.

The Chairman: And that still applies.

Mr. Lyon: Yes. I did not draft this particular section, but I understand part of the concern was that in some other context of law possession itself has attracted much attention of late years, and this is to provide a special protection in that case.

The Chairman: I do not think it is objectionable. I always like to see things that we believe are clear made clearer.

Mr. Lyon: We may be going beyond what is necessary, but, on the other hand, it is probably better to do it this way.

The Chairman: You are emphasizing, or underlining the positive.

Mr. Lyon: Yes, Mr. Chairman.

The Chairman: Any other questions? Shall I report the bill without amendment?

Senator Barrow: Could we have an answer to those first two questions I asked, concerning the definition of "magazine" and also concerning who has the responsibility of investigating accidents? Those are two other questions that Senator Macdonald raised.

Mr. Fraser: I was not just clear on Senator Macdonald's question on the magazines, but he seemed to allude to the change that we are asking for under the section which refers to the exemption of a magazine on a mining property. The change we are asking for here is to be found on page 2, clause 1.(4)(a). The new paragraph (a) will read as follows:

> (a) a place where an explosive is kept or stored exclusively for use at or in a mine or quarry in a province in which provision is made by the law of that province for efficient inspection and control of explosives stored and used at or in mines and quarries,

The important point here is that the explosives stored are exclusively for the mine or quarry, and that they are under controls of security and safety comparable to the federal standards.

Senator Molson: This is an exception to the definition.

Mr. Fraser: This is an exception to our definition of a magazine.

Senator Molson: A magazine, under this section that you read out, is not a magazine according to this act.

Mr. Fraser: If it complies with those requirements, it is not a magazine, and it remains under provincial control.

The Chairman: Any other questions, Senator Barrow?

Senator Barrow: The responsibility for the investigation of accidents.

Mr. Fraser: Yes. The responsibility for the investigation of accidents lies with the minister. The minister investigates all accidents relating to manufacture, transportation by road, or storage on other than mining properties. The minister does not investigate any accidents that involve national defence explosives that are under the control of the Minister of National Defence, nor accidents on a mine underground, or otherwise, unless we are asked to participate in that investigation. That is an investigation that is under provincial jurisdiction.

The Chairman: Any other questions? Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Chairman: Thank you, Mr. Fraser.

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FIRST SESSION—THIRTIETH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 8

WEDNESDAY, NOVEMBER 20, 1974

Fourth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

28349—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hays
Beaubien	Laing
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

28349—2

Minutes of Proceedings

Wednesday, November 20, 1974.
(9)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10.45 a.m. to further consider the following:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto".

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Blois, Buckwold, Cook, Desruisseaux, Flynn, Gélinas, Haig, Laird, Macnaughton, McIlraith, Molson and Walker. (15)

Present but not of the Committee: The Honourable Senators Benidickson, Everett and Manning. (3)

In attendance: E. Russell Hopkins, Law Clerk and Parliamentary Counsel and C. A. Poissant, C.A., Advisor.

WITNESSES:

The Canadian Real Estate Association:

Mr. Albert Fish, Past President,
Chairman, Competition Policy Committee;

Mr. William Allan, Immediate Past President
of the Toronto Real Estate Board;

Mr. J. T. Blair Jackson,
Executive Vice President;

Mr. B. S. Onyschuk,
Legal Counsel.

Canadian Amateur Hockey Association:

Mr. Gordon W. Juckes,
Executive Director;

Mr. Garry E. Schreider,
Legal Counsel;

Mr. Larry Skinner,
Director of Communications.

Other Amateur Sports were represented by the following:

Mr. John Russell,
Director,
Sports Federation of Canada;

Mr. Dave Fishman,
Canadian Lacrosse Association;

Mr. Lawrie Johns,
Canadian Federation of Provincial School Athletics;

Mr. Tom Beynon,
Legal Counsel,
Sports Federation of Canada;

Mr. Ron Stewart,
National Sport and Recreation Centre;

Mr. Andy Shaw,
National Sport and Recreation Centre;

Mr. Julian Carroll,
Canadian Federation of Amateur Aquatics;

Mrs. Jo-ann Lawson,
Executive-Director,
Sports Federation of Canada;

Mr. Keith Nesbitt,
Canadian Ski Association;

Mr. Eric Donegani,
Canadian Field Hockey Council;

Mrs. Josie Thompkins,
Canadian Table Tennis Association;

Mr. Ian Stoddart,
Canadian Volleyball Association;

Mr. Al Tummins,
Canadian Amateur Boxing Association;

Mr. G. Anderson,
Canadian Amateur Boxing Association;

Mr. Al Price,
Canadian Federation of Amateur Oarsmen;

Mr. Ralph Reilly,
Canadian Canoe Association;

Mr. Eric King,
Canadian Soccer Association;

Mr. Tom Kinsman,
Canadian Gymnastics Federation;

Mr. Terry Phillips,
Canadian Yachting Association;

Mr. Barry O'Brien,
Canadian Lawn Tennis Association;

Mr. John Restivo,
Canadian Amateur Basketball Association;

Mr. Bud Fraser,
Sport Canada.

At 12.35 p.m. the Committee adjourned until Wednesday, November 27, 1974 at 9.30 a.m.

ATTEST:

Frank A. Jackson,

Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 20, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 10.45 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: We now come to the continuation of our hearing on the competition bill. As I told you earlier, we have two groups here today to make submissions. In the order of receipt of their requests and their briefs, the Canadian Real Estate Association will be heard first, and then the Canadian Amateur Hockey Association, together with those who are joining in their presentation.

For the Canadian Real Estate Association we have Mr. Fish, who is the Past President, and Chairman of the Policy Committee. Mr. Fish, I take it you are going to make the opening statement.

Mr. Albert Fish, Past President, Chairman, Competition Policy Committee, Canadian Real Estate Association: Yes, Mr. Chairman.

The Chairman: You have with you Mr. William Allan, Mr. Blair Jackson, and Mr. Onyschuk. Mr. Fish, would you care to make your opening statement?

Mr. Fish: Honourable senators, we appreciate the opportunity to appear before you again.

As you will recall, we appeared before you on May 8, which was the day that Parliament was dissolved. The main point of discussion at that time was the method of establishing commission schedules in Canada. Today we would like to concentrate, with your permission, on the other parts of the proposed legislation.

As stated in the letter to you, Mr. Chairman, fixed or minimum commissions are not now an issue with the Canadian Real Estate Association. We have set a policy recommending to all real estate boards in Canada that they remove from their by-laws any reference to commission or fee schedules, but I should like to point out that some of our boards and some of our general members do not share that opinion and are convinced that the elimination of fixed or minimum commissions will seriously affect the operation of the multiple listing system and eventually, in the long run, will not be in the public interest.

So, honourable senators, having said that about commissions, and while there are many areas of concern—such as the exclusive dealing section and selling above the advertised price, as we have set out in our brief and as I think we discussed on May 8—the primary concern of organized real estate in Canada is to be found in two areas. The first is the operation and continuance of the multiple listing system, and we have documented this in our brief and the second is the continuance in operation of our provincial associations and real estate boards in the areas of codes of ethics, standards and business practice, discipline procedures, arbitration procedures, educational standards and so on.

The real estate industry takes upon itself the task of self-regulation but, unlike the other major professions, there is no act of any provincial or federal government which has put into law the real estate boards and associations and their self-regulation procedures. The result of this is that while other professions and some service industries can continue to operate under this legislation, because they have provincial acts under which they operate, we do not have legislation covering real estate and covering our organization code of ethics, educational requirements, et cetera.

So, in regard to the multiple listing system, we have set out briefly its operation in our written submission, but in order for MLS to operate it must have fixed rules of procedure. For example, it must be able to regulate the split between the listing broker and the selling broker; it must have adherence to a set of rules of procedure, methods of distribution of listings, arbitration procedures between members and so on.

It is our submission that all of these would be in contravention of section 32.(1)(a), (c) and (d), because it could be interpreted as restricting competitive behaviour of people in the industry and therefore restricting or limiting competition unduly.

Senator Everett: Mr. Chairman, the brief refers to section 16(1)(d).

Mr. Fish: That is a typographical error because it came from the original Bill C-256.

Senator Everett: So in fact you are referring to section 32.

Mr. Fish: It is in the criminal clause which is section 32.

Senator Everett: You referred to two specific parts.

Mr. Fish: I referred to section 32(1)(a), (c) and (d).

Senator Laird: Where is this in your brief?

Mr. B. S. Onyschuk, Legal Counsel, The Canadian Real Estate Association: I think, Mr. Chairman, the error occurred on page 13, at the end of the first paragraph. That is a carry-over from the first competition bill. Now it should read section 32 instead of section 16.

Mr. Fish: This has been recently retyped and it is now definitely called 32 which is similar to the original section 16 in Bill C-256.

Regarding real estate boards, some real estate boards have stiffer membership requirements than the provin-

cial licencing bodies who have jurisdiction over real estate brokers and sales people. Historically the real estate boards have had higher standards for membership and have constantly prodded the provinces to upgrade standards for licensing to protect the consuming public.

To give you some examples, at the present time in Newfoundland we are proposing educational requirements which the industry itself has started. They were not set up by the provincial government, but we have started them. Furthermore, in Ontario, it was at our request in 1931 that the Real Estate and Business Brokers Act was passed. As a further example, at the present time there are no educational standard requirements to get a licence in Manitoba generally, but in Winnipeg, for the real estate board, you must attain certain educational requirements. So, it is obvious that in certain areas in Canada the requirements to join a real estate board are higher than the licensing standards.

The real estate boards in Canada also have what they call the Canadian Real Estate Board Foundation and we have set up chairs in universities in British Columbia and Ontario. We have a $500,000 fund now in Ontario, the interest from which is used for conducting seminars and other matters in the public interest and to make inquiries, and all of this is set out in the Canadian Real Estate Board Foundation as being in the public interest.

We have various educational courses that we are carrying out at community colleges with no cost to government, real estate information courses for the general public, and the questions we ask are: Are ethics and standards of business practice wrong? Are educational requirements wrong? Are disciplinary procedures and arbitration procedures wrong? Because what I have said about education applies to all these other areas.

We respectfully submit that we operate in the public interest, but under section 32(3) it says: The exemptions under subsection (2) do not apply and a conspiracy exists if anybody restricts or is likely to restrict any person—et cetera. So, it is our opinion that this legislation would require the complete restructuring of organized real estate in Canada and could possibly mean the demise of real estate boards and the multiple listing system.

If I may give one further point as an example, in some areas in Canada where you must have a multiple listing system to compete in residential, this legislation, in our opinion, would probably say that anybody outside the real estate board should have access to the multiple listing system without necessarily having to join the real estate board. In our opinion that would then destroy the things that we have built up in organized real estate for the protection of the public.

So, the dilemma we have is how to operate, as we have been operating, in our boards and associations under this legislation when we do not have any provincial legislation to cover us.

That, Mr. Chairman, is our opening statement, and now we would be pleased to answer any questions.

Senator Walker: You said something about commissions. Whatever commissions you have suggested have been approved by the overall executive of your association, is that correct?

Mr. Fish: The commissions are not set by the Canadian Real Estate Association; they are set by the individual boards and the rates vary across the country.

The Chairman: When you say "individual boards," what do you mean?

Mr. Fish: Real estate boards. In other words, the Calgary Real Estate Board sets the commission for their area, and Edmonton does the same for their area, but it does not necessarily mean it is the same rate.

Senator Walker: Well, your preamble seems to suggest that there is a lot of dissatisfaction.

Mr. Fish: No, what we have said is that the Canadian Real Estate Association, having given a lot of thought to this and a lot of consideration to fixed or minimum commissions, has recommended to real estate boards that they remove any reference to fixed or minimum commissions or fees from their bylaws. In other words, let the commission float.

Senator Walker: To any extent, up or down?

Mr. Fish: To any extent, up or down, with no restrictions.

Senator Walker: Well, when you are making all the money you are—enough to endow scholarships, et cetera—if you allow it to float, then naturally having regard to the nature of the situation, it floats up, does it not?

Mr. Fish: I would have to say that that would depend on the economics of the real estate market at any particular time. There definitely will be a floating situation depending on the market.

The Chairman: I think the marketplace would have a tremendous influence.

Mr. Fish: Yes.

The Chairman: The system in the marketplace seems to be the background of the competition bill. Now, to have things float, when times are good and sales are quickly made, when there is a great demand, might not be a good time for the commission scales to be raised. I suppose, however, it could be said to be the influence of the marketplace and if selling is more difficult, obviously the commission may have to be less, or sellers will endeavour to sell their property themselves.

Mr. Fish: Mr. Chairman, if I may make a comment, in my opinion it would be exactly the opposite. If the market is very good, then the commission would become lower, but if the market is tougher to sell, then the owner will probably offer to pay a premium commission in order to sell on this tough market. That is our opinion, anyway, Mr. Chairman.

The Chairman: That seems hard to relate to human nature as we know it to be.

Senator Laird: The board you represent frowns on a fixed rate of commission, as I understand it.

Mr. Fish: No, the Canadian Real Estate Association, as a national body, has said that it does not subscribe to

the theory of fixed or minimum commissions and has so recommended to real estate boards.

Senator Laird: In other words, you consider it should be implemented area by area.

Mr. Fish: No, we say it should float.

Senator Laird: Yes, but let us assume for the moment that it will remain under the present system of fixed rates, would you say then that it should be done area by area? Does it not vary between such locations as Toronto, Calgary and Windsor?

Mr. Fish: Yes, it varies now.

Mr. Onyschuk: Mr. Chairman, if I may add to that in order to answer the senator's question a little more fully, the idea is that even within an area, or under one board, commission should be changed, or can be different for one broker as opposed to another broker. The theory has always been, and it has been the same theory that lawyers and doctors have espoused, that where there is a fixed or suggested tariff the idea is to prevent gouging on the one side and undercutting on the other. It is because of that that the real estate industry, as it developed into a regulated body, adopted that theory.

Now, because of the philosophy of the competition bill and because it is something that the government of the day sees as a good thing and frowns upon any type of fixed or suggested tariff system, the association has relented on that point. They have agreed to go along with such a policy. Therefore there was never a fixed or suggested commission throughout Canada. There were commissions within local boards which were fixed, and the association has recommended to each of those boards that they withdraw any suggested or fixed tariffs even within their locale, so any individual broker can charge higher, or lesser, as he wishes.

Senator Laird: The law profession, for example, maintains a tariff which varies from community to community.

Mr. Fish: Yes.

Senator Laird: Might I suggest that in the absence of some type of system similar to that your industry would develop into something chaotic?

Mr. Onyschuk: That is exactly why certain of the boards and I, for example, fear that some type of suggested tariff, or tariff, is a good thing. To illustrate, an example occurred in the United States because of prosecutions against real estate boards specifically. They have lifted all fixed commission schedules, with the result that in certain cities the rates have gone as high as 10 per cent. In my opinion, that is contrary to the public interest.

Senator Laird: Also, as pointed out by the other witness, it amounts to undercutting and all that sort of thing.

Mr. Fish: It could result in that.

Senator Laird: Yes, which would create chaos.

Mr. Fish: You see, at the present time the minimum or fixed commission set by real estate boards really becomes a maximum and a guide to the general public. However, if everything were to float, there would be no guide for the public.

Senator Laird: Yes, precisely.

Mr. J. T. Blair Jackson, Executive Vice-President, The Canadian Real Estate Association: Mr. Chairman, the industry feels that it may not be proper to impose a mandatory, fixed commission rate and that, as a responsible trade industry, it as a whole should have mechanics to indicate to the public what are considered to be reasonable rates for particular types of services. In the absence of suggestion as to what is considered a reasonable or going rate, the individual practitioners could attempt to achieve any kind of rate. The public generally would then have no point of reference from which to attempt to determine whether their rate was above or below the going rate for greater or lesser services.

The Chairman: It would become a matter of bargaining in connection with each deal, would it not?

Mr. Fish: That is correct.

Mr. Jackson: Well, there is still a bargaining factor, but the point is that consumers should know when bargaining whether they are bargaining above or below the going rate. If a broker or a salesman seeks a higher rate because he is offering more services, the property is more difficult of access, or for a variety of reasons, he at least knows what that is, and conversely if it works in reverse.

The Chairman: Except that at the end of the road, when a real estate agent is engaged to sell a house, there is a commission form which is signed.

Mr. Jackson: No; there is a listing form which is signed. Contained in that listing agreement is a place for insertion of the rate of commission on successful consummation of the sale.

The Chairman: So that the man who makes that listing arrangement is in a position to say that the commission is excessive.

Mr. Jackson: That is correct; he is not compelled to sign the form or buy the property at all. So the engaging of a real estate salesman in itself is an optional process to begin with.

Senator Walker: Have important local boards so far allowed this to float?

Mr. Fish: Yes.

Senator Walker: Where are they?

Mr. Fish: About 25 per cent of our boards at the present time are on floating commission.

Senator Walker: How is it worked out?

Mr. Fish: I can name one or two: Thunder Bay, Sudbury, Barrie, Kelowna, Surrey, Victoria, the Okanagan Valley. It was worked out so that it stayed probably about the same.

Mr. Jackson: Mr. Chairman, it would be fair to suggest that these have all been fairly recent developments and the real estate market in the last six months, when most of these occurred, has not been as buoyant as it otherwise might have been. We would have to know what the effect might be on the floating process, because it has been a rather dull real estate market within that period. Very little has changed, so there has not been any movement.

Senator Walker: Has this been tried out in any large centres?

Mr. Fish: Two or three are in the process now.

The Chairman: Mr. Fish, how will your multiple listing plan work with a floating rate of commission?

Mr. Fish: It is obvious to us that if a listing salesman takes a listing, let us say for argument's sake the going rate has been 5 per cent, this is listed at 2 per cent on the MLS system and there are 20 other houses of the same type on the market at 5 per cent, I do not believe I have to tell you what would happen to the 2 per cent listing. We feel, therefore, that the economics of the real estate business and the economics of the market will eventually level off the rate in an area. The concern of the real estate boards, however, is that they feel that eventually, with all these other factors such as our ethics procedures and education requirements, which we feel are affected by the bill very seriously, over-all these would probably have a disastrous effect on our MLS system, which we feel is still the best method of selling real estate in Canada; that it would seriously affect the market and not be in the public interest.

The Chairman: We had a request at an earlier hearing that the services performed by the real estate people should be exempt from the provisions of the bill.

Mr. Onyschuk: The conundrum we have is that nowhere in any legislation is there sanction given to the existence of a real estate board or real estate association, and they have, over the past 65 or 70 years, caused to have created a self-policing, self-regulating industry, where they have established and imposed on their members educational standards of a certain criteria. In certain provinces they can be considerably higher than the licensing requirements of those provinces. For example, the Ontario Standards are higher than those in Newfoundland or Nova Scotia. There are ethics, and disciplinary procedures are imposed on members, primarily for unethical practices dealing with the consuming public; and there is the MLS system, which is really a mini-stock exchange. It must operate under rules and regulations which are codified, set out in actual rules and regulations that apply to every member who cooperates on the MLS system. There must be those rules or regulations or the system could not work, just as a stock exchange could not work without fixed rules and regulations.

The Chairman: But you have that system working now.

Mr. Onyschuk: We have.

The Chairman: If this industry, or this service, is exempt from the provisions of the bill, why would it not continue to work?

Mr. Onyschuk: It would continue to work. My concern, and I think the pragmatic question that my clients ask, is whether it is reasonable to consider that the Parliament of Canada will exempt one industry without having to exempt a whole slew of others on other grounds.

The Chairman: Let us think about that.

Senator Everett: Mr. Chairman, dealing with this question of exemption, and following on from the recommendations of the association that they do not fix commissions, I wonder if Mr. Fish could tell us how sections 32(1)(*a*), (*b*), (*c*), and (*d*), in his judgment, are contravened by the operation of the present real estate boards. If you like, I will read the paragraphs:

> (*a*) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
>
> (*b*) to prevent, limit or lessen, unduly the manufacture or production of a product, or to enhance unreasonably the price thereof,

And:

> (*d*) to otherwise restrain or injure competiiton unduly.

I wonder if you could tell me what practices the real estate board operates today that "restrain or injure competition unduly".

Mr. Fish: I could do that, but I think it would be better to let our legal counsel answer the question. He can do it a little clearer.

Mr. Onyschuk: The first thing to remember, of course, is that you can substitute the word "service" for the word "product." For example, in subparagraph (a) "to limit unduly the facilities" of a service. Following from that, if you cannot limit the facilities of the service—entrance requirements, for example, into a board or an industry are anti-competitive. If you go to the theory...

Senator Everett: Let us accept that we have a service and there are entrance requirements or entrance restrictions. What entrance restrictions do you impose on a citizen who wants to sell real estate?

Mr. Onyschuk: That he be properly qualified from an educational point of view, which in many provinces is higher than the provincial licensing standard.

Senator Everett: Does that mean that he cannot get a licence?

Mr. Onyschuk: No. He can get a provincial licence. For example, in Manitoba the only provincial requirement is that a man sit down, write a two-page exam, and if he passes that two-page exam he gets a provincial licence. He can then practise real estate in the province. On the other hand, that man cannot become a member of the Real estate board in Winnipeg, for example, unless he has completed courses 1 and 2, which are sponsored across Canada by the various provincial associations under

the auspices of the Canadian board. Course 1, for example, is a basic six-months course for salesmen, which teaches them everything from law to economics—business dealings, ethics, all the various things that the industry feels the man should know in order to practise his calling. He does not have to go through that...

Senator Everett: Let us assume that he does not go through it, that he has his licence. What restrictions does the Winnipeg Real Estate Board apply to him that could come under the heading "restrain or injure competition unduly"? What is it that they do to him?

Mr. Onyschuk: They would not do anything to him, other than not permit him to be a member unless he completed this real estate educational course.

Senator Everett: If he is not a member, what does that do?

Mr. Onyschuk: If he is not a member of the board, he cannot partake of the MLS service. The MLS service has considerable economic advantages to a member and disadvantages to a person who is not a member.

Senator Everett: Is that the only restriction on him, that he cannot participate in the MLS?

Mr. Onyschuk: If you are not part of the board or the association, you cannot do anything that the board or association does...

Senator Everett: What restraints do you apply against this man?

Mr. Onyschuk: We do not apply any restraints against him.

Mr. Jackson: There are some peripheral advantages, but in terms of hard economic advantages...

Senator Everett: What are the advantages?

Mr. Jackson: The board operates rather like a club in some respects. It is a process of being able to consult or communicate with people in the industry, exchange experiences, ideas, attend seminars, and that sort of thing. Boards bring in speakers and run training sessions. In this area they usually represent the real estate industry at the local level in terms of zoning, community development, and so on. It provides a spokesman for those in the industry. If a man is not a board member, he is more remotely connected, if connected at all, with others in the same industry, and operating in isolation probably has some effect on his ability to function and talk at economic levels.

Senator Everett: Are you suggesting that there would be a conspiracy of members of the board to prevent him from operating in the business, apart from the MLS?

Mr. Jackson: No. There are some people who prefer, for a variety of reasons, not to become involved in the board membership. They find it in their own interests...

Senator Everett: So the board would be doing nothing, in your judgment, which would contravene subparagraphs (a), (b) and (d), apart from the MLS?

Mr. Jackson: Nothing positive. It would have only a negative effect—some things that a member who is not a member would not be able to...

Senator Everett: Do not forget that this is a criminal statute. I am trying to determine whether or not there is anything that you are doing that contravenes the amendments proposed here, or that restricts a person—subparagraph (d)—from entering into or expanding a business in a trade or industry.

Mr. Onyschuk: I should point out to the honourable senator this further point. Look now at the members of a board, those people within a board. Their competitive behaviour is regulated, because the boards do have codes of ethics, disciplinary procedures and ethical standards which they apply and which they require every member within the board to uphold. To that extent the board is unduly limiting competition in the service, or, in theory, that is the offence, 32(1)(c), and it is also...

Senator Everett: It would not be in theory. As you know, it would be as a result of a criminal charge.

Mr. Onyschuk: Of course. Under the act it would be a criminal charge.

Senator Everett: They would have to show that competition was restrained or injured unduly. Are you suggesting that the activities of these boards go to that? That is pretty far, you know. That is a conspiracy that goes a long way.

Mr. Onyschuk: There need not be a conspiracy. There need only be an arrangement or an agreement, which is far less than a conspiracy. Also, the courts have not, in looking at the word "unduly," looked at the public interest and economic theories.

Senator Everett: With respect, it says, "conspires, agrees or arranges."

Mr. Onyschuk: It can be any one of those things, then. It does not have to be a conspiracy. It can be simply an agreement or an arrangement. In the cases you are applying, you do not have to show a social ill to prove you are doing something that the public considers wrong. "Unduly" is strictly a matter of percentages. If over 60 or 70 per cent of the people within a trade or industry are parties to this arrangement or consortium, or association, then that is sufficient for the word "unduly" to be triggered. There is no subjective connotation given to the word "unduly" by the courts.

The moment you have, as in the case of real estate boards, 80, 85, 90 per cent or, in some cases, 100 per cent, of the members of an industry within a board, with educational standards and disciplinary standards, and they throw a member out for unethical practices, the effect of throwing that individual out is to eliminate competition, bringing them under section 32.1.

The Chairman: Senator Everett, I am wondering whether the question does not resolve itself into this: the real estate people are concerned that they could be swept into the provisions of this bill. It should not necessarily be a matter of interpretation for us as a committee to decide whether they are covered by this bill or not, but if that is a possibility, and we conclude that they should

not be exposed to that possibility, then the only way to deal with it is by way of exemption.

As I understand it, Mr. Onyschuk, it is your belief and your interpretation, because of the manner in which you operate and the organization you have, you are likely to be caught under the provisions of this bill.

Mr. Onyschuk: That is right, Mr. Chairman.

The Chairman: Obviously, if you get away from the one we are talking about and look at section 37.1 at page 36, you have another problem to wrestle with.

Senator Everett: I find no difficulty in agreeing with the board's submission in respect of section 37.1, Mr. Chairman. Where I have some difficulty is with Mr. Onyschuk's definition of "unduly limiting," in which he takes, I feel, the jurisprudence a little farther than it has in fact gone. I fail to see how a legitimate operation of a real estate board, which was not an arrangement or conspiracy to exclude people or to freeze them out of the business in some way, would be considered by the courts as coming under section 32.1.

Mr. Onyschuk: Perhaps I can answer that in a different fashion. Were it not for the fact that there are various provincial acts covering law societies and medical societies, permitting such bodies to have associations with entrance requirements, and so forth, I suggest to you that those societies would be in contravention of section 32.1.

Senator Everett: But they are professions under provincial laws. The real estate business is not a profession under law.

Mr. Onyschuk: That is exactly the problem with which we are faced, senator.

Senator Everett: I do not think that answers the question. I do not see how you would be in contravention of section 32.1 in your present operation, as you have described it.

Senator Flynn: You cannot act as agent without a provincial permit in the province of Quebec.

Mr. Jackson: There is, of course, legislation covering permits in most areas of Canada. However, the most recent legislation brought down in the province of Quebec enumerating certain professions included appraisers but not real estate brokers.

Senator Flynn: It may not be considered a profession as such, but there is legislation in Quebec which forbids anyone to act as a real estate agent without having qualified himself and obtained a permit under the appropriate act. Whether you call it a profession or not is irrelevant.

Mr. Jackson: That is simply a licence. The same thing applies to barbers and dog catchers.

Senator Flynn: If there was provincial legislation settling this problem, you would avoid application under this act.

Mr. Onyschuk: That is correct, senator. The problem, however, is that no one can give a guarantee that all ten provinces will pass an act establishing this as a self-regulating industry.

Senator Flynn: But that would be a solution.

Mr. Onyschuk: It would be a solution, yes, but there is no guarantee that that would be the case. You may have nine provinces enacting such legislation and in the tenth province those same activities might be criminal offences. That, I think, would be ludicrous.

Senator Flynn: I agree with the chairman that if there is any doubt, we should try to remove it.

Senator Walker: I predict you will have chaos when you start allowing the rate to float. I cannot understand how that can succeed.

Mr. Onyschuk: We agree, senator. It is for that reason that up until recently there has been no movement to take away the fixed tariff. There is a very serious argument within the Association as to whether that should be done. The question is: What will happen to these rates? Will they float up? If, for example, a widow, because she is not in a good bargaining position, has to pay 10 per cent to have her house sold, that would be against public interest.

In the last inflationary market a number of boards dropped the fixed commission rate on their own initiative. They did this prior to these directives being sent out. We feel there should be some sort of guideline, a guidepost, a benchmark, as is the case with lawyers and doctors, so that people can make a judgment.

Senator Walker: Considering the era we seem to be entering now, you will be massacred if you do not have it.

Mr. Onyschuk: Unfortunately, senator, under this act I do not think we will be able to bring that into effect. It would be considered that we were engaging in price fixing.

The Chairman: Are there any other questions?

Mr. Fish: Just to summarize, if I may, Mr. Chairman, I think we have stated our doubts in this regard. We appreciate the remarks of Senator Everett. There is that doubt in our minds. It is our feeling, after a lot of legal work—not only by our own legal counsel, but by others—that there is that doubt, and we feel we should have it cleared up before this legislation comes into effect.

The Chairman: Are members of the committee satisfied that we have had a proper development of the points of view put forth by these witnesses?

Some Hon. Senators: Yes.

The Chairman: As I understood the point Senator Everett raised, it was in relation to the position of these people since establishing the floating rate of commission, not their position in the form in which they carried on business before this floating rate of commission was established.

Senator Everett: I think it is fairly clear that when the real estate boards were enforcing rates of commission, they were in contravention of section 32. What I am suggesting is that I see nothing that they are doing—as these gentlemen have described the operations of real estate boards, and from what little I know about them—that would result in their being in contravention of section 32, except in relation to the restriction which would be placed on MLS. I think there certainly is room for some sort of an amendment to take that very legitimate point of view into consideration, as in the case of section 37 on the higher price, because, as they point out, they have no control over that, they are the intermediary between vendor and purchaser.

The Chairman: Also section 37(1).

Mr. Onyschuk: I feel I should elaborate on that. There are three areas of concern. Only one is the fixed commission, and because of the position of the association that is now no longer an issue. The other two areas, first the MLS, which operates as a stock exchange and must operate under rules, and must perforce restrain competition; it is "unduly" because 85 per cent of the members of any board work within that system.

Secondly, you have the operations of a board, and the operations that I say fall within section 32(1)(a), (c) and (d) are the codes of ethics, which limit the competitive behaviour of people in the industry, and disciplinary procedures for people who are disciplined, who do not follow those ethics and may be thrown out of the real estate board and an MLS service, and they will be retrained in their competitive behaviour "unduly."

Thirdly, there are the educational requirements, which, until such time as each province adopts the standards the industry has developed over 50 years, are limiting the entry of a person into a business. That is covered by section 32(1)(a) as well as section 32(3), which talks about restricting any person from entering into a business. It is those activities of a real estate board, which are legitimate and are in the public interest, that are swept into the provisions of section 32 because of the breadth of those provisions.

Senator Everett: The second part was that you do limit the competitive activities of members.

Mr. Onyschuk: Yes, you do.

Senator Everett: Then I agree you would be contravening the section.

Mr. Onyschuk: By the code of ethics, by disciplinary procedures and by educational standards that are required of each member of the board.

Senator Everett: That is number one and number three. Number two was that you limited competition between members.

Mr. Onyschuk: By the code of ethics.

Senator Everett: The code of ethics being the instrument.

Mr. Onyschuk: Yes.

Senator Flynn: This discipline would not prevent somebody who was thrown out acting as a real estate agent with another licence.

Mr. Onyschuk: No. You just throw him out of a board.

Senator Flynn: That is all right; it does not limit competition.

Mr. Fish: He does not have the advantages of the multiple listing system.

Senator Flynn: If you can continue to operate, then you can continue to operate.

Mr. Onyschuk: Senator, if you were the judge in the first case that came to court I would be very happy.

The Chairman: We might arrange that.

Senator Flynn: I cannot see that I would not be a good judge.

The Chairman: Thank you very much, Mr. Fish.

Mr. Fish: Thank you very much, Mr. Chairman. We appreciate the opportunity of appearing before you.

The Chairman: Honourable senators, we have here representatives from the Canadian Amateur Hockey Association. I believe Mr. Juckes will speak in the first instance and make the presentation. There are other associations represented. We have the National Sport and Recreation Centre, the Canadian Lacross Association, the Canadian Federation of Amateur Aquatics and the Canadian Amateur Basketball Association.

First we hear from Mr. Juckes.

Mr. Gordon W. Juckes, Executive Director, Canadian Amateur Hockey Association: Mr. Chairman, first I should like to thank you and the members of your committee for inviting us here to discuss the implications of the amendments to the Combines Investigation Act. This is not something that involves my sport of hockey only. It involves all amateur sport, and that is the reason why there are other sports represented here this morning, headed by the Sports Federation of Canada, an umbrella group to which we all belong. If I may suggest it, Mr. Chairman, I would ask you to consider hearing Mr. John Russell, who is the representative of the Sports Federation of Canada first. Then, if you wish, I would be most happy to discuss my particular sport, following the letter I sent to you.

Mr. John Russell, Member, Board of Directors, Sports Federation of Canada: Mr. Chairman, honourable senators, perhaps it would assist the committee if those present who are involved with the various sports identified themselves and the sports they represent.

Mr. Gary E. Schreider, Legal Counsel, Canadian Amateur Hockey Association: I am Gary Schreider, Legal Counsel for the Canadian Amateur Hockey Association.

Other representatives present were:

Mr. Keith Nesbitt, Canadian Ski Association;

Mr. Lawrie Johns, Canadian Federation of Provincial School Athletics;

Mr. Eric Donegani, Canadian Field Hockey Council;

Mrs. Josie Thompkins, Canadian Table Tennis Association;

Mr. Ian Stoddart, Canadian Volleyball Association;

Mr. Al Tummins and Mr. G. Anderson, Canadian Amateur Boxing Association;

Mr. Al Price, Canadian Federation of Amateur Oarsmen;

Mr. Ralph Reilly, Canadian Canoe Association;

Mr. Julian Carroll, Canadian Federation of Amateur Aquatics;

Mr. Eric King, Canadian Soccer Association;

Mr. Tom Kinsman, Canadian Gymnastics Federation;

Mr. Terry Phillips, Canadian Yachting Association;

Mr. Barry O'Brien, Canadian Lawn Tennis Association;

Mrs. Jo-ann Lawson, Sports Federation of Canada;

Mr. Dave Fishman, Canadian Lacrosse Association;

Mr. John Restivo, Canadian Amateur Basketball Association;

Mr. Andy Shaw and Mr. Ron Stewart, National Sport and Recreation Centre;

Mr. Larry Skinner, Canadian Amateur Hockey Association;

Mr. Tom Beyon, Legal Counsel, Sports Federation;

Mr. Bud Fraser, Sport Canada.

Senator Walker: A very distinguished group, Mr. Chairman.

Senator Buckwold: I think we should get some kind of sporting organization for the Senate. Everybody else seems to have one.

Mr. Juckes: We would be glad to organize one.

Senator Buckwold: The scope might be limited.

Senator Walker: We should start with conditioning.

Senator Macnaughton: You had better get some protection for those here.

Senator Laird: Before we start, could I ask Mr. Russell if all these organizations are in the same boat so far as this legislation is concerned?

Mr. Russell: All these organizations feel that they are in the same boat, yes.

I also represent the Canadian Rugby Union, in addition to being a director of the Canadian Sports Federation. That throws another sport into the picture.

All those sitting round this room are, by and large, representing sports that have permanent resident directors here in Ottawa. Many of the sports are not represented here today because they do not have people in Ottawa on whom we can call at short notice.

My remarks will be very brief, and then I can hand over to Mr. Juckes, who I am sure will be able to answer questions in detail much better than I could.

The Sports Federation of Canada represents 86 sports associations and national sports governing bodies in Canada, which between them have approximately four million volunteer coaches, administrators and athletes.

Our concern really is with section 32(3) of the bill. I was interested in the comment that Senator Macnaughton made earlier, because we feel this section is a simple section that could be explosive. We feel that this section could destroy the whole fabric of amateur sport in Canada. It could act as a deterrent to involving the volunteer in all sports, as a coach, as a trainer, or as a club executive. These volunteers are the unpaid and often unsung backbone of amateur sport and without their devotion and effort the whole structure of most amateur sports in Canada will collapse.

Most Canadian sports are international in character and must conform to rules and regulations of international boards to be able to compete internationally. This legislation, as it stands, may jeopardize the 1976 Olympic Games, in addition to the opportunities for international competition by the national team of any sport.

We are at a loss to understand the rationale that includes amateur sport in the same category as service industry and professional sport, as amateur sports within themselves are democratic institutions responsible to their membership.

I am sure, that those who prepared this legislation did not intend to impede the progress and possibly destroy amateur sport in this country, and we would request that amateur sport be excluded from section 32.(3).

Mr. Juckes: Mr. Chairman, I believe that the members of your committee have a copy of the brief. I do not suppose there is any need for me to go over it again.

The Chairman: We would like to have a general statement from you.

Mr. Juckes: Mr. Chairman and honourable senators, we feel that there may be reasons for service industries to be included in this Combines Investigation Act. That is not our problem. We do question the idea that amateur sport is a service industry. We think it is part of community service; we think it is part of cultural activity rather than commercial or economic activity and, therefore, that it does not or should not be considered in this area at all.

We are not questioning the fact that government does have a very real responsibility to protect the individual rights of athletes. We are simply submitting that if those rights need protection, surely there is another way to do it besides throwing all amateur sport into a nomenclature of service industries or monopolies or all these other points that have to do with our industrial life and our commercial life, rather than with our cultural life. We feel, therefore, that amateur sport as a whole should not be included in the Combines Investigation Act through these amendments. We feel that because, as I have stated, we do not believe we are part of any industrial or commercial activity, nor are we part of a service industry. We are part of the cultural fabric of Canada and should be treated in respect to individual rights on that basis.

Secondly, we are very concerned over the proposition that thousands of volunteer amateurs, who give so much of their time and their effort to amateur sport in all areas of Canada, should be confronted with the possibility that there might be a conflict between what they are doing

and what the law says, and therefore they are liable to be guilty of an indictable offence. As I have said in my brief, this seems to us to be a very heavy hand in dealing with volunteers who are interested only in the furthering of amateur sport life in our country.

Thirdly, most of our sports have some type of residence rule or zoning system in order to maintain the calibre of competition. Most of us feel that if this were removed, which is what we consider the amendments suggest, this would, as Mr. Russell says, completely upset the fabric of most of our sports and result in chaos. If there is not some method whereby an organization can tell 600,0000 youngsters in Canada where they are going to play hockey, there has to be chaos.

Therefore, we are suggesting that this should not come under anything that has to do with criminal law, an indictable offence and a prison term of two years, as I think it mentions.

We feel that if the protection of an individual is necessary this is already provided. My sport is a very good example. Last week—as Mr. Schreider can describe better than I can—a father and a boy, after going through all of our normal internal procedures with regard to a transfer, decided to ask for an injunction. He got the injunction and we accepted the injunction, and if there were any rights taken away from that player the courts acted very quickly to nullify that opposition and this boy was given permission to transfer to the team which he and his father wished. This has happened a number of times in my sport.

The Chairman: Right on that point and the zoning you were talking about, you have zoning rules? Is that right?

Mr. Juckes: That is right, sir.

The Chairman: Are they flexible enough that you can grant exemptions under these rules?

Mr. Juckes: Yes. There are three levels of procedure here in amateur hockey. First, the player can appeal to the local group, which would be, say, the National Capital Minor Hockey Association here in Ottawa. If he is not satisfied, he can go to the Ottawa and District Minor Hockey Association. If he is not then satisfied, he can go to the Ottawa District Hockey Association. If he is still not satisfied he can go to the Canadian Amateur Hockey Association. There is a procedure in our regulations which provides for all of these recourses. We also state in our regulations that once anyone has exhausted these recourses he has the same right as any other Canadian to take the matter to a court of law. We do not restrict our members in any way from going to a court of law, provided they have exhausted, first, all of the internal recourses which they have.

Our problem with regard to residence rules is that in large metropolitan areas, such as Winnipeg or Saskatoon, it would be absolutely impossible for the Greater Winnipeg Minor Hockey Association to provide the type of competition they are now doing if they could not say that any boy who lives in St. James should play for a team in St. James instead of across the river in St. Boniface.

The Chairman: But if he cannot make the team there, what can he do?

Mr. Juckes: He can always go to the team next closest to him. There is never any case where a Canadian boy, if he wishes, cannot play for some team.

The Chairman: In the same district.

Mr. Juckes: Yes. If he cannot in the same district, then there is no reason for stopping him from going elsewhere, if he and his parents wish to. This happens many times in Toronto. In Toronto, if a boy cannot play for the junior team closest to where he lives, then he can move out in the larger area until he finds a place to play. But then he must play for that team, and once that team has given him the opportunity to play he must stay with that team. He is not expected to move two weeks later because someone suggested they can buy him a pair of skates or for some other reason.

The other point about the restriction of our residence rule is that there are somebody else's rights involved here, too. If we allowed a boy to move from one part of Ottawa to another and become a member of that team, there is a boy on the end of the bench who gets pushed off because his place has been taken by the other boy. So we must consider the rights of that boy.

The other thing, of course, which concerned our volunteer officers as laymen, is the vagueness of this section. Perhaps it is not vague to lawyers or to the courts—I do not know—but it is very hard for our people to sit down and consider what is meant by "limiting unreasonably," "to impose unreasonable terms," and the "maintenance of a reasonable balance". For instance, one section says that you can maintain balance within a league. But this does not maintain competition. If you allow one league to maintain competition within itself, this does not say that it is going to maintain competition between it and the next league. There would be many cases, I am sure, of raiding, if this type of transfer were permitted, because we have teams, say, in Hull, which belong to one league, and we have teams in Ottawa, which belong to another league, and it would be very simple, if there were no regulations in hockey, for the boy in Hull to move over and play in Ottawa.

The Chairman: If I understand you, Mr. Juckes, in paragraph (b) of the proposed section 32.3(1), the conspiracy, they say, may be "to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional or amateur league."

Mr. Juckes: We say that would create chaos in amateur sport, because it would do away with our residence clauses, which require a boy to play nearest his place of residence, and our zoning rules, which are used in metropolitan areas to prevent certain teams from taking the best players, the cream of the crop, and putting them all on one or two teams. Again, if I can give you an example, years ago in Winnipeg it got so bad—and this is many years ago, when there was professional sponsorship of amateur hockey, the "C" form and many things which are now gone—that there

were only six juvenile teams in Winnipeg. But five years after the Greater Winnipeg Minor Hockey Association was formed, there were over 40 juvenile teams, because the type of competition allowed 40 times 20, or 800 boys of that age group, to find a place. Before that the six teams were all sponsored by commercial and professional organizations, and if the boy did not make one of those six teams he just quit playing hockey.

Mr. Chairman, I am sure there are other representatives here who would like to speak on this, but to wind up my points of interest, I would just like to suggest that, if further protection of an individual athlete is necessary, some method ought to be found which will not sacrifice or destroy the efficient operation of amateur sport. To put it in the vernacular, I think it is a shame to have to shoot the dog just to get rid of a few fleas.

Senator Molson: Mr. Chairman, I think Mr. Russell said that in all the member organizations of the Sports Federation there is a representation of about four million. Is that correct?

Mr. Russell: That is correct.

Senator Molson: And in amateur hockey there is now a total of about 600,000 players, you think, Mr. Juckes?

Mr. Juckes: There were 605,000 players registered in the CAHA last year, and there were over 100,000 volunteer workers—coaches, managers, trainers and so on.

Senator Molson: In addition to the 605,000 players registered?

Mr. Juckes: Yes. Also, of course, as Mr. Johns could probably attest to, our figures do not include high school hockey and they do not include armed forces hockey. So you are really talking close to a million players of whom 600,000 are members of our organization.

Senator Molson: Out of these large numbers have you had many complaints from various players on the various teams in the various leagues? Has there been a large number of complaints about lack of freedom to move or to play for the team of their choice?

Mr. Juckes: I would not say there has been a large number, when you consider the totals. Two years ago—and I recall this number because I did give it to the Consumer Affairs people with whom we met earlier—we had 42 appeals on a national basis. Out of 600,000 that is not too many. The rest of the problems were resolved either at the provincial level or down at the community level, which is where they should be resolved and where we hope all of them are resolved. There were 42 referred to us; 39 of those players received their transfers; the other three accepted our decision that they were asking for a transfer for hockey purposes and not for personal reasons of improving their particular positions.

Senator Molson: That is quite a remarkably good record, Mr. Chairman. If the proposed section 32.3(1)(b) applied, would that not lead to a great deal more of the secret professional inroad into the younger players' lives because of the ability to negotiate with them? I am thinking of the young players of a few years ago; I am sure you remember when their parents negotiated for real youngsters.

Mr. Juckes: We fought for years, as you know, sir, to eliminate professional sponsorship from amateur hockey. We fought for years to get rid of the A, B and C forms and these sorts of things. The senator could be correct that this type of thing could come back on an individual basis—I really do not know—but what I am suggesting is that the bill, as it is now worded, gives more protection to the professional or semi-professional areas than it does the strictly amateur, because the better you get, or the closer you get in a sport—in hockey, say—to a professional standard, the better organized they are and, therefore, they can take advantage of that clause, as they have. All the major junior hockey leagues in Canada are now in one league; therefore, they can, according to the law, according to this bill as I understand it, quite legally maintain a balance of competition between those people. That is 33 teams across Canada. But if you step down below that to the minor hockey, they are not permitted to do that. That is one of the points that we went to raise with the Consumer Affairs people.

Senator Molson: One of the changes that happened at the time you mentioned—the getting away from the A, B and C forms and the professional sponsorships—was also that the junior players were not signed until age 20.

Mr. Juckes: That is correct, sir.

Senator Molson: I gather that within the last year or two you are now having junior players signing up at age 18. Is taking them out of the community having a bad effect on hockey at that level?

Mr. Juckes: So bad that, as Mr. Campbell mentioned the other day, it could kill junior hockey as we know it today.

Senator Molson: I do not think he developed that point very much, actually.

Mr. Juckes: I am sorry. I think it was at the university in London last week, in an address in which he said he was very concerned about the future of junior hockey because of the inroads made by both professional leagues last summer through the draft on under-age players. They took a total of 24 under-age players and they signed 16 of those players professionally. This is the first time in many years that players who have not finished their junior eligibility have been turned pro.

Senator Molson: Do you consider that this is a very harmful thing to hockey as a game, as a sport?

Mr. Juckes: It is disastrous.

Senator Molson: It is disastrous?

Mr. Juckes: Yes.

The Chairman: Do you think that if this proposed section were not in the bill the situations that you are saying would be disastrous could not happen?

Mr. Juckes: Oh, yes, they could happen. I am afraid that, again, we are in quite a struggle in hockey, particularly between professional and amateur hockey, to try to do away with this. Perhaps I should not call it a struggle, because I think the professionals now recognize the fact that by taking that player so early they are really killing the source of their raw material. They now realize, too, that changes have to be made, so I should not perhaps say it is a struggle between pro and amateur; it is an acceptance of the fact that if this carries on there will be very serious effects on hockey.

Senator Molson: This only occurred after the WHA came into existence. Before that the National Hockey League had agreed not to do this. Is that not correct?

Mr. Juckes: Yes. Our old agreement was like that.

Senator Molson: And it had not been done for some time.

Mr. Juckes: That is right.

Senator Macnaughton: Mr. Chairman, I just want to ask a general question. Is there much of a change-over in the officers of these various senior amateur organizations, or do the same people stay on year after year after year?

Mr. Juckes: We have an unwritten by-law, I guess you would call it, that no president can serve more than two years, and that means that automatically everyone moves up. We have seven national officers, and we have a board of 20. I would say that of the directors of the CHA, 33 per cent change every year, and in the officers there is a movement every two years of one in and one out, sometimes more.

Mr. Russell: Could I answer that, possibly, from a more general point of view? I think the situation, obviously, does vary from sport to sport. Each sport is different, and each sport has its own different requirements and priorities. I would suggest that probably without exception every national sports governing body in this country holds a meeting once a year, at which time there are elections of officers. Now, if a man is doing a good job, particularly in a sport which is in the initial, growing stages, he may retain that office for several years; but he is only going to do this on the grace and favour, if I can call it that, of the electorate at large, if the people are satisfied that he is doing a good job for his sport.

Senator Flynn: Mr. Chairman, I note that the important point made here concerns the vagueness of section 32.3, especially the words "to limit unreasonably". I suggest that you could interpret these words as not applying to the residence rules which you described some time ago, because they may appear to be reasonable. As you mentioned, that would not prevent a young boy from playing any sport of his liking. It gives only a priority to a club operating in a given area. The point is whether we should provide a definition or an explanation of what would be reasonable. It seems to me that maybe if we had a guideline in this section, that would probably correct the situation which you fear, because at this time you do not know whether a court would really find that the rules that you are now applying would be considered to limit unreasonably the opportunity of any young boy or girl to play in the sport of his or her choice.

The Chairman: They go further, Senator Flynn. They say that amateur hockey, or amateur sport, is not a service in the category of industrial or commercial services.

Senator Flynn: But if their only worry is with regard to that, I mean, there may be other aspects with which they are not concerned in the operation of amateur sports in Canada, at the level of clubs or leagues or otherwise.

Mr. Schreider: Perhaps I may answer the question as counsel on behalf of the CHA recently in the Bolduc case—which was decided prior to this legislation, and prior to the introduction of this legislation in its original form, Bill C-227—where Mr. Justice Zuber decided in favour of a Toronto hockey club which was refusing to give a release based on the fact that there was no contravention of any combines situation, and then, on the balance of convenience within the league. Although it is not, in the reasons, we have it from the solicitors that that decision would not have gone that way had this been in effect.

What you are asking is, the legislation itself invoked the guideline, because it talks about the balance between leagues, which is the very thing that the CHA at the amateur level is concerned with, because they deal with all matters between leagues at the minor level —not the Junior A league itself, but the minor level. So they give two guidelines on that, dealing with international sports and the other dealing with the leagues, and there is no doubt, and I have given this opinion to the CHA, that their rules and regulations, as presently constituted, would violate this statute if it is passed in its present form.

Senator Flynn: But I was suggesting, of course, that you could add a paragraph (c) and cover the point that you have in mind.

Mr. Schreider: I think there is a whole area here. We are just talking about one aspect. There is negotiation, for instance. I think there is no doubt that there is negotiation going on, and that teams, for the betterment of the organization of the whole sport, even within leagues or outside of leagues, do negotiate, and they do place restraints on boys, so that I do not think you can, piecemeal, take it away. At least I would respectfully submit, and I agree with Mr. Juckes on this, that the only way to protect it is to take it out. There are many decisions in the courts now where these rights are not being violated —violations that they are trying to prevent within the statute.

Senator Flynn: The chairman questioned some time ago whether the rule in this section would provide the solution that you are seeking. I have some doubts. Maybe you would be covered by other sections.

Mr. Juckes: The other point, if I might, Mr. Chairman, is that I understand—and I do not know this bill completely—that all sports could be involved very easily by just one person lodging a complaint with the sport, or six people, or five people, in undertaking a defence which

would be very, very expensive for amateur sport. We have gone through this two or three times, where it has cost us $7,000 or $8,000 to get a court decision either one way or the other. The only way you can get away from that—and most sports do not have this kind of money—is to let the people get their judgment by default; and that is what we did last week, in the case I mentioned. We were just not interested in fighting a father and his son to the extent of lots of money and lots of effort, and we just said, "Go ahead!" and this is what I would be afraid of, that we might, as the honourable senator suggests, be able to establish in a court that we were right, but it might cost us an arm and a leg to do it.

Senator Flynn: I agree; but if you provided an exception in the act for all contracts dealing with amateur sports, if that is the right expression, do you not think you would be going maybe too far?

Mr. Juckes: Could I ask you a question? Why is it important that amateur sport be in this type of category?

Senator Flynn: It would be a special treatment, I would say, for this kind of service.

Mr. Juckes: Certainly, if we cannot persuade the government to remove this section, or remove amateur sport from it, then, as I indicated in our brief, we wish to request a very serious study of it, so that the whole fabric, as Mr. Russell suggests, of amateur sport is not endangered. That is our second position, that if amateur sport is remaining in this, then can we please have this really investigated, to such an extent that amateur sport can live with whatever the findings are?

Senator Flynn: But what would be the reason why they would try to cover this? There must have been some abuses or some cases where there was a lack of competition, or something.

Mr. Juckes: I do not think it is lack of competition, so much as that they have a feeling that there is still some need to protect the individual, and I think, if you will read the blue book, or the reference material, it tells you there, sir, that many of these suggestions have come because of various inquiries which have been made into sport—the task force on sports, for example, which was, I think, the latest one, and prior to that an inquiry by Professor L'Heureux, I think, in 1967 with respect to amateur hockey. I think that is the reason that the department does feel that there has been evidence presented to them as a result of which they are more concerned about the individual's freedoms more than the fact that they want to do anything about competition, because the fact is that they do try to protect competition within the league.

Senator Flynn: You are suggesting, then, that this is not a matter for this legislation?

Mr. Juckes: That is right.

Senator Flynn: I have that feeling too. It could be dealt with in provincial legislation.

Senator Walker: I have a suggestion, Mr. Chairman. Might I move that the words "amateur sports" be eliminated from line 17 of clause 32.3 and that the lines "or amateur" be eliminated from line 25?

The Chairman: I understand this is a suggestion you are making. We have not yet got to the stage of considering the bill as it comes to us in a formal way, and in due course we will be making an interim report and we will deal with these clauses and will state our position in relation to them. Your statement is now a matter of record, and I take it that what you are intending to say is that if the words relating to amateur sports were eliminated from these clauses then that would be satisfactory to you.

Mr. Juckes: Yes.

Senator Walker: This can be dealt with in another way.

Senator Buckwold: I just have a couple of questions, and the first is in relation to universities, where many amateur sports are played, and the restrictive policies they sometime institute by limiting the freedom of choice of athletes when it comes to playing for their teams or other amateur teams. Could you explain that a little more so that we can find out whether that is a good practice or not and how it is affecting the rights of individual athletes?

Mr. Lawrie Johns, Executive Director, Canadian Federation of Provincial School Athletic Associations: Mr. Chairman, perhaps I can answer that question for Senator Buckwold. We represent the high school athletic associations where we have the same type of restrictive regulations where you may be able to play for the high school team and not for the minor hockey team or football team at the same time. I believe that the governing bodies of the universities have the same type of regulations. We believe that this bill would put us in jeopardy and would also put the player who went to one high school but who wanted to play for another in jeopardy. He would not have the choice of what high school he played for regardless of what high school he went to.

The rationale behind this is a controversial one in our federation, but it is a relatively simple one. We believe at the high school level, and I believe also at the university level, they should give as many opportunities to play to as many students as possible. We believe if a child or a student is playing hockey for the CHA or one of their bodies, then we should not allow him to play for a high school because that opens another spot in our team. In that way you will not have one player playing for two teams when two players could play for two teams.

Senator Buckwold: I agree that at the high school level there is too much difficulty, but I am more concerned with the university level where you are getting a more sophisticated type of athlete.

Mr. Johns: I believe that is the regulation there too, and I believe that sometimes it reverses itself where a player may play for a national team but may not play for a high school team.

Senator Buckwold: Is there ever any restriction at the university to say that if you do not play for the university you cannot play period?

Mr. Johns: Not that I am aware of.

Senator Buckwold: Then there is the suggestion that there could be other types of legislation that could cover any possible exploitation or advantage being taken of athletes which this bill is primarily intended to protect. Have you any idea as to what type of legislation that could be, or could you give us any suggestions as to the way you think this could be protected?

Mr. Russell: I think that while this has been suggested it does become a very difficult thing to do. There was a suggestion earlier that we should be more specific about some of these clauses, to make sure, for example, that hockey is protected. Well, when you look at some specific clauses to protect hockey, then you have to look at specific clauses to protect skiing and field hockey and table tennis, because every sport is a little different in the way it operates and the way its rules and regulations are put into effect. That is because of the nature of the sport itself. I personally feel that any legislation to protect an individual player is probably not needed. I do not think there is a great deal of abuse, and to try to produce any such legislation would be difficult. Any of us who have been in any way involved with amateur sports realizes all the variations that go on, and I think that to write such legislation in an equitable manner to cover all sports played in this country would be an impossibility.

Senator Buckwold: What you are really saying, then, is that if anybody has a real case they should go to the courts.

Mr. Juckes: That is really what our brief suggests, that there is protection now, the same protection that every Canadian citizen has. If his rights are being in any way interfered with, he has recourse. In our particular sport the experience is that the courts obviously, and quite rightly, usually decide in favour of the individual. And from your own city, Senator Buckwold, there is a case which is a very good example.

Senator Buckwold: The problem is as you have said it earlier, that as an amateur hockey association you cannot fight the cases in court because they are expensive.

Senator Laird: Mr. Chairman, could I make a suggestion to expedite matters? Would it be possible to ask any other representatives to say if they disagree with the representations already made?

The Chairman: That is what I was just going to do.

Senator Desruisseaux: Mr. Chairman, I would like to ask Mr. Juckes if he is aware of any players' organization that would express views that are contrary to his? This is an association of organizers, but what about the players themselves?

Mr. Juckes: Well, of course, the CHA is an association of players with some 600,000 members, and that would indicate that we are a membership organization. I do not believe there is in amateur sport anything comparable to the players' unions which have appeared in professional hockey, for example, and other professional sports. But, certainly, if this committee wanted to get information, I am sure it would be very simple for them to ask a few athletes to appear as witnesses to tell you what their experiences have been, and whether there is indeed any need, from their viewpoint, for such legislation. I am not personally aware of any.

Senator Macnaughton: I take it, Mr. Chairman, that we have a lot of ex-athletes right here, even if they are not class number 1.

The Chairman: I would like to ask the representatives here, who have been introduced, if there is anything that has not been said by Mr. Juckes and Mr. Russell which they would like to add at this time. All you need to do is to stand up and tell us your name and make your statement.

Mr. Dave Fishman, Executive Director, Canadian Lacrosse Association: Yes, Mr. Chairman, the name is Fishman and the sport is lacrosse. I made some copious notes earlier which I am going to ignore by and large at this stage because almost everything has been said. But like a good lacrosse player I want to fill in a few blanks and plug a few holes. We in lacrosse have some very difficult situations in trying to understand the rationale of this legislation. As we understand it from reading the background information circulated by the department, practically all the complaints, if you want to call them that, that have resulted in this type of legislation coming forth occurred in hockey. Yet, when the legislation comes out it encompasses all sport.

First of all, as Mr. Juckes has adequately pointed out, the impact of the legislation on sport is at the level that can least stand it. That is the volunteer administrator at the grass-roots level. Those who are highly organized can circumvent this legislation. There was a question from the floor as to whether or not a player has as much resources or access to redress as, perhaps, the organization. Well, neither of them really has the resources, but we have attempted to establish in just about all of our sport organizations an inexpensive jurisprudence system. Mr. Juckes has explained that which exists in his organization, in which it does not cost the player and it does not cost the organization to have a fair hearing.

The implications of this act, as we understand it, are that even an investigation by the RTPC will be an expensive affair.

Another point I would like to emphasize, which I do not believe has really been emphasized so far, is that each sport is bound to live by regulations of an international body of which it is a member. As we understand section 32.3(2)(a), the court is required in hearing such a case, if it involves an international regulation, to consider that. It is also, however, given the authority to disregard that regulation if it is deemed to be not applicable in Canada and is possibly a violation or restriction of competition.

Now, in order to follow that situation, suppose that lacrosse is subject to an international regulation which a court does not deem to be a violation, it would then be in violation of the regulations of the international body. It

would not be allowed to compete internationally. To take the ridiculous to the sublime, there is a good possibility that we will not be allowed to participate in the 1976 Olympics, in our own country, in our own national sport!

The Chairman: These are merely guidelines. If some question is raised with the director of the Combines Investigation Branch, or otherwise, that there is a violation of section 32.3, the director, and I presume if it goes to court, the judge, should consider following guidelines. One is as to whether the sport in relation to which the violation is alleged is organized on an international basis. Should that be so, would any limitations on the terms and conditions alleged for that reason be accepted in Canada? That guideline is to permit the director and the judge, if it goes that far, to determine whether the violation is of such a nature that attention should be paid to that guideline. This is not a statement of the law, but a guideline for the direction of the director and the court.

Mr. Russell: Mr. Chairman, if it so happened that the court upheld that this particular requirement should not be accepted in Canada, the corollary stated by Mr. Fishman would in fact come into effect. If a national sport-governing body in this country is not willing to abide by the rules and regulations of the international regulatory body, participants in that sport in Canada cannot compete internationally.

The Chairman: That is the end of your association.

Mr. Russell: It would be the end of our association for international competition.

The Chairman: That is correct.

Mr. Fishman: I would like to make one final point. In my perusal of the entire act, and this has been pointed out earlier, I find that it deals almost exclusively with commercial and industrial relations within the country. A question was put from the floor as to whether amateur sports should be excluded. I put it to you, senators, that there is just as much justification for eliminating amateur sport as there is to include in this legislation such other aspects of our culture as the Kiwanis, Lions and other service clubs or, perhaps, even the arts. It is a form of regulation of an administrative arrangement of one of the aspects of Canadian culture. To our way of thinking, it has absolutely nothing at all to do with any profits, with which the legislation is primarily concerned. We feel if it is necessary for such legislation to go that far, the Bill of Rights, precedents in the courts and several pieces of provincial legislation are far more applicable for inclusion in a commercial bill.

Senator Laird: Mr. Fishman, you agree, then, as far as you are concerned, that this section should be eliminated from the legislation?

Mr. Fishman: I do not agree that the legislation should be eliminated. I agree with the honourable senator's suggestion that it should be amended simply by the deletion of the word "amateur" wherever it appears.

Senator Laird: Well, naturally you cannot speak for the professionals.

Mr. Fishman: No, and I do not wish to do so.

Mr. Julian Carroll, Executive Director, Canadian Federation of Amateur Aquatics: Mr. Chairman, my name is Julian Carroll. I speak for swimming, diving, water polo and synchronized swimming. Our federation certainly supports the remarks which have already been made. It is important, however, that you and your committee focus your attention on the fact that we are not discussing only hockey which, as we all know, is an important sport in this country and we all love it. Hockey also is very often in the news. However, as was pointed out to you today, approximately 84 amateur sport-governing bodies exist. Some of them are very small and some do not have nearly the same number of registered players. Some of them, unlike hockey and lacrosse, are not team sports, but individual sports.

Our confederation or association has been in existence since 1909. We have swimming clubs throughout the country, and in order to maintain some order among the movement of swimmers from one club to another, their affiliation and for whom they may earn points, whether it be in an international championship, an inter-city meeting or a meeting within a district, we maintain regulations. For example, it is provided that they must wait for a period of 60 days, two months, before representing a new club. They can swim during that 60 days, and they swim with the designation of "unattached". They are not restricted from competing, but from competing for the new club, for instance on a relay team, or earning points for the new club, and it takes four swimmers to make up a relay team.

Under the proposed legislation, it is conceivable—it is perhaps a little ridiculous to suggest—that six persons who belong to the new club, who receive the new swimmer and who is in limbo for 60 days, may file a complaint to the director or ask for an inquiry saying that the new swimmer's opportunity to represent his new club is unreasonably limited because he has 60 days to wait before he can do that. It sounds unreasonable or unlikely that a court in this country would say that it was an unreasonable restriction. The members of my federation, and I believe many are concerned about the very fact that this type of proposal now before the Senate is an indication that perhaps we are not too far away from a court of law in this country saying, "That is an unreasonable restriction."

The Chairman: Have you ever had any complaints from any of your members in connection with any of these rules?

Mr. Carroll: No, we have not. But the one thing you have to keep in mind, Mr. Chairman, is that in our sport we are dealing with young people. Most of our Olympic swimmers are retired by the time they reach the age of 18. We are dealing with 10, 11 and 12-year-old boys and girls. Generally and always behind them are parents, and parents have a habit of losing sight of the correct perspective when their little Johnny or little Mary is involved. It is not unreasonable to expect that if this piece of legislation were available to them, some person might not use it as a means to make their point.

My final point, Mr. Chairman, is that I would ask your committee to keep in mind how this legislation would affect those sports which are amateur but which have a professional counterpart, such as hockey and lacrosse, and those sports which are amateur but which have no professional counterpart.

The Chairman: Thank you.

Mr. T. Beynon, Counsel, Sports Federation of Canada: Mr. Chairman, my name is Beynon. I act as counsel for the Sports Federation of Canada. I have also had the privilege of assisting a number of other Canadian amateur athletic associations. My background in sport goes back a long way. A number of volunteers in my home town assisted me to play amateur sport. I am sure a number of gentlemen here today were in the same situation, where they looked to volunteers to bring them through the ranks. I do not think we are just talking about hockey in this instance; I think we are talking about the broad perspective of sport.

I was also very lucky to have the opportunity of playing professional sport. I went on and had the opportunity of coaching children on sports techniques. I had the privilege of being a volunteer, a player both amateur and professional, but never during those years did I consider that I would have to look to the Combines Investigation Act to assist me as a player. If you look at this volume, you will see a heading "Protection of the Athlete." From a personal point of view, in Canada at this point in time the athlete does not need protection, as Mr. Juckes pointed out.

The Chairman: The development of that section, in those proposals that you have, is very much out of date in its statements.

Mr. Beynon: I quite agree. The reference that are made in that report are two, mainly—one, to ask a task force report on sport. The particular appendix that is put in this volume pertains basically to professional and amateur hockey. I believe there is another report that it makes reference to. That is a report on amateur hockey. There is no reference to any other reports in the broad perspective of the other approximately 87 sports. I submit that the Department of Consumer and Corporate Affairs have not done their homework in considering the ramifications of this section with reference to amateur sport.

The Chairman: You say that the background of sport in this section, so far as it is referred to in the proposals, is very weak?

Mr. Beynon: That is correct. I do not think sufficient homework has been done in realizing the broad ramifications of this section with regard to amateur sport.

Until four or five years ago, amateur sport in Canada was basically arranged in the kitchen. People sat around the kitchen table. There would be volunteers, as they are today. Four or five years ago the Department of National Health and Welfare saw fit to start making grants to set up a sports administration centre. Sport has come a long way in Canada in four or five years, and I would hate to think what this piece of legislation could do to the amateur sport volunteer.

Senator Macnaughton asked a question with regard to a possible amendment, by deleting the reference to "amateur" in this section.

Senator Macnaughton: It was Senator Walker, but I would have seconded it.

Mr. Beynon: My apologies. The committee might wish, in its further deliberations, to consider the regulation that was passed under an act concerning amateur sport. There is a definition of amateur sport. I do not think that definition goes far enough. The definition of "amateur," as I am sure you are all well aware, is something that is continually in contention. We hear of it on an everyday basis because of the Olympics. You might wish to use that as a parameter in your further consideration.

I find great difficulty in linking amateur sport with professional sport. Firstly, why did the drafters of this piece of legislation have to distinguish between professional and amateur sport, because the ramifications are the same for each? Why did they not simply refer to sport?

That question, in my view, is not answered in this document, or in any other piece of information I have been able to obtain. When the Income Tax Act was amended a year or two ago, the Parliament of Canada saw fit to permit as a deduction donations to Canadian amateur athletic associations. By definition, those associations are groups that carry on their activities without pecuniary gain. I submit that it is very difficult to put associations that are involved in amateur sport in the same category, the same mixing pot, as those professional sports whose activities are carried on for pecuniary gain.

It is interesting to note that this particular exemption comes under a charitable exemption. I wonder if the next step of the Department of Consumer and Corporate Affairs is to go on to churches, religious bodies, and so on. I do not think they realize the ramifications of it.

In the event that this committee wishes to have further representations made, I am sure there are a number of people who would like to have additional time to put material together. For this group, other than possibly the Canadian Amateur Hockey Association representation, this was initiated basically 24 hours ago.

The Chairman: I can aswer that right away. If any of the other representatives here have any submissions they would like to make, we invite them to make them. The only question is the matter of time. We would like to have it reasonably soon, because we shall soon reach some conclusions. We do not expect the bill to come from the Commons until some time in the New Year. We are considering the subject matter of the bill. The bill is not yet officially before us. That is why we cannot make amendments, as such, to the bill. But we can draft amendments and make recommendations. If you have been following the history of this committee, you will know that. We have succeeded in having many of our amendments accepted. The Senate has to pass the bill, or it does not become law.

Mr. Beynon: That is very encouraging, Mr. Chairman. I am sure that those involved in the various amateur associations, and the Sports Federation of Canada will at this point in time seek whatever further information is available and will, if time permits, make further representations.

I think it certainly would be beneficial to know what deliberations have taken place in other countries with regard to similar concerns. I think the fact that there are no reports that have been put forward dealing with sports other than hockey is of such concern in itself that the legislation not be considered in this form.

The Chairman: If there are no other representations, we will adjourn.

Senator Molson: Mr. Chairman, there has been a good deal of reference made to certain reports and inquiries made on the subject of sports in the last few years. I do not think it would be unfair to put on the record that in the view of some people those reports were not universally accepted as being objective.

The Chairman: Thank you, Senator Molson. We will now adjourn.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable ALAN A. MACNAUGHTON, P.C., *Acting Chairman*

Issue No. 9

WEDNESDAY, NOVEMBER 27, 1974

Fifth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

28351—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

28351—2

Minutes of Proceedings

Wednesday, November 27, 1974.
(10)

Pursuant to adjournment and notice the Standing Senate Committee on the Banking, Trade and Commerce met this day at 9:30 a.m. to further consider the following:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Barrow, Beaubien, Blois, Buckwold, Cook, Desruisseaux, Flynn, Gélinas, Haig, Laird, Macnaughton, McIlraith, Molson and Walker. (14)

Present: not of Committee: The Honourable Senators Heath and Manning. (2)

Upon motion of The Honourable Senator Molson, The Honourable Senator Macnaughton was elected *Acting Chairman.*

On behalf of the *Chairman,* the *Acting Chairman* explained to the members that the Committee would soon begin the advance study on the Budget Resolutions and following such explanation, it was Agreed that Messrs. Peter Cumyn of Stikeman, Elliott & Co.; Charles B. Mitchell, C.A.; and Mr. C. A. Poissant, C.A. be engaged as an advisory staff for the purposes of the above mentioned study.

WITNESSES

Canadian Petroleum Association

Mr. John S. Poyen,
President and Chief Executive Officer;

Mr. Laurance McArdle,
Manager, Ottawa Division.

Investment Dealers Association of Canada

Mr. A. G. Kniewasser,
President;

Mr. J. R. LeMesurier,
Chairman of Committee on Bill C-2,
(Vice-President, Wood Gundy Limited);

Mr. R. A. F. Sutherland, Q.C.,
Counsel. (Bordon & Elliott);

Mr. J. C. Baillie of Tory, Tory, DesLaurier & Binnington.

Allied Beauty Association

Mr. Robert C. Swenson,
President. (a manufacturer);

Mr. W. W. Robinson,
Past President. (a distributor);

Mr. M. E. Corlett, Q.C.,
Legal Counsel;

Mr. G. B. Greenwood, of Maclaren, Corlett & Tanner.

At 11:30 a.m. the Committee adjourned until Wednesday, December 4, 1974, at 9:30 a.m.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, November 27, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Alan A. Macnaughton (*Acting Chairman*) in the Chair.

The Acting Chairman: On November 21, last Thursday, the Senate granted us permission to consider the budget resolutions relating to income tax in advance of the bill coming before the Senate. As you well know, this gives us plenty of time to consider those resolutions without being held to a deadline, as has happened in the past. Senator Hayden telephoned yesterday and suggested for your consideration that we engage counsel as follows: Albert Poissant, C.A.; Charles Mitchell, C.A.; Peter Cumyn, of Stikeman, Elliott, as legal counsel. But, of course, he needs your approval. Could we have a motion to the effect that those three gentlemen be appointed counsel to the committee?

Hon. Senators: Agreed.

The Acting Chairman: He also told me that he expects to consider these income tax amendments in the budget on December 4 and 5, next week. With your permission, I suggest we continue our consideration of the Combines Investigation Act.

This morning we have three associations appearing before us. They are the Canadian Petroleum Association, Investment Dealers Association of Canada, and Allied Beauty Association. I suggest we hear them in that order, because that is the order in which they replied to our invitation to appear before us this morning. Who will speak for the Canadian Petroleum Association?

Mr. John S. Poyen, President and Chief Executive Officer, Canadian Petroleum Association: I shall, sir.

The Acting Chairman: Would you care to come up to the table? For the record, have you anyone else with you?

Mr. Poyen: I have not, sir.

The Acting Chairman: Have you an opening statement?

Mr. Poyen: I have one, sir, that I should like to refer to.

Mr. Chairman, honourable senators, I thank you for the opportunity to submit the views of the Canadian Petroleum Association this morning. I believe you have in front of you our very short submission, to which I shall refer in a few moments. As an introduction, may I say that this association, the Canadian Petroleum Association, which I represent in the capacity of president and chief executive officer, is an association of oil and gas companies, large and small, internationally and nationally owned and controlled, but with one basic similarity: they are all primarily engaged in the exploration and development of the oil and gas resources of Canada.

The refining and marketing activities of members of this association are not the business or concern of the Canadian Petroleum Association. Thus matters contained in Bill C-2 impacting on wholesale or retail trade practices relative to oil and gas product sales have not been the subject of comment in our submission.

As the honourable members of this committee have noted, our submission is very brief, consisting of only four pages, and after eliminating the normal philosophical recitals which our legal committee has wished to express to you gentlemen, there emerges only one provision in the bill to which we think we have a responsibility or the capability to respond—that being section 32.2 of the bill which creates the offence of bid-rigging.

I did not think it germane to the deliberations of your honourable committee—it may even have been impertinent to the terms of reference of the committee—to include legal counsel in this review before you. Hopefully, my professional and business career in the oil and gas industry will suffice in answering queries or describing the normally acceptable business activities and the interrelationships of exploration and development companies in joint bidding on petroleum and natural gas rights being offered for sale by the Crown. In this connection, I should like to quote from our submission at pages 1 and 2, as follows:

> The Association is especially concerned with the provisions of Section 32.2 of the Bill which creates an offence of "bid-rigging". The reason for the introduction of such Section, as indicated by the Proposals published by the Department of Consumer and Corporate Affairs in relation to Bill C-227, seems to be to prevent collusive bids being made in contracting for services, such as bids for construction contracts. However, because of the encompassing manner in which the Section is worded, many currently accepted practices are also made per se offences. Our concern involves one such practice which has long been established within the oil and gas industry.
>
> The acquisition of most petroleum and natural gas rights by the industry is accomplished through purchases at Crown petroleum and natural gas rights sales. The monies expended in such acquisitions could be fairly regarded as extremely high risk capital because of the limited knowledge concerning the petroleum and natural gas rights being purchased.

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The recommendation of the Canadian Petroleum Association in this regard is that a subsection (c) be added under section 32.2(1), as follows:

> (c) Notwithstanding the provisions of subsections (a) and (b) the offence of bid-rigging will not be committed if the request for bids or tenders does not expressly prohibit joint bids.

Otherwise, a procedure historically accepted and practised and, so far as I know, never challenged as being contrary to the public interest or any restraint of trade or competition, could be, per se, an indictable offence.

I note that the Canadian Chamber of Commerce, in its representation before this honourable committee on May 8, 1974, suggested that section 32.2 was basically intended to deal with cases of contractors getting together and submitting bids to municipalities and others, and suggested that it was a case of over-reach, or overkill in their words, since the language is broad enough to include team agreements in highly technological industries—and I submit that would include the oil and gas industry. As a matter of fact, in its submission before this committee the Canadian Chamber of Commerce included, as an example, the practice of joint bidding on the part of the petroleum industry in order to spread exploration and development risks.

Mr. Chairman, having made those introductory comments, possibly I could now outline for the committee my business background, following which I will be available for any questions which members of the committee may have, either as to the submission of the Canadian Petroleum Association or any other questions regarding the oil and the gas industry itself.

I have been associated with the exploration and development function of the oil and gas industry for the past 30 years in various capacities—as a geologist, engineer, drilling contractor, exploration manager, and general manager of exploration and production for a major oil company, and as the president of a smaller, integrated oil company having exploration and production activities in Canada and refining market and pipeline activities in the United States. With that as my background of experience, I am open for any questions which members of the committee may wish to ask.

The Acting Chairman: I note on the second-last page of the submission you stress the word "unduly" by setting it off in quotation marks. Did you wish to call attention to that word?

Mr. Poyen: Mr. Chairman, I think I recognize the requirement or the reason for the word "unduly" being used in Bill C-2. It does not impact on our particular situation. The legal committee of the Canadian Petroleum Association discussed the word "unduly" at some considerable length, and have dwelt on it in their dissertation. However, I really have no specific statement to make as to the use of that word.

Senator Molson: Joint bidding is the common practice, is it not, practically every time oil and natural gas rights are offered for sale?

Mr. Poyen: That is right, senator. As a matter of fact, I think it is more encouraged than discouraged by governments offering petroleum and natural gas rights for sale. During a discussion I had with the Honourable Donald Macdonald some time ago in connection with the formation of Petro Canada, he suggested that one of the reasons for forming Petro Canada would be to give the independent oil companies an opportunity for joint venture activities on federal land in areas where one company alone could probably not finance the operation.

Senator Cook: The fact that there is a joint bid submitted does not mean that is the only bid, does it?

Mr. Poyen: No, senator. Perhaps I could describe the procedure for bidding on petroleum and natural gas rights. All bids are sealed bid tenders. They are not at an auction, nor are they withdrawable. Neither are they allowed to be increased on opening. It is a sealed bid tender, and the oil company or the consortium, or the joint venture, does its best to make a bid which it feels will be successful, bearing in mind it has no idea what the rest of the industry may bid. So, in effect, it is a catalyst to make the bid as high as possible so that it will be successful rather than to try and make it as low as possible. Success is the important thing, not the saving of substantial amounts. It is not collusive from the point of view of diminishing the bid, but rather to increase the bid to its highest possible level.

Senator Cook: But it still means that there could be more than one bid.

Mr. Poyen: In that particular case, senator, there would not be more than one bid. There would be a joint bid by companies A and B, or A, B and C, and it would be the only bid submitted by those companies for the particular parcel of land offered for sale.

The Acting Chairman: Perhaps I could direct your attention to page 3 of your submission, No. 1, where you state:

> 1. The Bill in providing for investigation grants powers to the Restrictive Trade Practices Commission which go far beyond those that are reasonable, conscionable or understandable by the ordinary citizen without having recourse to a phalanx of lawyers, who in themselves could not come to a common decision on the interpretation to be given several provisions in the Bill.

That is quite strong language. Would you care to explain the excitement?

Mr. Poyen: Quite frankly, Mr. Chairman, I did not prepare this submission. It was prepared by the legal committee of the Association. The members of that committee, I think, injected words into the submission of a stronger nature than I personally would have included had I prepared it. With your permission, I would rather not comment on the emotional vein in which this submission appears to be written. I think we have been through some tremendously emotional stresses and strains in our industry over the past year or so, and it more or less comes out very clearly in this submission.

Senator Cook: If a bid is successful, what does the successful bidder have to do? Must he go on and develop or can he, after he pays the money, just allow the option or concession to lapse?

Mr. Poyen: Normally, in acquiring petroleum and natural gas rights on bidding such as this, the company or companies involved have a program in mind or in hand for further exploration. In other words, having acquired the mineral rights they will possibly do seismic geophysical surveying, or may already have done some geophysical surveying. Fundamentally, the answer to your question is that they are looking down the road towards drilling a well on the lands they acquire. This is the ultimate purpose of having acquired the land, to drill an exploratory test to ascertain whether or not there are reserves of oil and gas on the properties purchased at this sale.

Senator Cook: But they are not obligated to do that if they change their minds?

Mr. Poyen: There are a number of ways of acquiring petroleum and natural gas rights. In the province of Alberta, for instance, some rights are offered called drilling reservations, and there is an obligation on the part of the successful bidder to drill a well or to forfeit the lands back to the Crown within a year. There is a forfeiture provision if they do not carry on with the basic obligation of drilling a well, which is inherent in the bid.

The Acting Chairman: On page 3 of the submission there is a paragraph beginning:

> Although the basic concern of the Association is involved with the bid-rigging provision of the Bill,

You go on to make some quite definite statements. Would you care to go on to read that or comment on it?

Mr. Poyen:

> ... the Association has a general concern over what is being done by Bill C-2 and other statutes such as the Foreign Investment Review Act, the Petroleum Administration Act and proposed amendments to the Income Tax Act. The obvious intent of such legislation is to transfer control of business from the private sector to government which could inevitably result in inefficiency throughout Canadian business.

May I apologize to the committee for the conclusions reached by the legal committee in this submission? Very frankly, although I have no legal counsel with me, I would have preferred to have the authors of this appear before you. Unfortunately, I was unable to get them to Ottawa today. Frankly, I have no real defence to these highly emotional conclusions that my legal committee has come to in writing its submission.

The Acting Chairman: I think you could without legal counsel agree to one of your statements, that in order to obtain self-sufficiency in energy resources the private sector must be encouraged. Would you go that far?

Mr. Poyen: Oh yes, sir, I certainly would go that far. I think our whole future is being severely threatened by the present activities of both governments, federal and provincial, in their continual confrontation over the levying of economic rents of one kind or another on this industry. I am very concerned that short-term considerations are taking precedence over the long-term requirements of Canada and the long-term economic and financial implications that it will have on this nation.

If I may recall it to you, I sat in the gallery the night the Honourable Mr. Turner brought his budget down. I was quite encouraged by his introductory statement when he said that the two basic elements of the economy of Canada are energy and food, and their use was important. I thought that hopefully the budget would assist the oil industry in participating in the energy future of Canada, but then the budget seemed to go contrary to his introduction.

Senator Desruisseaux: On page 35 of the blue book issued in connection with the former Bill C-227, the first paragraph says:

> The Bill makes bid-rigging an indictable offence, and defines bid-rigging either as an agreement to refrain from bidding in response to calls for tenders or to submit tenders arrived at by collusion.

Are you aware of any cases where restricting certain people in making bids has affected the picture in the oil industry?

Mr. Poyen: I do not know of any cases. As I said earlier, possibly bidding by partners or joint ventures in the oil business or petroleum and natural gas rights tends to strengthen the biddable amount rather than decrease the biddable amount going to government and, therefore, to the public.

Senator Heath: Could you perhaps go a step further and say that the restriction on getting enough money together to go into an exploration situation could be very damaging, because we really have not got as much money as we want to marshal to do this? Would you go that far?

Mr. Poyen: Certainly I would say yes. I might even elaborate on that a little further. If companies were not allowed to bid jointly it would mean a complete loss of capability by the independent oil company to get on with its operations, because it cannot afford to spend all of its capital money or all its budget for the year in the acquisition of one piece of property and then have no money left for continued exploration throughout the year. The philsosophy—particularly of the independent oil companies, but it also relates to the larger companies—is that in this high risk business they wish to spread their bets over as many possibilities as they can. To put it in very simple language, a company much prefers to have a piece of several pies rather than just one pie all to itself. It is almost like going to Las Vegas to the dice table. No one ever really goes to the dice table with the intention of throwing the dice only once and standing or falling on that one toss of the dice. People go down there with the idea of having ten, twelve or fifteen opportunities to throw the dice, and hopefully out of that number of throws there will be one, two or three successes.

Senator Walker: A very appropriate analogy. We understand that.

Senator Cook: If the successful bidder does get a right, is that right assignable in whole or in part?

Mr. Poyen: Yes, it can be. You bring up a very interesting point. For instance, in the province of Alberta the government of Alberta recognizes the validity of joint bidding, and when the successful joint bidders acquire a property the government in fact recognizes the joint ownership by issuing a title to those minerals in the joint names of the successful bidder, not in just one name. So there is a joint and several transfer of title. As you ask the question—yes, one of the bidders may assign or sell or otherwise dispose of his interest. Generally, however, it is conditional on the consent of the other partners.

Senator Cook: Therefore you would fear, if this bill goes through and one company makes a bid and is successful and subsequently assigns it amongst, say, another nine partners, that you would be questioned as to whether the original bid was not made in collusion.

Mr. Poyen: Under the terms of the new bill, there certainly is an inference, and possibly this word "unduly" comes into the situation. I think our legal people are concerned that it is per se an indictable offence, that the company, the successful bidder, may then transfer portions of the title to other companies, which may in that case certainly be presumed to be a collusive action.

Senator Cook: From the first?

Mr. Poyen: Yes, sir.

Senator Walker: Before the witness leaves, may I say I would not suggest that he should withdraw any part of his brief. I like a little emotion, and it is so seldom we get it. It is very mild and to the point.

Mr. Poyen: Thank you, sir. I hope you receive it in that spirit.

The Acting Chairman: Is there anyone else you wish to call?

Mr. Poyen: No, sir, I do not wish to call anyone else. However, Mr. Chairman, I do notice in the gathering here a senator whom I admire greatly and who knows as much about this oil business as I do—Senator Manning.

Hon. Senators: Hear, hear.

Senator Manning: Mr. Chairman and honourable senators, may I make a few observations, although I am not a membr of the committee? In the earlier questioning, a point was raised as to a case where a joint bid is made and that is the only bid. I think an erroneous impression might have been left with some other people, and was left with myself at first. It was pointed out in the answer that, as a rule, that is the only bid in so far as the companies joined together to make that joint bid are concerned. But that does not mean that there is not a number of other bids on the same property, so it is not a case of this creating a single bid. There may be a dozen bids, two or three of which may be joint bids and several others of which may be those of individual companies. But there is always the broad competitive factor retained even though joint bids are made.

The second point which I might be permitted to mention, as being of interest to the committee, is this. I would like to confirm from my own past experience the point which was raised in this submission, that the provision of joint bids as far as Alberta was concerned was, if anything, initiated more as a matter of government policy than policy on the part of the companies. When our oil development policies were formulated, we very strongly favoured the use of joint bids, primarily for the reason mentioned in answer to a question a moment ago, that while a large integrated company may be in a position to make a very substantial bid for a property, the small independent Canadian companies are not as a rule in that position; and by encouraging joint bids it afforded an opportunity for smaller companies to get into the picture, which would not be possible in some cases if they had to bid as individual companies in competition with the large international companies which financially were in a position to outbid them.

So I want to confirm, historically, this reference to this being a matter of government policy, encouraged by the government of Alberta in the early years. I cannot speak for the present situation; I think it is the same. It was definitely the desire of the government.

The Acting Chairman: Thank you Mr. Poyen, very much.

Mr. Poyen: Thank you.

The Acting Chairman: Honourable senators, the second submission is on behalf of the Investment Dealers Association of Canada. The president, Mr. Kniewasser, is here. Mr. Kniewasser, perhaps you would introduce the other members of your committee.

Mr. A. G. Kniewasser, President, Investment Dealers Association of Canada: Mr. Chairman and honourable senators, I have with me today Mr. J. R. LeMesurier, Vice-President of Wood Gundy Limited, who is chairman of the Committee on Bill C-2 and Bill C-7. I also have two distinguished counsel: Mr. R. A. F. Sutherland Q.C., from the firm of Borden & Elliott, who is the counsel for the Association; and Mr. J. C. Baillie, from the firm of Tory, Tory, DesLauriers & Binnington, who is an expert in the field.

I believe we have sent to you our original brief, which is the brown book on Bill C-7, and subsequently, to update things, a copy of our letter to the Minister of Consumer and Corporate Affairs dated September 11. There may be caught up in the mails a subsequent letter dated November 7 to the Director of Investigation and Research, Mr. Bertrand.

The Acting Chairman: Those have been caught up in the mail, reports our clerk, Mr. Jackson.

Mr. Kniewasser: Would it be convenient if I pass them over to you now?

The Acting Chairman: Yes.

Mr. Kniewasser: Mr. Chairman, if your colleagues would agree, I would suggest that I start off with a rather short statement trying to summarize these numerous papers and outline the essential concerns of the securities industry about this legislation. If there are questions, we will do our best to respond to them.

Honourable senators, as to the national securities industry association of Canada, at the back of the brown book you will see a list of our members. Those names are all familiar to you. Those are the people who do all of the investment banking business in Canada. Last year the dimensions of that, in terms of the underwriting of financing for governments and industry, were perhaps $4 billion in refinancing for various levels of government, and another $2 billion to finance in debt form the corporations in Canada. Our people do that business.

In addition, as members of stock exchanges, they are responsible for some 80 to 90 per cent of all the trading in licensed securities in Canada. The dimension of that business on the three major exchanges, Montreal, Toronto and Vancouver, is in the order of some $9 billion a year. In addition, they do all of the short-term commercial paper business, the money market business, which is now of enormous proportions in this country, being some $24 billion to $25 billion a year. They are active also in respect to over-the-counter trading, in respect to the underwriting of equities, and in respect to a number of other related financial services.

We are, therefore, endeavouring this morning, sir, to give you a picture of how this community feels about this bill. In our view, there are, of course, some serious implications for these different processes in Canada in this legislation.

We appreciate this opportunity to appear before you, honourable senators, and we also appreciate the importance that you attach to this bill and, indeed, to its predecessor bills. We have actively followed the progress of all of this legislation, or proposed legislation, since the publication in July 1969 of the Interim Report on Competition Policy. We have submitted briefs on that report, on Bill C-256 and on Bill C-7. Copies of these briefs, in addition to the letters I have just referred to, have been sent to you. In the two letters and in our remarks today we refer not only to Bill C-2, which is now before the house for consideration, but also to a number of suggested changes to that bill's predecessor, Bill C-7, which were introduced at the committee stage in the last Parliament by the Honourable Herb Gray.

The IDA is also pleased that the government has decided to approach the sweeping proposals of the Interim Report in two steps, postponing for later consideration changes in legislation affecting mergers, monopolies and related matters. The matters dealt with by Bill C-2 provide a more than adequate plateful. I have in mind particularly the extension of the act to affect service industries. While the reasoning in the Interim Report to support this extension is persuasive, there are complexities in the application to the securities industry of rules tailored principally for consumer products. he securities industry is a good example of a service industry to which the new proposed rules will have to be carefully adapted if the savings and investment process in Canada is not to be seriously jeopardized. The Interim Report states that its authors confined their attention to "devising an improved general framework for competition policy" rather than seeking "to resolve the problems of specific industries". We welcome the indications in Bill C-2 and Mr. Gray's amendments that some steps have been taken to meet this problem—the problem of dealing with a specific industry or specific process, the financial process.

Two major themes predominate in our submissions. The first is that, for capital markets and the securities industry to operate effectively in the public interest, investment dealers must upon occasion enter into agreements which contain provisions of a type ordinarily regarded as anti-competitive. I refer here to the underwriting or investment banking process. The second is that the industry is so closely regulated by 11 provincial securities commissions as to obviate the need for detailed rules under combines legislation. The merits of each of these points has been implicitly acknowledged in Bill C-256 and in each of its successors through the inclusion of a specific exemption to facilitate agreements entered into in connection with underwriting and the distribution of securities. While we have concerns with the adequacy of this provision, it is helpful to see that the needs of the capital markets are recognized in principle.

The second of the two themes, that the securities industry is closely regulated, gives rise to another important question. Bill C-256 included a complicated section designed to provide a limited exemption for regulated industries which satisfy certain criteria. These criteria were so narrow that the section would have been of little assistance to this Association. The section does not appear in Bill C-2, which on its language appears to apply even where a practice is specifically required by statute.

The commentary published by the Department of Consumer and Corporate Affairs indicates that appropriate exemptions will be implied by judicial interpretations. Our counsel have advised us that the implied exemption should not be relied upon except where a practice is carried on in compliance with a specific requirement of law. In our view, if a practice is clearly necessary and desirable in the public interest and yet might technically contravene the law, an appropriate exemption should be specifically made for it in the act. The exemption should contain any reasonable limitations that appear appropriate. The IDA has endeavoured to reflect this philosophy in all of its discussions concerning the new legislation and has had a number of helpful discussions with departmental officials on this basis. My letter to Mr. Bertrand, which has just been handed to you, might be of some assistance on that point. The approach is reflected in the various submissions of which copies have been given to you.

I hope that what I have said so far sufficiently indicates the importance which the IDA and its members attach to the new legislation and the work of your committee. If fully thought through, amendments to competition law may contribute significantly to the health of the Canadian economy; implemented without adequate prior analysis, the amendments could be critical at a time when the economy can ill afford new burdens. For example, at this point in Canadian development I can think of few things less desirable than the imposition of new constraints on the ability of investment dealers to work together in raising the pools of capital which this country needs. The figures are, of course, massive. The estimate is something like $300 billion required by 1980 to make the investments in resource industries generally across the country with gross capital formation rising from $26 billion to well

over $50 billion by the end of the decade—all of this, honourable senators, at a time when there is a worldwide shortage of capital.

So Canada's need to raise more money than ever before will be difficult in itself, but particularly so when compounded at the same time by international scarcities in world markets.

The IDA has been concerned in all of its reviews of the new legislation with the lack of defences to what might be very serious charges. For example, the misleading advertising sections in the bill might give rise to both criminal and civil liability based on sales literature and investment recommendations that were found by hindsight to be inaccurate and misleading, even though prepared with reasonable care. Our submissions have consistently recommended that this be changed, and my letter of November 7, 1974 to Mr. Bertrand contains a specific proposal to this effect, avoiding liability where due diligence was used. I am pleased to see that this approach is strongly supported in the recent report prepared by the federal Law Reform Commission on strict liability, which recommends in strong terms against the continued inclusion in federal statutes of offences based on strict liability. In all cases, says the Commission, due diligence should be a defence. We have a copy of that report here and I know that my legal friends would be pleased to expand further if you are interested.

I would like now, if I may, Mr. Chairman, to conclude by highlighting the four major points in our submission.

Senator Walker: Could I ask you a question before you do that? Were you consulted by the minister, at all, before this bill was drafted?

Mr. Kniewasser: We have had almost constant contact with the department. The most recent conversations took place just prior to my letter to Mr. Bertrand.

Senator Walker: Thank you.

Mr. Kniewasser: I think I should add, sir, that this consultative process appears to be reflected in successive drafts of the bill. Each time a new one comes forward we recognize some of our discussions in that legislation.

Senator Walker: It is improving, but still bad.

Mr. Kniewasser: We still have serious concerns.

The four points I would like to highlight, in conclusion, are the following: the underwriters' exemption; the extension of this exemption to other parts of the bill; the very important part relating to misleading representations; and finally, the desirability of incorporating into this bill paragraph 32(2)(g) of the present act, which would in effect permit the Investment Dealers Association of Canada to continue to operate as the national securities organization in Canada. Unless that happens, we really will be finding it impossible to administer regulations with regard to our members across the country. It will be done then entirely at the provincial level by the provincial securities commissions.

With respect to the underwriters' exemption, it has been recognized by the draftsmen that an exemption is required from the provisions of sections 32 and 38 of the act in order to permit the effective underwriting and distribution of securities. Our concern is to make the exemption workable and to make it apply to those types of securities distributions than can be most effectively handled by mobilizing the resources and placing power of a number of securities dealers. In our letter of November 7, 1974 to the director we have suggested wording that will remove the technical defect with respect to securities distributions that are exempt from the prospectus requirements under the provincial securities legislation. In that letter we have also pointed out that the exemption as presently drafted would not apply to an important category of distributions which do not require filing of a prospectus nor a specific prospectus exemption under securities law. I am referring to the secondary distribution of large blocks of securities where the vendor is not a member of the "control group" of the issuer.

It is important to the Canadian capital market to permit such large blocks to be distributed with maximum efficiency and at minimum cost, and with minimum disruption, of course, of market prices. To attain these ends most efficiently, it is often necessary to form the same type of distribution groups as are typically formed to handle a large security issue under a prospectus.

The draftsmen have correctly recognized that the need to mobilize groups of dealers is usually a function of size of the distribution and that the larger distributions usually involve the filing of a prospectus or the existence of a prospectus exemption. There is no essential difference between primary distribution and the secondary distribution of large blocks so far as the actual functions of securities dealers are concerned. The need for co-operation among dealers is equally applicable to this type of transaction, and it is our submission that the section 4.1 exemption should be extended accordingly. In our letter to the director, of which copies have been distributed to you, we have included suggested wording designed to effect this extension.

As explained in our submissions, the provisions of Bill C-2 creating criminal offences of strict liability in respect of price discrimination (paragraph 34 (1) (a)), double ticketing (section 36.2); advertising at a bargain price (section 37) and sale above advertised price (section 37)—all of which appear to have been conceived to apply to advertisements and sales of manufactured articles—are not well suited to underwritings of securities. Their application to the underwriting process would give rise to a number of problems—including in some cases conflicts with provincial securities legislation—without providing any counter-balancing public advantage.

While it is most unlikely that the department would institute prosecution in these circumstances, it must always be remembered that Bill C-2 provides for civil actions based upon alleged breaches of its criminal provisions. It is therefore our submission that the underwriters' exemption should be extended to apply to these sections.

With respect to misleading representations, the present section 36 makes it an offence of strict criminal liability for anyone, for the purpose of promoting a sale, to make a material misrepresentation as to the price of an article. The draft section 36 would extend the same strict criminal liability to any material representation

made for the purpose of promoting not only a sale but any business interest. We are strongly of the view that a distinction should be made between representations as to clear matters of fact which are, or ought to be, known to the maker of the representation and on the other hand representations which involve, and are known to involve, elements of analysis, commentary and subjective judgment.

It is inconceivable to me how you can have a stock market, or a securities market, unless there is provision for different points of view with regard to forecasts and analyses, most of which are of an objective nature. I know that Mr. LeMesurier would like to expand on that point later on. I regard this, Mr. Chairman, as one of the most serious items in the legislation at the present time.

It is our contention that, at the very least, the offence involving strict criminal liability should be confined to representations as to clear matters of fact. We are also of the view that the proposed section 36 should be revised to introduce as a defence to a prosecution thereunder, a due diligence test. The addition of a due diligence test is particularly appropriate in the case of the representations made in relation to securities, but our submission is that such a test should be introduced not as a special provision relating to the securities industry but as a general amendment of the section as advocated by the Law Reform Commission.

With regard to the Trade Association exemption, the conspiracy provisions are set forth in subsection (1) of section 32, and subsection (2) includes certain exemptions covering matters such as agreements as to limitation of advertising, the introduction of the metric system, industry standards and related matters. Bill C-2 would omit an existing paragraph (g) which covered "some other matter not enumerated in subsection (3)". We are concerned that the elimination of the exemption for "some other matter" will jeopardize the activities of the Investment Dealers Association of Canada. Our rules operate across Canada and play an important part in the orderly operation of the Canadian securities market. The retention of paragraph 32 (2) (g) in the act would support these valuable rules without interfering with the main thrust of the act.

Mr. Chairman, those are the major points I wished to bring to the attention of the committee. I thank you and your colleagues for your attention.

The Chairman: Thank you, Mr. Kniewasser.

Senator Gélinas: How would the advertising of bargain prices affect the investment banking industry? I have never seen any bargain prices advertised.

Mr. J. R. LeMesurier, Chairman of Committee on Bill C-2, Investment Dealers Association of Canada: Say you have a syndicate ad on a new issue which shows Bell Canada bonds at 100, but in the after-market Bell Canada bonds are at 105½, by the time the syndicate ad appears, then the syndicate is holding out a bargain price that is no longer available. That is one of our concerns, although it is a technical one.

Senator Gélinas Then it is the timing of the ad that relates to the price.

Mr. LeMesurier: Yes.

Senator Gélinas: Mr. Chairman, might I make a suggestion here to the witnesses? Would it not be timely for the witnesses to mention that a few years ago in the United States there was somewhat similar legislation suggested, either through the SEC or the Justice Department, and after prolonged discussion it was amended so that the investment banking industry in the United States operates as we do in Canada, through syndicates—through syndicated bids and through syndicated offers. I do not know how similar we are now, but I think we are quite close. But at that time, as I said, there were long discussions and the industry finally won out so that they can still syndicate bids.

Mr. LeMesurier: I think that is true. I think the case you are referring to is the famous investment banking case with Judge Medina where the anti-trust people went after the syndication process. Then the judge said there was tremendous competition within the industry and that on balance the process was worthwhile and was in the public interest. In that particular situation he exonerated the practice and the people involved. I think that if you go further, however, and if you compare the U.S. scene with the Canadian scene at the present time, the U.S. capital markets and participants in the markets are struggling between these tremendous conflicts between the securities legislators on the one hand and the anti-trust people on the other. There are cases now in the courts, because there are not specific exemptions in some areas for the capital market or the securities industry from the anti-trust law and it is uncertain as to how far the courts will go to provide exemptions. People thought for many years that there were exemptions and that the courts would apply exemptions, but now there are many cases involving $3 billion lawsuits against the New York Stock Exchange testing whether or not the courts will give exemptions on the brokerage side and various parts of the business. This is one of the problems that we had. This is generally applied in service industries, and that includes this industry. But the question is how far will the courts go in applying exemptions.

Senator Walker: Have there been any judgments?

Mr. J. C. Baillie, Investment Dealers Association of Canada: There was at least one case involving the minimum commission structure on the New York Stock Exchange which has gone against the exchange, and the best information I have is that the New York Stock Exchange finally paid half a million dollars to settle.

The Acting Chairman: During the course of your testimony Mr. LeMesurier, you mentioned that you might like to discuss the question of fact versus analysis and commentary and subjective judgment.

Mr. LeMesurier: I think the concerns we have are that in a simple letter to a client—a one-page research report on the Steel Company of Canada, for example, or a detailed 20-page report—there is a lot of fact, but there is also a great deal of opinion and a great deal of judgment. Now, if the Dow Jones is selling at 1,000 when

this goes out, but suddenly two years later the person can pull that research letter out of a file when the Dow Jones is selling at 550 or 600 he probably can find something in it which, with the wisdom of hindsight, may show that there was not full, true and complete disclosure. An example I sometimes use is that of one of the oil companies, where the news comes out that such-and-such a company has drilled two more gas wells up in the Mackenzie Delta. So the report comes out that this looks very favourable. But if that one-page letter or two-page report did not refer to the fact that a certain senator from Washington or a certain Secretary of the Interior spoke a week earlier—among a hundred other speeches—to a chamber of commerce saying that he favoured the Alaska line, and if this was not pointed out in the research report and if ultimately the American gas goes the other way and our gas gets stranded for another ten years, then someone can pull out that research report and say that it was misleading and that they did not have full information. You cannot update an investment recommendation. It is very hard to apply a full, true and plain disclosure prospectus test. There will always be something that, with the addition of hindsight, somebody will find was left out of the report or the one-page letter. A considerable number of securities are sold by the one-page letter. Now there may have been several telephone conversations between the client and the securities salesman, but there is the letter which, in the light of hindsight, could be said, on the face of it, to be misleading because it did not show some of the negatives, although these may have been discussed on the telephone the day before. Our concern is that it is very hard in the securities business, in that everything is opinion, judgment and analysis rather than hard facts, as you would find in the case of a refrigerator—that, for example, it will last for ten years—and it is very difficult to combine the two.

Mr. Kniewasser: But we do not go so far as to ask for total exemption. We say it should be amended so that we are indeed responsible for facts and for disclosing clear facts because we have a responsibility there. But then we move beyond that and get into interpretation and forecasting, then that should be different.

Senator Cook: As the law is now, has the investor any recourse in the case of recklessly or carelessly expressed opinion?

Mr. R. A. F. Sutherland, Q.C., Counsel, Investment Dealers Association of Canada: Yes, he does. He has civil law and common law recourse for misrepresentation.

Senator Cook: But I am not speaking of misrepresentation. I am speaking of carelessly expressed opinion.

Mr. Sutherland: If he has misrepresented the facts relating to an investment in a material way, then he would be subject to civil liability under the common law. And the customer would have statutory rights in respect of provincial security laws in regard to misrepresentation in the documents required to be filed under such laws. Under the case laws he is in the position of reliance on a person who, in turn, is in a position to express expert opinions, and these people would be responsible for carelessly expressed opinions.

Senator Molson: I am interested in what the position is with respect to publicized careless assumptions by financial analysts which we sometimes see getting extremely wide readership. These appear with a certain voice of authority, and yet they are completely unfounded and can affect a situation quite substantially.

Mr. LeMesurier: Do you refer to such situations as the *Globe and Mail* or the *Montreal Gazette* quoting an investment dealer or a broker and the facts or opinion are wrong, whether it is with respect to earnings per share or for the year?

Senator Molson: I mean that type of thing.

Mr. LeMesurirer: Or are you referring to a broker's research opinion?

Senator Molson: I am speaking of financial analysts who are quite often quoted as considering a certain situation with regard to an investment and come out with conclusions which have absolutely no factual basis.

Senator Walker: Such as the chap who advised the sale of gold a short time ago and then jumped out the window.

Mr. LeMesurier: In connection with research material that goes out to the public, as long as there is a due diligence defence, we are not asking for no liability whatsoever if someone acts on very bad advice. We are suggesting, however, that there should not be strict criminal liability, and then civil liability if a defence of due diligence can be thrown up. If something is irresponsible and ill thought through, we cannot say that the person who made the statement should not be found responsible in some way or another. We are not asking for an absolute exemption.

Mr. Kniewasser: Or, indeed, if he says that the last quarter's earnings were X dollars and they were different.

Senator Molson: No, that is too factual. I am not getting down to mistakes in figures and so on, but assumptions and interpretations which can have a very substantial effect but which are not based on fact.

The Acting Chairman: Are you referring to daily items such as the daily financial commentary and so on?

Senator Molson: Not necessarily. It may be in a press report; it could be an interview, a radio interview or an article. There is a great variety of these things and sometimes assumptions are very large and very sweeping, and are given with a voice of authority.

Mr. LeMesurier: But if that type of statement, senator, is not allowed, would we not simply stifle everything? The first person goes to jail and no one else says a word. The information just stops flowing and the capital market dries up. It only takes a couple of security dealers to go to jail because they researched a report which, blessed with hindsight, the judge on balance decided involved strict liability, for the information to dry up very quickly.

Senator Cook: Would there not be difficulties? Someone makes a great big puff of something, which is always different from giving a calm, reasoned, considered opinion. They may indicate that a certain stock may increase in value, without guaranteeing that it will double.

Mr. Kniewasser: Absolutely. Also, a dealer carrying on business in such a manner as described by Senator Molson would not be in business very long and would certainly not sell me very many of his securities.

Senator Cook: But he could do a great deal of damage while he was in business.

Senator Laird: I would like to ask Mr. LeMesurier whether he is in accord with Mr. Kniewasser, that the application of the due diligence test would solve the problems we have discussed.

Mr. LeMesurier: In our opinion, this is a reasonable position, yes. We do not believe it is practical or appropriate for the securities industry to say that if there is a consumer protection bill coming down, even though we are regulated and policed, there should be absolute exemption for all situations. We therefore believe that the due diligence defence is a reasonable compromise.

Senator Laird: And would solve your problems?

Mr. LeMesurier: Well, naturally it would be nice to have complete exemption, but at the present time that is not practicable, so we are not asking for it.

Senator Flynn: It is far from sure, Mr. Chairman, that we need this provision, anyway, to establish liability for any statement or representation which would include fault or negligence. Throughout Canada the common and civil law provides for recourse based on fault or negligence, be it in a statement, or any representation made by anyone, either in the field of securities or in any other commercial field.

Mr. LeMesurier: Oui, c'est exactement ça qu'il expliquait.

Senator Flynn: No, I do not believe it is necessary to provide it in this bill.

Senator Walker: To which particular part do you refer?

Senator Flynn: I mean the section of the bill which provides for civil action in cases in which the legislation is contravened.

Mr. Sutherland: In my opinion, as Mr. Kniewasser has stated, this proposed section 36 would considerably widen the provisions of the existing section 36, which now apply only to misrepresentations made by a seller or supplier as to the price of an article. This section would apply to the statement made by anyone who has any business interest, and it would apply to any material representation.

Now, we hold to two essential points in this regard. The first is that there is a great distinction between a representation of a clear matter of fact, such as price, made by a seller who knows or should know that it is false. On the other hand, we are faced with words such as a person having "any business interest". I would like to give you the example of someone who carries out a series of analyses of, for instance, Alcan, or any other large company, considers its shares, the position of the industry, its future and issues a report. Even if he warns not to buy this security at this time and in this market, he still makes that report with a business interest. He expects the quality of his analysis to be appreciated by investors and the next time they wish to purchase securities that possibly they will deal with him. So he is within the group to which we refer.

In contrast to the person who speaks of price or something similar, he is speaking, in the securities business at least, of factors which are affected by all sorts of developments in the market, actions by governments and international factors. He is bound to be discussing elements of analysis and judgment, and most people receive his reports with that knowledge. We are not saying that this man should be, as Senator Molson suggested, free to say anything. We know civil law constraints on him exist. We are asking that this legislation include a due diligence defence, and a due diligence defence is not an easy ride home. It has applied in the securities legislation in the United States and it is very hard. Someone who is accused of contravention and has only a due diligence defence has a great deal of work to do in order to make out such defence. He must show that he has made adequate research, that it is based on facts and he has done everything reasonable to assure himself that the statement is true. So a due diligence defence is in no sense a licence to misrepresent. It permits the true facts to be brought forward and the person to come forth and substantiate that he made the statement reasonably, after reasonable investigation and with reliance on facts which he reasonably believed to be true.

That is very much more appropriate to this type of activity than would be a simple strict liability provision, which we argue should not be available at all for any representations, but certainly should not be in matters of this degree of complexity. We are suggesting that section 36 should have added to it the criminal provision for a due diligence offence. Secondly, if it should not be in there, it should be a factor in any civil liability based on breaches of this offence.

The Acting Chairman: Are there any further questions?

Senator Gélinas: This expression used in your letter to Mr. Ouellet—price maintenance—is that similar to secondary markets?

Mr. LeMesurier: It is all part of it. Price fixing would be putting in 100 on the cover of a prospectus. Price maintenance would be to maintain a banking group price so that all consumers and investors would get the same price and would not charge more for Mrs. Smith and less for Canada Trust.

Senator Gélinas: It has nothing to do with secondary markets?

Mr. LeMesurier: Yes. If an investors' syndicate or institution wanted to sell $10 million of Steel Company of Canada stock, you could form a syndicate to do that. An investment dealer would probably have to bid $2 less than would a syndicate which can distribute quickly in two or three hours. There would be a price maintenance

in that operation. The syndicate would distribute that block of stock at an agreed price.

Senator Heath: I cannot see that Mr. LeMesurier has made a case for the Investment Dealers Association under this act. I was wondering if he would not feel that a tightly-knit associaton, where he can rap the knuckles of the membership or drum them out, could not police its own activities. Can he convince me that he should be under it?

Mr. Kniewasser: The bill, as finally drafted, would seriously jeopardize our self-regulatory activities. There are all sorts of regulations that have been built up over time in respect to how a business is to be conducted, the kinds of net-free capital you must have, the kinds of accounting procedures you must apply. I have a staff who have the right at any time to walk into any member firm, look at their books and insist that the firms meet their tests. These tests are well known, are approved by the Securities Commission and are known to the Bank of Canada. The massive money market operation is administered entirely by the IDA, and the criteria for how you handle that $24 billion or $27 billion a year is administered by us and these compliance officers. The bill would cast serious doubts on our ability to enforce those regulations. We think it is essential that it be carried on, not just at the provincial level but nationally.

Senator Cook: Can you give us examples of some disciplinary action you have taken with your members?

Mr. Kniewasser: Yes sir. It takes place at all levels of the business. Every month there is a case of a complaint from a salesman or firm who has misrepresented the value of a security. A procedure is followed whereby those who feel they have been wronged advise the association. They have a district council in every province in Canada. That complaint is investigated by our people and the man or company in question is called in and asked to explain. A decision is taken and the responsible provincial securities commission is given those facts and advised of our proceedings. If someone has indeed violated one of the regulations of the association, action ranges all the way from a fine to expulsion from the association, or he may lose his licence to sell securities. You cannot be in the securities business in Canada unless you have passed an examination organized by the Canadian Securities Institute, which we set up and manage. If you do not have a licence to practise . . .

Senator Cook: What happens to the investor who has suffered?

Mr. Kniewasser: The individual investor, if there has been wrongdoing, is compensated. Those cases occur from time to time. There are approximately 20,000 people in this business in Canada.

Senator Laird: How is the Canadian Securities Institute set up?

Mr. Kniewasser: The Canadian Securities Institute is managed and financed by a board of seven people, four of whom are nominated by the Investment Dealers Association of Canada, and one of whom is nominated from each of the three major stock exchanges—Montreal, Toronto and Vancouver. The present chairman of the institute is the IDA man from Vancouver, Mr. Finnegan. The vice-chairman is Mr. Deslauriers, nominated by the Montreal Stock Exchange. The financing of the institute is on the basis of that board's composition.

Senator Desruisseaux: May I ask whether the SEC in the provinces regulates in the field in which we now wish to regulate?

Mr. Kniewasser: The provincial securities commissions all have very detailed securities acts and regulations patterned largely and historically on what has happened in the Ontario Securities Commission. The answer to your question is, yes, they are actively regulating in all of these aspects.

Senator Desruisseaux: Could conflict arise under this legislation?

Mr. Kniewasser: Yes indeed, sir. We point out in our brief instances where the federal government would be legislating in one direction under this bill and the provincial securities commission legislating in another. There is serious conflict with provincial governments in this legislation. Those points have been identified.

Senator Molson: I suppose this situation would not arise were there federal securities legislation.

Mr. LeMesurier: It could arise just as easily, senator. They have the problem in the United States. There they have two regulators, the SEC, which regulates for investor protection and orderly markets, and the anti-trust legislation, which legislation has a pure competition thrust. Those two public policies can collide. In the Ira Haupt case, the salad oil swindle case of several years ago, the New York Stock Exchange told all its members, "Don't deal with Ira Haupt, because they are going under." The purpose was to ensure that some firms did not lose $5 million dealing with Ira Haupt. It was public policy to protect the clients of that other firm so that the firm didn't go broke. But Ira Haupt sued under anti-trust. They said "the stock exchange is in a conspiracy to stop its members dealing with us." So you have pure competition and investor protection, two public policies administered by two different agencies of the same government.

If we had federal securities, you could have the same problem, with the additional problem that they would both be under the same deputy minister. At least in the United States you have the SEC, which regulates the capital market as a creature of Congress, and the anti-trust. They can fight in the courts and not in the deputy minister's office, which would occur here.

Mr. Kniewasser: If I could add to that, Mr. Chairman, certainly the position of the Investment Dealers Association of Canada would be quite different under this bill if there were a federal securities commission. The stock exchanges are directly regulated by the provincial governments, and as such they are, by and large, discharged from most of the provisions of the bill. But national securities organizations, investment dealers associations, do have a problem with this legislation, as I tried to explain a few moments ago.

The Acting Chairman: Senator Gélinas.

Senator Gélinas: Mr. Chairman, it might be timely to mention to the committee the American Telephone and Telegraph issue in the amount of, I believe, $600 million which had to be cancelled because the SEC and Justice did not confer with each other.

Mr. LeMesurier: Was that a company decision, or did the SEC refuse to allow it to go ahead?

Senator Gélinas: The underwriters had to withdraw because the transaction had not been completed. The delivery of the securities had not taken place when the antitrust branch of the Department of Justice decided to sue American Telephone and Telegraph in order to break it up into smaller companies. For that reason, the underwriters had to cancel the deal, leaving American Telephone and Telegraph without the $600 million.

Senator Cook: Was the reason for the withdrawal the fact that the suit would have to be mentioned in the prospectus?

Mr. LeMesurier: The prospectus would have to have been revised.

The Acting Chairman: Did you wish to make any comment, Mr. Baillie?

Mr. Baillie: I have no comment on the specific point under discussion now, Mr. Chairman, but there are two points which were raised earlier on which I should like to comment. Senator Flynn referred to that section of the act which creates civil liabilities, referred to in the context of section 36. Without commenting on the legal point advanced by Senator Flynn in that context, as to the availability under present Canadian law of a remedy for negligent advertising, the point on which Mr. Sutherland commented earlier, I think it is very, very important and of great concern to the IDA that the new provision for civil liability extend to all criminal offences under the act. It opens up in Canada, for the first time in our combines legislation, the opportunity for private plaintiffs to initiate litigation which may extend the frontiers of the law, without any opportunity for any government agency to determine whether it is appropriate as a matter of public policy. This is one of the concerns of the IDA. We would not be concerned if we felt that the initiative for the enforcement of this provision were held in the appropriate government department. We are very concerned when we see a wide ranging civil liability provision which, in effect, gives a blank cheque to any plaintiff who wants to assert a technical argument before the court, regardless of whether or not there has been criminal liability. I therefore underscore the concern expressed by Senator Flynn that there is no civil liability provision.

I should also like to comment on Senator Heath's question as to how we justify coming under this act. My first reaction to that is that the IDA has, I hope, taken a reasonable approach in its comments in relation to the provisions of this bill. Ideally, the IDA would like to see the conclusion drawn that it should not come under this legislation, but we recognize that that is probably not possible in the circumstances. What we are trying to do, therefore, is to advance constructive suggestions as to how the provisions of this bill, which were clearly not designed for this industry, might be adapted so that we could live within those provisions. Of course, if there is a suggestion that there should be wider exemptions, we would not argue against that.

The Acting Chairman: Thank you, Mr. Baillie. If there are no other questions, I should like to thank Mr. Kniewasser and the other representatives of the Investment Dealers Association of Canada for a very interesting presentation.

Honourable senators, the next presentation will be that of the Allied Beauty Association, of which Mr. Robert C. Swenson is president. Accompanying Mr. Swenson are Mr. W. W. Robinson, past president of the Allied Beauty Association, Mr. M. E. Corlett, Q.C., legal counsel, and Mr. G. B. Greenwood, of Maclaren, Corlett & Turner. Mr. Corlett will be speaking on behalf of the Association.

Mr. M. E. Corlett, Q.C., Legal Counsel, Allied Beauty Association: Mr. Chairman, I understand honourable senators have been provided with copies of our submission, in which event I shall deal with it orally.

The Acting Chairman: That is right.

Mr. Corlett: Mr. Chairman, I am legal counsel for the Allied Beauty Association and with me this morning, as you have already pointed out, are Mr. Swenson, the president of the Association, and Mr. Robinson, the past president. Both of these gentlemen represent a different phase of the Association.

I was rather amused before the proceedings started this morning to hear one person in the room, in all innocence, having in mind the name of the Association, express the view that perhaps it might have something to do with beauty contests. That, honourable senators, is not the case. This is a national trade association in Canada comprised of manufacturers and distributors of beauty products which are sold to ladies' salons and barber shops throughout the country. Mr. Swenson is a manufacturer and Mr. Robinson a distributor, both of whom have been in this business for many years. Because of their different capacities, I am sure they will be able to answer any questions honourable senators might care to raise.

To give an idea of what is involved in this type of business, the Allied Beauty Association, which has been in existence since 1935, has resorted to surveys which have been conducted by independent auditors, Price Waterhouse in Toronto being one. The Association itself is made up of 168 firms, of which 40 are manufacturers operating from coast to coast in Canada. The customers of the manufacturers, of course, are the salons and barber shops, and the surveys conducted show that in Canada today there are approximately 60,000 hairdressers and barbers engaged in each of these professions. The manufacturers sell to distributors who, in turn, sell to the shops, and the products are made up in what are known as professional sizes. In other words, there is a difference between the type of thing one can buy, say, at the cosmetic counter of a department store and what is sold to the trade.

What does this association do? Firstly, it has conducted trade shows across the country for years. For

example, a trade show is held in the city of Toronto every year for the benefit of hairdressers, largely, and that trade show attracts a little short of 10,000 persons. A similar show is put on annually in Montreal in the halls underneath the Bonaventure Hotel. That will attract 6,000 or 7,000 hairdressers and other interested parties. Similar shows are put on in the Atlantic provinces, the Prairie provinces and on the Pacific coast.

In addition, the provincial Department of Labour in Ontario is anxious to upgrade or retrain people engaged in the trade of hairdressing and so on. This association is presently working out a program with the Department of Labour of Ontario to assist in carrying out such a retraining program. If that is successful, it will presumably be carried over into other provinces. Courses have been given under the auspices of Seneca College in Toronto, which is one of the community colleges in this province. I mention this merely to indicate the type of thing this association engages in. It has nothing to do with the conducting of beauty contests.

Senator Laird: If you were going to start in this room I am afraid there would only be one winner!

Mr. Corlett: I might say in all sincerity, having been present here this morning, that I was very impressed with the questions put by Madam Senator.

Senator Laird: She has got brains too.

Mr. Corlett: Turning to Bill C-2, A.B.A. (Allied Beauty Association) has prepared a brief. I presume each senator has received a copy and I do not propose to read it. With the permission of the committee, I would merely like to highlight the three points of concern to this association.

First, I refer to a group of sections under the heading "Part IV.1," dealing with matters reviewable by the commission. The various types of transactions enumerated in this series of sections, starting with section 31.2, would not be transactions which by themselves would be offences under the act, but the commission could, under certain circumstances, direct that certain things be done if, in their judgment, certain factors existed.

This leads to two fears on the part of this association. With respect to the criteria set forth in section 31.2, dealing with refusal to deal, which is one that might be of interest to this association—the ABA would not be concerned with one relating to tied selling or consignment selling, or perhaps even exclusive dealing—it is our submission that as section 31.2 is presently worded it is very vague, and there is not a sufficient establishment of the criteria the commission should use when deciding whether or not to act on any such transaction. I would refer you to phrases such as "adversely affected in his business," "adequate supplies of a product" or market, or "inadequate degree of competition." How can one determine exactly what these phrases mean?

As evidence of the difficulty, I would refer you to evidence taken before the House of Commons Standing Committee on Finance, Trade and Economic Affairs on April 30, 1974, when the house was dealing with Bill C-7, which, as has been pointed out, was identical to the present Bill C-2. It was issue No. 9 at page 25. A member of the house at that time, Mr. Atkey, asked the then minister, the Honourable Mr. Gray:

> Finally, concern has been expressed about the term "inadequate degree of competition."

That is one of the phrases I have mentioned.

> What do you mean by that? Are you in a position to provide a more precise definition of that?

The answer of the minister was:

> This is also something we have examined. Our feeling so far is that it does not seem possible to come up with a definition of "inadequate" which would at one and the same time not be too rigid or too flexible; that is to say, one which might catch certain practices that on balance you would think should not be caught or might not catch some practices which we think should be. I use "we" in the very broad sense, not just myself and the department, but the public at large.

I merely cite that as an illustration of the fact that the then Minister of Consumer and Corporate Affairs recognized, I think, the validity of this complaint. As I interpreted his reply, he was more or less throwing up his hands and saying, "This is the best we can do, inadequate as it might be." I am aware of the work that the Senate, and particularly this committee, has done in connection with restoring order out of the inadequate phraseology of bills that have come to it from the house, as undoubtedly Bill C-2 will some time in the new year.

Senator Cook: You are doing well!

Mr. Corlett: I would ask that something be done along these lines. As honourable senators know, this matter of a competition policy for Canada has been dealt with by the Economic Council. Without taking up the time of the senators by referring to passages in the report of the Economic Council on a competition policy in 1969, which are cited in the brief, I would point out that they have emphasized in a general sort of way that, whatever competition policy was to be reduced to legislation, it should be put in reasonably precise terms. Our fear as an association is that, certainly in section 31.2, the refusal to deal section, as it is presently worded, there are no clear guidelines as to how the commission should reach a decision.

Senator Buckwold: Do you have a definition for "inadequate competition"?

Mr. Corlett: No, I have not. That is something I suppose one would have to give some thought to.

Senator Buckwold: Do you have any suggestions?

Mr. Corlett: Not at this point.

The next point I would like to highlight and refer the committee to arises from the same type of situation, namely the matters that can be reviewed by the commission, and that is the lack of an appeal provision. This, of course, came up by way of criticism of the previous bill, Bill C-7, last spring. In fact the present minister, when Bill C-2, as it is now known, was before the house on second reading, anticipating that this was coming up, attempted in a general way to deal with the

matter again by saying that there was an appeal provision.

It is our submission that the minister and his predecessor have erred in this respect in making this statement. The present minister made a statement about the existence of an appeal section, as reported in House of Commons *Hansard*, on October 22, 1974, at page 611. The previous minister made the statement when he was dealing with Bill C-7 on March 13, 1974, as reported in House of Commons *Hansard* at page 482. The justification these learned ministers have for saying there is a right of appeal is the existence of section 28 of the Federal Court Act.

I submit that section 28 of the Federal Court Act does not provide a right of appeal. It provides a more limited right—to review and set aside. I would refer you to a document written by the present Chief Justice of the Federal Court. Chief Justice Jackett wrote a Manual of Practice for the new Federal Court of Canada, which was published in 1971, shortly after the court in its present form started to operate. This document has a foreword by the then Minister of Justice, the Honourable Mr. Turner, and it was published by the Government of Canada through Information Canada. At page 22 of this manual—and I refer to this at page 5 of the brief—the Chief Justice Jackett was very careful to point out:

> It should be emphasized that the jurisdiction of the Court of Appeal under Section 28 is not an appeal jurisdiction. It is a jurisdiction to "set aside" a decision of a board, commission or other tribunal, but does not involve a power to substitute a decision of the Court of Appeal for the decision of the tribunal.

Secondly,—and I provide the appropriate quote in the ABA brief—he points out that if you are going to try to set aside such a decision, you must act within ten days. Well, 10 days can go by pretty quickly without the aggrieved party being aware of his position.

I would submit if Part IV.1 of Bill C-2, headed "Matters Reviewable by Commission,"—that is, the Restrictive Trade Practices Commission—is to be kept in the bill, as I presume it will be, that there be a full right of appeal.

After all, you have the Federal Trade Commission of the United States going back to, I think, the Woodrow Wilson administration of about 1912 or 1913, dealing with some of these matters that will be covered in this group of sections under this new part concerning matters reviewable by the commission. The Federal Trade Commission, as honourable senators know, operates frequently through the issuance of what are known as "cease and desist" orders. But it is our understanding that such orders of the Federal Trade Commission are appealable to a circuit court of appeal in the United States—a full right of appeal—and a more restricted right of appeal to the Supreme Court.

That is our second submission, that a full right of appeal should be permitted under this legislation. Of course, we are not alone in making this suggestion.

Senator Flynn: And the appeal should be to which court?

Mr. Corlett: I presume to the Federal Court of Appeal.

Senator Flynn: Do you think the Federal Court of Appeal would be qualified to review the whole policy?

Mr. Corlett: This, I know, sir, is one argument that is advanced.

Senator Flynn: I am not arguing.

Mr. Corlett: We have to have experts. I may be biased, but certainly as a lawyer I have faith in the ability of the Federal Court. The Federal Court of Appeal has to deal with matters relating to tariffs, dumping duties, income tax, and I think their record has been eminently good. I do not see any reason why qualified judges cannot deal with matters of this kind.

Senator Flynn: They would deal only with points of law, as do courts of appeal generally.

Mr. Corlett: Yes, and it is true that the Economic Council made that recommendation, that any appeal be restricted to a matter of law. That exists in connection with appeals from other tribunals such as the Tariff Board or the Anti-Dumping Tribunal. On the other hand, under the Income Tax Act there is a full appeal on tax and law. Certainly, as a bare minimum there should be a full appeal on the matter of law.

Senator Flynn: In that event, there will be the advantage of having the court of appeal able to change the decision, to make it what it should have been in the first place.

Mr. Corlett: Yes, and presumably the Federal Court of Appeal would acquire an expertise in this matter as time went on.

Senator Laird: You would not want a trial *de novo*, or anything like that?

Mr. Corlett: Oh no.

Senator Laird: Just an appeal on the record?

Mr. Corlett: Yes. The third point that we have dealt with in the ABA brief relates to the resale price maintenance section, which appears as the proposed new section 38, and can be found on page 38 of Bill C-2.

The concern of the association relates to what is presently subsection (5) of section 38 of the Combines Investigation Act, and it is proposed this subsection be deleted.

This subsection (5), honourable senators will remember, was put in as an amendment to the Combines Investigation Act in 1960. Resale price maintenance was outlawed, or made an offence, back in 1952 by an amendment to this act. Of course, in order to be able to enforce the prohibition on resale price maintenance, one would have to make it an offence for a vendor or a manufacturer to refuse to sell to a dealer, because the dealer would not be bound by the prices mentioned by the manufacturer. That would have to be in, in order to make the section operative and that, of course, was in effect from 1952 through 1960.

But in 1960 it was decided that there might be bona fide cases where a manufacturer or seller had a good reason for not reselling. Four grounds were given, and they appear in subsection (5). The ABA members would be concerned only with two. One is were the purchaser is

going to use the article as a loss leader; and the second is where the purchaser would not provide the level of servicing that the purchaser of the articles might reasonably expect.

These two provisions are of interest and importance to the members of this association, and either of my colleagues can speak better to this issue, because they are in the business. It is proposed now that this be deleted, for the reasons outlined in the brief. I shall not take up senators' time to go over these now, because in reading the brief one can see the reasoning. It is our submission that neither the Economic Council, which skirted around this issue, nor the commentary contained in the blue book which was the companion to Bill C-7, adequately deal with the situation in so far as this association is concerned. Therefore, it is our recommendation that subsection (5) of the resale price maintenance section be retained.

I think, Mr. Chairman, that pretty well summarizes whaat is set forth in our brief, and those are the points of objection that this association has to Bill C-2.

Senator Walker: Coming back to Chief Justice Jackett's opinion that the jurisdiction of the court of appeal under section 28 is not an appeal jurisdiction, but a jurisdiction to set aside a decision of a board or tribunal, when such a decision is set aside is the whole matter one of *stare decisis*, or can it be started all over again on a different basis?

Mr. Corlett: If it is merely a jurisdiction to set aside, then you are back where you started, but, of course, you could go again.

Senator Walker: That is what I thought.

Mr. Corlett: It does not permit the court of appeal to impose its own judgment on the matter.

Senator Walker: But you never get past the original body, do you? You do not get into the court of appeal for any kind of judgment.

Mr. Corlett: No.

The Acting Chairman: Your arguments on resale price maintenance are contained in pages 7, 8 and 9 of your brief?

Mr. Corlett: Yes, and they relate only to the desirability, in our estimation, of the retention of subsection (5) of section 38, which has been deleted in the form as set forth in Bill C-2.

The Acting Chairman: I have just two obvious questions. The turnover of the members of your organization, according to your brief, is about $16 million, but the Canadian public, I understand, spends $300 million on beauty services in any given year.

Mr. Corlett: Perhaps Mr. Swenson or Mr. Robinson could elaborate on the bona fides of those figures, if you wish them to.

The Acting Chairman: There is no question of that in my mind. It was the scale.

Mr. Robert C. Swenson, President, Allied Beauty Association: If it is not quite clear, Mr. Chairman, perhaps, as a manufacturer of products used in the service, I can explain. For instance, when a women has a permanent wave, the price of the package of permanent wave which the beaty salon would purchase is only a small percentage of the total cost that the womna would pay for that service. In other words, if the supply cost to the beauty salon was $2, the woman might conceivably pay $20 for the permanent wave. Eighteen dollars of that would be attributable to the location, to the input of labour and stylability. The actual product cost would be approximately 10 per cent of the total cost of the service.

Mr. W. W. Robinson, Past President, Allied Beauty Association: Perhaps I should mention one further point. The $16 million refers to manufacturers selling to dealers, such as myself. I, of course, have my mark-up. The actual amount paid by salons is more in the neighbourhood of $25 million. There are several graduated levels. We are sort of the last of the free enterprisers. We buy from the warehouses, turn around, and sell to the salons.

The Acting Chairman: Do we understand that you are not selling to the general public, but only to various salons.

Mr. Robinson: We sell to the salon, which in turn has a certain resale situation developing, but that is not the big part of our business. Mainly our products are consumed by the hairdresser in the process of creating the effects which the consumers desire.

The Acting Chairman: Mr. Greenwood, do you have any comment to make?

Mr. G. B. Greenwood: No, Mr. Chairman. I am with the firm, but I do not really know anything about beauty.

The Acting Chairman: You are counsel with Mr. Corlett, is that right?

Mr. Corlett: Mr. Greenwood is a product of the Dalhousie Law School, and, like all Maritimers, he likes to come to Ottawa to see how the Government of Canada functions.

Senator Molson: You have made no allusion to section 36, the clause on advertising and representations, specifically misleading advertising. Have your members no problems with respect to that section?

Mr. Corlett: My information, Senator Molson, is that we do not. The position we took is that we would only endeavour to speak to the specific parts of the bill that were of direct concern. The section that you have raised does not pose any problems, and the association has no objection to it at all.

The Acting Chairman: Thank you very much, gentlemen.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 10

WEDNESDAY, DECEMBER 4, 1974
THURSDAY, DECEMBER 5, 1974

Complete Proceedings on Bill S-15, intituled:

"An Act to amend the Department of Industry, Trade and Commerce Act"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, November 26, 1974:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Everett, seconded by the Honourable Senator Barrow, for the second reading of the Bill S-15, intituled: "An Act to amend the Department of Industry, Trade and Commerce Act".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Langlois moved, seconded by the Honourable Senator Perrault, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate

Minutes of Proceedings

Wednesday, December 4, 1974
(11)

Pursuant to adjournment the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider the following:

"Bill S-15, An Act to amend the Department of Industry, Trade and Commerce Act."

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Blois, Buckwold, Cook, Desruisseaux, Everett, Flynn, Gélinas, Laird, Lang, Macnaughton, McIlraith, Molson and Walker. (16)

Present, not of the Committee: The Honourable Senators Bourget and Heath. (2)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

WITNESSES

Department of Industry, Trade and Commerce

Mr. Gordon Ritchie,
Acting General Director,
Office of Industrial Policy;

Mr. J. G. MacKinnon, Chief,
Import Analysis Division;

Mr. A. M. Coll,
Director,
Policy Analysis Branch.

Following the suggestion of the Hon. Senator Everett that certain amendments be made to the above Bill; it was *Agreed* that consideration thereof be adjourned until further information was received from the Department.

At 10:40 a.m. the Committee adjourned further consideration of the above matter until Thursday, December 5, 1974 at 9:30 a.m.

Thursday, December 5, 1974
(14)

Pursuant to adjournment the Committee *resumed* its consideration of Bill S-15.

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Blois, Cook, Everett, Macnaughton, Molson and Walker. (9)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

WITNESSES

Department of Industry, Trade and Commerce

Mr. Gordon Ritchie,
Acting General Director,
Office of Industrial Policy;

Mr. J. G. MacKinnon, Chief,
Import Analysis Division;

Mr. A. M. Coll,
Director,
Policy Analysis Branch.

After discussion and upon motion of the Hon. Senator Everett it was *Resolved* that the Bill be reported with certain amendments.

NOTE: (The full text of the amendments appears by reference to the Report of the Committee immediately following these Minutes).

At 10:05 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Thursday, December 5, 1974

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill S-15, intituled: "An Act to amend the Department of Industry, Trade and Commerce Act" has, in obedience to the order of reference of Tuesday, November 26, 1974, examined the said Bill and now reports the same with the following amendments:

1. *Page 2:* Strike out lines 10 to 12, both inclusive, and substitute therefor the following:

"(4) Except for the purposes of a prosecution under subsection (6) *or (7),* but subject to subsection (5)"

2. *Page 2:* Immediately after line 51 add the following:

"(7) Every person who, after having taken and subscribed an oath or affirmation pursuant to subsection (2), and having been designated by the Minister of Industry, Trade and Commerce for the purposes of this section, uses any information obtained in the examination of copies of invoices or other documents made available by the Minister of National Revenue pursuant to subsection (1) for the purpose of speculating in any stocks, bonds or other security or any product or article is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

(8) Except for the purposes of a prosecution under subsection (6) or (7), any copy of an invoice or other document made available by the Minister of National Revenue pursuant to subsection (1) is privileged and shall bot be used as evidence in any proceedings whatever, and no person who has taken and subscribed an oath or affirmation pursuant to subsection (2) and who has been designated by the Minister of Industry, Trade and Commerce for the purposes of this section shall, by an order of any court, tribunal or other body, be required in any proceedings whatever to give oral testimony or to produce any copy of an invoice or other document with respect to any information obtained pursuant to this section."

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, December 4, 1974

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-15, to amend the Department of Industry, Trade and Commerce Act, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators this morning we have one public bill, and then we are going to sit *in camera*, unless the committee says otherwise, and hear an analysis of the proposed income tax amendments contained in the budget resolutions. This material that you see being assembled here is part of the mechanics for projecting, for your information, all the different portions of the resolutions. We will have present Albert Poissant and Charles Mitchell, and Peter Cumyn of the Stikeman, Elliott firm, from Montreal. They have made their preparations, so they will be fully able to proceed and, I hope, answer any questions you may have.

Bill S-15 is an Act to amend the Department of Industry, Trade and Commerce Act. Appearing are Mr. Gordon Ritchie, Acting General Director, Office of Industrial Policy; Mr. J. G. MacKinnon, Chief, Import Analysis Division; and Mr. A. M. Coll, Director, Policy Analysis Branch—all of the Department of Industry, Trade and Commerce. I understand Mr. Ritchie will make the opening statement, and then he and his panel will be subject to any questions you may want to ask.

Mr. Gordon Ritchie, Acting General Director, Office of Industrial Policy, Department of Industry, Trade and Commerce: Mr. Chairman, honourable senators, I have with me Mr. MacKinnon, who is on my far right, and Mr. Coll.

Today you are being asked to legislate to permit us somewhat more adequately to perform a quite significant industrial development function. Canadian producers are, through this operation, made more aware of potential opportunities in markets open to them in Canada as revealed by import sales in this country. The use of import analysis, therefore, in some respects presents a useful complement, in some cases even a positive alternative to stimulating industrial development through protection and subsidization of industry. We have been carrying out these functions for a number of years. We have, however, been obliged to operate in a somewhat circuitous manner. It has cost more and it has been less comprehensive than could have been the case if we had explicit legislative provision.

Therefore, it would be our hope that you would see your way clear to providing us with such provision in a manner which would not in any way impinge upon the rights of individuals, and particularly on the rights of importers to confidentiality. It is for this purpose that we have Bill S-15 before you today. I would be pleased, with my colleagues, to answer any questions you might have on it.

Senator Macnaughton: Mr. Chairman, I probably do not understand the purpose of the bill. What happens to those Canadians who have built up a large import business? Apparently, this bill would allow the officials to see where the imports have come from and what they are and then to take that information and say, "Let us create our own products in this country." Is that the idea? Supposing I have built up an import business over the last 150 years, is it a conscious decision of your department to say, "That is too bad, we are more interested in local production"?

Mr. Ritchie: Perhaps I should say that Canadian importers do make use of this service, in fact, to their own advantage. Perhaps I could ask Mr. MacKinnon to elaborate on that.

Mr. J. G. MacKinnon, Chief, Import Analysis Division, Department of Industry, Trade and Commerce: As a matter of fact, the import analyses that are prepared on the basis of these documents are prepared primarily for industrial development purposes, in order to provide employment and in order to help the international commodity trade, the merchandise trade balance of Canada. At the same time it is hoped that in some cases it exposes an opportunity for manufacturing; and, by the same token, it can also expose a marketing opportunity for importers as well. Our reports are used by them as well as by entrepreneurs.

The Chairman: Would you tell me, Mr. MacKinnon, how have you operated to date, if these records which you are now asking for were not available to you?

Mr. MacKinnon: They were available in a fashion, on the basis of an interdepartmental arrangement.

The Chairman: What do you mean by "an interdepartmental arrangement"?

Mr. MacKinnon: By way of an interdepartmental arrangement with Customs, between Revenue (Customs Division) and Statistics Canada.

The Chairman: You mean that, up to date, the customer would consent so that you could see the record that you now want statutory authority to see?

Mr. MacKinnon: It was worked on the basis of this interdepartmental arrangement. One of the conditions was that any employees who were permitted to see a document had to be sworn in under the secrecy provisions of the Statistics Act, section 6.

Mr. Ritchie: Honourable senators, perhaps I may explain it. We may be expressing ourselves in bureaucratese when talking of "interdepartmental arrangements." The legal basis on which we had access was in terms of employees of our operation being sworn in under the Statistics Act, pursuant to the provisions of that Act, and therefore,

having access to these documents. We could not, obviously, by an interdepartmental arrangement override the provisions of the Customs Act and the Statistics Act.

The Chairman: Up to the present, you have been getting at this information by some kind of arrangement you have with Statistics or National Revenue, is that right?

Mr. Ritchie: Yes, Mr. Chairman. We have been able to obtain this information on this basis.

Senator Everett: This is provided for under section 23(2) of the Statistics Act?

Mr. Ritchie: Yes.

The Chairman: You will have decided to bring this bill in to legalize what you have been doing?

Mr. Ritchie: I think, Mr. Chairman, what we have been doing has been entirely legal, pursuant to that section 23(2).

Senator Everett: I think you could make clear to senators under what section of the Statistics Act you are operating, rather than talk about interdepartmental arrangements, and where your clear authority comes from to do what you have been doing.

Mr. Ritchie: Honourable senators, let me read to you section 23(2) of the Statistics Act:

> For the purposes of this Act and subject to subsection (1) of section 16, the Minister of National Revenue shall cause to be sent to the Chief Statistician returns of imports and exports into and from Canada and details of the means of transportation used therefor, in such manner and at such times as the Governor in Council may prescribe upon the recommendation of the Minister and the Minister of National Revenue.

The Chairman: Under that authority, that is the way that information gets to the Statistics Branch. My question was directed to this: what was it that enabled you to get the information, once it was in the hands of the Statistics Branch? What enables you to get it?

Mr. Ritchie: Under the provisions of this act, our employees have been sworn in to act then in this regard under, I suppose, technically the aegis of the Chief Statistician.

The Chairman: You mean that an employee of Industry, Trade and Commerce could go to the Statistics Branch and request this information, some of which had come from National Revenue, under the authority of the Statistics Act; and these papers and records would be made available to an employee of your department.

Mr. Ritchie: Mr. Chairman, the paragraph to which I made reference explains the basis on which the Chief Statistician has access to these documents. Then, under the provisions of section 6(1) of the Statistics Act:

> The Chief Statistician and every person employed or deemed to be employed pursuant to this Act shall, before entering upon his duties, take and subscribe the following oath . . .

Senator Cook: Even though you take the oath, you are still wearing your hat as a staff member of the Department of Industry, Trade and Commerce and not as an officer of the Statistics Branch?

Mr. Ritchie: Quite right.

The Chairman: In the language of that section that Mr. Ritchie read from the Statistics Act, it authorizes the person who is an employee of th - Chief Statistician to see this information, or some person who is deemed under that act to be an employee. Now, where is it that an employee of the Department of Industry, Trade and Commerce is deemed to be an employee of the Chief Statistician, and who makes the decision that he is deemed to be such an employee?

Mr. Ritchie: Mr. Chairman, that is the rule which has been adopted in the past and part of the reason why we are hoping to get this through.

The Chairman: You are saying that, right or wrong, that is the way you have been doing it?

Mr. Ritchie: That is the way we have been doing it and our legal advisor advises us that that has been within the letter of the law.

The Chairman: If it is, I wonder why we have this bill.

Mr. Ritchie: Mr. Chairman, I think that is part of the concern. That is a very critical question to the importance of this bill. I think part of the answer to that question is that this is a function we would consider highly defensible and quite generally used by other governments than our own, and one which should be given explicit legislative provision, rather than going a rather circuitous route which, among other things, has some technical implications. It means we have to march our people over to another part of town to examine the documents. It means that we have not perhaps the sort of information which would be most precisely useful to our purpose. It means, further, that we are placing upon the Chief Statistician the responsibility of policing these provisions, whereas in fact we should as a department be held responsible for the policing.

Senator Lang: Apart from the legalities, Mr. Ritchie, that information that flows into Statistics Canada is for the purpose of producing statistics, is it not?

Mr. Ritchie: Yes.

Senator Lang: And when those statistics are produced, I presume they are available to your department like they are available to anybody else in Canada?

Mr. Ritchie: Yes.

Senator Lang: If the statistical information is readily available to you, without swearing anybody in as being deemed to be an employee, for what purpose do you want this information other that than, statistics?

Mr. Ritchie: Mr. Chairman, perhaps I could ask Mr. MacKinnon to explain the difference between "statistics" and "statistics," that is, those statistics at the sort of aggregative level for Statistics Canada purposes for their trade publications, and statistics which would in fact be useful and relevant to our industry.

Mr. MacKinnon: Published statistics, as produced by Statistics Canada, are based on a commodity classification basis and they are fairly general. For example, when you are talking about certain goods, they would show up in an import class as front-end loaders, but if you wanted to develop some industrial development information from that, you would have to know the size of the front-end

loaders, the types and this sort of detail. So you could release this information, while at the same time protecting the importer and making sure you are not revealing any more than that or revealing any one importer's business to anybody else. It has got to be done in that way. The difference between what we try to do in analysing imports, vis-à-vis what is published statistical information, is that theirs is one that is done on a classification basis, whereas ours is done to the type of product as much as possible.

Senator Lang: If that is so, why cannot Statistics Canada produce that information for you?

Mr. MacKinnon: In order to get that information there is a great amount of research necessary to indentify the products that are coming in.

The Chairman: Mr. MacKinnon, I understand that the method which the Chief Statistician follows is a method by which he collects the information from all the various sources where it is available in connection with business, and then he collates that in a more general form so that you cannot identify the particular operations of particular companies which enter into that general compilation. As I understand what the department wants the information for, it is to break down the compilations that the Chief Statistician has made in the interests of preserving the secrecy of the information for the particular industries who have contributed this material. I was waiting for somebody here, representing the department, to tell us how important that is and how they use it.

Mr. Ritchie: Perhaps, honourable senators, we could first distinguish between the level of aggregation required to protect confidentiality and that used by the bureau in its published statistics. To give you an illustration, if the Imports of Canada document were to go to the level of disaggregation which is required to be meaningful to a potential Canadian producer of all of these products, it would be a row of volumes which would fill this table and a good part of this room. We are looking at the need to, in fact, go very much more finely into the items which, in part for reasons of confidentiality—which we respect and to which we remain faithful—but also in part for reasons simply of compression of the documents into manageable size, are aggregated for purposes of Statistics Canada.

In terms of why, then, we need this information and what benefits flow from it, the information on the importation, generally speaking, of front-end loaders is not very helpful to anyone. The information as to the sorts of front-end loaders which are, in fact, finding markets in Canada can indeed be very significant. On the basis of that sort of information we have in fact amassed a fairly considerable array of industrial development activities which, on an unsolicited basis, the entrepreneurs have asserted, depend directly on the work of this import analysis function.

If you wish, perhaps Mr. MacKinnon might give some illustrations of the sorts of activities which have in fact flowed from the more detailed form of analysis which would not have been possible from the more general analysis undertaken by Statistics Canada.

Senator Buckwold: Who initiates this study or the gathering of information and data on any given product? Is it your department or is it any individual who says he would like to know, for example, how many front-end loaders in a certain price range are coming into Canada? How does it start?

Mr. Ritchie: We have a system of priorities, which has a number of elements in it. Perhaps Mr. MacKinnon could elaborate on that. Essentially, we are responsive to demands rather than initiating.

Senator Buckwold: What you are really saying is that, basically, an individual can come to you and say that he is interested in a given article and that he would like to get all the information about it—presumably detailed information which would not just be quantity but would go down to even the finest price information and the cost information of the data that is being required. Is that the way it is generally initiated, or is it the department itself which determines to gather the statistics on a given subject?

Mr. MacKinnon: As a rule, we are responsive. That is, action requests have to be investigated, and what-have-you, from industry or from a private businessman who is interested in going into a manufacturing operation. For example, supposing a person comes, just as an ordinary businessman, and said, "I don't think that there are any scissors being manufactured in this country, and scissors are used in every household, every office and every other place in the country. The manufacturer of that piece of equipment provides employment for people in a foreign country and there is no Canadian involved in the manufacturing of it whatsoever. It is a product which is used from coast to coast in about every household. What is the situation then? Is there any production in Canada? How much of the product is coming into this country? Can you give me an idea of what types are coming in?" Well, if you look up published statistics you will find that there are scissors, shears and so on shown there, but to say actually how many scissors are coming in in a given period is not possible. You would not be able to find out that information. Therefore, a businessman would be very hesitant to make a costly survey of, for example, Woolworth stores, in order to find what the demand is for scissors. He would want something a little more factual than that in order to invest his money or make arrangements for investing his money in the manufacture of scissors. That is the purpose of it.

Senator Buckwold: I happen to be one who supports the bill. Really, what we are doing is trying to create secondary industry in Canada in order to provide employment. To that end we are trying to get all the information we can in order to help people get into the business. I think basically that is what we are trying to do. I am all for it. My question really was, "Who starts it?"

Senator Everett: May I ask a supplementary? Could you be more precise as to what information I, as a prospective manufacturer of scissors, would get from you?

Mr. MacKinnon: What type of information?

Senator Everett: What you have told me so far would not be sufficient for me to make a considerable investment in a manufacturing facility to manufacture scissors. I would want to know a lot more about the volumes and particular details of importation of scissors than you have been able to give me so far.

Mr. MacKinnon: As I said, it is all on imports. The whole market is supplied from imports.

Senator Everett: Yes.

Mr. MacKinnon: So what we try to do is to break this down to find out what kind of scissors are coming in. First,

we try to determine the type according to function—whether they are cuticle scissors or bandage scissors, and so on. Then we try to determine the type according to whether the scissors are curved, serrated, tapered or pointed, and whether they are of a school type or a pocket type, and so on. Then we consider the sizes and we arrange those and put them in sizes from, for example, three-and-a-half inches to six inches. Then we consider the quantity. We actually did this and it took us over a period of three months.

Senator Everett: When you refer to quantity, do you mean the quantity of each size?

Mr. MacKinnon: That is right, the quantity of each range of size. We are able to put that down. Then we consider the area in which they are imported. If they are all imported on the east coast, then in trying to interest anybody on the west coast, then transportation costs would be an important factor to take into consideration, because, for example, they might be able to get them cheaper from Taiwan or Japan or certain other countries than they could from a Canadian manufacturer. So we would show whether it was coming into ports in Ontario, or into ports east of Ontario or west of Ontario, to give them some idea. We would then show by percentage of value the countries of origin—not the countries of export, but of origin, the countries which actually produce the goods.

Senator Everett: Is that all the information you would give me?

Mr. MacKinnon: That, plus a five-year time series of that whole import cost, to give you an idea of what the ratio of imports was during that three-month period with regard to the twelve months of each year, for five years.

Senator Everett: Can you give me any idea as to the price of the import?

Mr. MacKinnon: Well, the value, for example, the bandage scissors, 3½ to 6 inches. There would be 5,518 of them, valued at $2,172.

Senator Everett: So in fact you would be giving me unit prices.

Mr. MacKinnon: It is an average unit price.

The Chairman: Senator Everett, you were the sponsor of this bill in the Senate, and I do not recall whether you dealt with this point. It seems that in the bill the authority of the minister took care of this information from the sources we have discussed, for the purpose of carrying out his duties under section 5 of the basic bill, the Industry, Trade and Commerce bill. The paragraph and the subparagraph under section 5 that might be pertinent, although I doubt if it is fully complete, reads like this, that one of the duties of the Minister of Industry Trade and Commerce is that he shall

> (g) compile and keep up to date detailed information in respect of manufacturing and processing industries in Canada and of trends and developments in Canada and abroad relating to Canadian industrial development and trade;

Mr. Ritchie, are you prepared to express an opinion that the subsection I have read, which is subsection (g) of section 5 of the Department of Industry, Trade and Commerce Act, is broad enough to cover what you ask to have access to in the way of copies of invoices of goods imported into Canada, or of other customs documents relating thereto?

Mr. Ritchie: Mr. Chairman, there is also, of course, section 5(e) which instructs the Minister to "provide support services for industrial and trade development, including information, import analysis, and traffic services." Now, in a sense, those two go very closely together.

Senator Everett: And there is also section 6(a).

Mr. Ritchie: Yes, which is the general mandate of the department.

Senator Everett: No. That is section 5(a) that you are talking about. Section 5(a) is the general mandate to promote manufacturing, et cetera. Section 6(a) says that the minister:

> (a) shall, where appropriate, make use of the services and facilities of other departments, branches or agencies of the Government of Canada;

You tie the section you read, Mr. Chairman, and the other three sections that have been read, together, and I think that is fairly clear authority, when combined with the Statistics Act, to allow them to do what they have been doing. The difficulty is, it is not under the direct control of Parliament. What this bill purports to do is precisely to put that under the direct control of Parliament. If the service they are providing is a useful service, then I would contend, as I did in my speech to the Senate, that it should be under our direct control, and that our control is not so much with regard to what has been happening, which has been through an amalgamated group of sections of different bills to create an authority, but should rather be with regard to direct authority, and how proper the safeguards are in respect of that direct authority. I am imposing on Senator Buckwold's time, but a little later I would like to suggest some possible amendments to this bill that would act as safeguards to its operation.

The Chairman: Are there any other questions at this time, before Senator Everett comes to the point of proposing any amendments?

Senator McIlraith: I wanted to ask a question about clause 1, but I am not clear whether it should be asked now. Perhaps, since there are so few clauses, I may ask it now, My question is this: The Minister of National Revenue is being authorized to make such copies available, but only to two persons. One is the Minister of Industry, Trade and Commerce—that is clear. Then the second one is:

> . . . to persons employed in the Department of Industry, Trade and Commerce who have been designated by the Minister of Industry, Trade and Commerce for the purposes of this section . . .

Now, in this type of work, are all the persons you have in the department and who are doing this type of work employees of the department, or are any of them under contract, as is often the case when there are special research projects being put in hand in government preserves? For example, university professors, and so on, are brought here in considerable numbers, and are not made employees of the department for whom they are working, but are rather put under those special contracts.

Mr. Ritchie: I believe, senator, that I could say with certainty that they are, and would be, all employees of the department. This would not be the sort of information that

we would expect to seek the minister's designation to make available to other than employees of the department.

Senator McIlraith: It is the reference to the method of hiring the employees that I find rather narrow here, with regard to the Public Service. Many of the full-time workers of the Public Service are not employed. I am concerned with the language here, and whether you have considered the point as to whether you should have used a wider expression than "employee".

Mr. Ritchie: Well, senator, as now constituted, the Import Analysis Division, the personnel of which would be the persons who would be designated for this purpose, is comprised of professional and semi-professional officers and clerical staff, all employed full-time on a permanent basis. There are no contract employees, and there are no other arrangements, other than those that are normal to the Public Service.

Senator Flynn: But the language would not restrict the power of the minister to designate only permanent employees.

Mr. Ritchie: Senator, I could not give you a legal opinion on that.

Senator McIlraith: They do not become employees of the government. That is my point. They are hired under contract, and they remain employees of the university, or whatever body they may be originally employed by, to do a job for the government, under contract.

Senator Flynn: But if you employ the services of someone, I do not see how he cannot become an employee.

The Chairman: Well, Senator Flynn, I suppose you could interpret this broadly enough so that the expression "employed by the department" could be someone who was employed specifically with regard to getting this particular information.

Senator Flynn: I am just discussing the objection of Senator McIlraith.

The Chairman: Senator Buckwold?

Senator Buckwold: If an individual came to you for any purpose, would you have the right to say that you did not want to do that particular statistical investigation? Is it a judgment factor on your part as to whether it would be the right of any individual to get the information he wants?

Mr. Ritchie: Because of the constraints on resources, senator, it is a management function to determine on which applications we will be in a position to act. We in fact have a substantial backlog at any given time.

Senator Buckwold: I note a growing trend in the import field to bring into the country partially finished goods. Now, what is concerning me a little is the reverse of what we hope will happen. What is happening at present is that manufacturers who normally make products here find that a good part of the basic manufacturing can be done in a country where costs of production are lower, or where efficiency is higher. The goods are then brought in and finished here. Sometimes they are just packaged and labelled here. I can envisage smart manufacturers trying to get the kind of information that would be helpful to them, and, in fact, reducing their level of output in Canada by utilizing imported goods on a much greater scale. Is that the kind of thing that would happen? Would you give that information?

Mr. Ritchie: I could not tell you that it could never happen, but it is something we would take into account and seek to avoid, in determining the priority with which we will undertake the analysis of import categories. We do look quite closely at the benefits to Canada that we expect to flow from that analysis, as we do with any of our other activities.

I wonder if I could return for a second to the earlier point raised by Senator McIlraith. I would draw attention to the fact that in section 6.1 it does talk of persons "employed in", and not persons "employed by". The reference is to "persons employed in the Department of Industry, Trade and Commerce". I am not a lawyer, but I would take that to mean, and I think this is what Senator McIlraith has suggested, full-time employees of the department.

Senator Lang: Mr. Chairman, I have a question to ask which contains two parts. The first is this: Assuming that Statistics Canada has the resources to generate the detailed statistical information that you require for your own purposes, could it generate that information, and could it make it available to you and to the public at the same time, having regard to the structures imposed on the Dominion Statistician under his act?

Mr. Ritchie: Well, senator, I think first of all that if Statistics Canada were to undertake the development and dissemination of that information, there would be no need for us to do it. Therefore what the question boils down to, in essence, is this: Do we transfer this function to Statistics Canada rather than keep it within the department? That has always been an option. The reason why we have not pursued that option in the past has been related again to some of this concern which has emerged from some of the questions, that in fact this function should be quite closely and coherently related to some of our industrial development objectives. For that purpose it was felt it could be much more sensitive to those objectives if it were undertaken within a unit of the department. There is also the historical element, in that this has been going on for a number of years within the department itself. There would not be, in principle, any fundamental reason why the bureau might not, on the basis of its own designation of priorities and its own allocation of resources within the bureau, undertake to do the same thing we do. But their view and ours is that this is more properly a function to be undertaken within the department because of its industrial development focus as opposed to its raw material statistical focus.

Senator Lang: The second part of my question was that assuming they could develop the information as required by you, could the Dominion Statistician release that information to the public within the strictures placed on him in his act?

Mr. Ritchie: He could release the sorts of information we now contain in our publication.

The Chairman: But that is not Senator Lang's question. There are structures on the Dominion Statistician as to the use and the publicity, if any, he can accord the information that is given to him. Now Senator Lang's question is whether within those statutory restrictions the Dominion Statistician could release to you or to the public the information that you go to him for.

Mr. MacKinnon: I think if you look at the bill I think you will agree that most of the words are lifted from the Statistics Act so far as constraints are concerned, so if we could release it, then they could release it.

Mr. Ritchie: But they could clearly not release the raw material.

The Chairman: I think the answer, Senator Lang, is that if the Dominion Statistician, under the strictures that he may have, can release the kind of information that Industry, Trade and Commerce wants, then, why not do it directly? I think the answer is that the Dominion Statistician is under structures by which he can not release this information.

Mr. Ritchie: Oh, now I think I understand the point of your question. Let us distinguish the various levels of information here. First there are the basic customs documents themselves; and then there is the analysis that we undertake of them at present, which is for certain selected product categories a very detailed examination; and then there is the more aggregate information which the bureau now releases. The informaton which we now release in our publications conforms fully to the structures in the Statistics Act by which we are governed. We could not, nor could, I believe, the Dominion Statistician under the Statistics Act, release the raw invoice information or any information in any form which would not fully protect the confidentiality of those giving the information or which would identify the person or which would permit the person in any way to be identified by deduction.

The Chairman: Nor, under this bill, could the Minister of Industry, Trade and Commerce do it under subsection 5 without the consent in writing of the person or the organization that may be affected by those invoices.

Senator Everett: But isn't Senator Lang's question this, Mr. Chairman. Under the present system, ignoring this bill, is the department getting information that the Chief Statistician could not release to the public under the strictures in the act?

Mr. Ritchie: The answer to that question is that we are getting information that should not be released to the public, on the same basis as normal employees in the bureau are getting that information, and we could not under any circumstances release it to the public in the form which would not be fully in conformity with the existing confidentiality.

Senator Everett: The second question is this. Are you releasing any information that the Chief Statistician could not release?

Mr. Ritchie: No.

The Chairman: Senator Everett, you indicated you had some suggestions for clarification. What are they?

Senator Everett: Well, there are three sections, all of which are now contained in the Statistics Act to protect the confidentiality of the information the officials get from examining these import invoices and information. Would you like me to read section 17.(1) of the Statistics Act?

The Chairman: Yes, please.

Senator Everett: Section 17.(1) of the Statistics Act reads as follows:

> 17.(1) Except in respect of a prosecution under this Act, any return made to Statistics Canada pursuant to this Act and any copy of the return in the possession of the respondent is privileged and shall not be used as evidence in any proceeding whatever, and no person sworn under section 6 shall by an order of any court, tribunal or otherwise be required in any proceedings whatever to give oral testimony or to produce any return, document or record with respect to nay information obtained in the course of administering this Act.
>
> (2) This section applies in respect of any information that Statistics Canada is prohibited by this Act from disclosing or that may only be disclosed pursuant to an authorization under subsection (2) or (3) of section 16.

It seems to me that that would be a useful amendment to this act, because I would think that information that was obtained from officers of the Department of Industry, Trade and Commerce under Bill S-15 might be compelled in court.

The Chairman: I was wondering, Senator Everett, if you could answer this question; What protection do you think that that section of the Statistics Act, if imported into the bill before us, would give that is not given in the bill under subsection (5) of section 6.1 of the bill?

Senator Everett: It is section 6.1(5), which in my opinion is permissive.

The Chairman: The information cannot be disclosed by the minister without the consent in writing of the party or organization to which the information relates. Is that sufficient protection?

Senator Everett: Well, it was not believed to be sufficient in the Statistics Act, because this section was included.

The Chairman: Yes, but I asked you a question . . .

Senator Everett: I will answer the question, if you will allow me, Mr. Chairman. This section provides that the minister may authorize information to be disclosed provided it is consented to by the person or organization concerned.

The Chairman: Yes.

Senator Everett: But I do not believe that would protect a departmental employee if he were subpoenaed as a witness in court and the court required him to disclose such information. I do not believe that section would be sufficient. If, indeed, it is, then I agree with you that we do not need the amendment.

The Chairman: The oath taken by the employee who comes into possession of this information requires him to swear that he will not without due authority in that behalf disclose or make known any matter or thing that comes to his knowledge by reason of having been designated by the minister. Then there is the authority under which the information may be disclosed as requiring the approval and consent of the person or the organization to which the information relates.

Senator Everett: That is correct, Mr. Chairman, but bear in mind that section 6.1(5) of the amending bill is lifted from the Statistics Act.

The Chairman: Yes.

Senator Everett: Despite that, section 17(1) is contained in the Statistics Act which provides that the information cannot be compelled in court. If section 17(1) is not essential to the Statistics Act, it could be removed. However, if it is essential, I contend that it should be included in the amending bill.

The Chairman: Without accepting your argument by analogy, I believe we should obtain the view of Mr. Ritchie first as to the desirability of adding your suggested language. What have you to say, Mr. Ritchie?

Mr. Ritchie: Thank you, Mr. Chairman. This is indeed a very desirable and worthwhile protection. The reason it is not included in the bill now before you relates perhaps more to another piece of legislation, the Customs Act. We must recall that the raw material for this import analysis is customs invoices governed by the Customs Act. At any stages subsequent to that an aggregation of that information has decreased confidentiality. So the raw information itself therefore requires the highest degree of confidentiality.

Section 172(3) of the Customs Act provides:

> In no case shall an invoice be shown or a copy thereof given to any person other than the importer, or an officer, except upon the order or subpoena of a court of justice.

Therefore, it would be possible to compel the invoices in a court of law from customs officials under the provisions of the Customs Act, irrespective of any provisions made governing our employees. So, in that case, because the lower level of rigour is applied to the control of the basic information by the Department of National Revenue, it would in a sense then be superfluous to require a higher level of stringency at subsequent steps in the process.

Senator Everett: I would like to disagree with you on that point, because customs officials who deal with those documents on a day-to-day basis may have to be compelled.

Mr. Ritchie: Yes.

Senator Everett: But I would think that in the case of the officials of the Department of Industry, Trade and Commerce there is a good reason why they should be.

The Chairman: I would like to ask Mr. Ritchie a question, Senator Everett. Have you received advice from the Department of Justice in connection with the scope of this bill in relation to the point raised by Senator Everett?

Mr. Ritchie: The advice we have received from the Department of Justice is to the effect that there is the lesser requirement with respect to customs invoices. This is in the administration of customs officers, and it was for that reason that the Department of Justice did not recommend that the additional stipulation be included. That is clearly a legal opinion, which could be overridden for policy reasons to include the more rigorous provisions of the Statistics Act in this legislation.

Senator Everett: But it is not really a legal opinion as such, is it? The Department of Justice is really saying that it could be got around by the court obtaining the information from the customs officials rather than doing it through the Department of Industry, Trade and Commerce. I say that for the protection of the Department of Industry, Trade and Commerce let the court go to the customs divisions and go all the way. It seems to me that it is essential for importers that this information be kept confidential. Under the Statistics Act, as you are presently operating, you cannot provide this information in court.

Mr. Ritchie: That is right.

Mr. Everett: I like that situation and consider it to be healthy. If the court wishes to go to the department, it must make that ruling and cannot do it by simply having an official in court and demanding the information.

I am prepared to await your consideration, or to make the amendment now. However, I believe it is worthwhile considering, even from your own point of view.

The Chairman: Senator Everett, if the feeling of the committee is that we should obtain the opinion of the Department of Justice, we can so arrange. I believe Mr. Gibson of that department was involved in the drafting of this bill.

Senator Everett: I do not believe it is so much the Department of Justice, because all it can do is give the legal opinion. I do not believe there is any difference of opinion as to what the legal effect is. The Department of Justice says they do not believe it ought to be done in such a way and, in my opinion, that is a decision.

First of all, I would wish to hear from the Department of Industry, Trade and Commerce as to why not. On reflection, I believe they will consider it and decide they should have that protection.

Senator McIlraith: Mr. Chairman, is the situation not that the Department of Industry, Trade and Commerce now has the same restrictions as Statistics Canada? Its employees are sworn in as employees of Statistics Canada. By approving this bill in its present form we would be removing that one stricture. The question we must ask ourselves is why must we remove it.

Mr. Ritchie: I would not wish to misrepresent the opinion of the Department of Justice, which I am sure would have been very exactly couched in terms of the options and of the fact that in their opinion there would be access to this information by virtue of the Customs Act, which access would not be precluded by any amendments which may be provided in this bill.

As far as the relaxation of the stringency is concerned, it is incidentally included now, in that we are operating under the provisions of the Statistics Act.

The Chairman: It seems to me that there are three methods by which to deal with Senator Everett's point. We can make our own interpretation, and if we consider anything more is needed we can add it. Secondly, we could obtain the opinion of our Law Clerk. Thirdly, we could obtain the opinion of the Department of Justice. I say the Department of Justice, because all the other departments of the government are supposed to seek their legal direction from the Department of Justice. Therefore we would be justified in asking the Department of Justice whether they considered this point in the drafting of the bill, and whether in their view the situation is adequately covered in relation to Senator Everett's point. Those three courses are open to us.

Senator McIlraith: It seems to me that having obtained the opinion of the Department of Justice in connection with this bill, we have for decision the matter of policy, as to whether or not the government decided what course it

wanted to take, whether it wanted to leave the availability of the information to be obtained only through the Customs department, or whether or not they wished to make it available to the courts under the provisions of the Customs department legislation and this bill. That is a matter of government policy. It has not come out clearly this morning what the government's policy is in connection with this bill, or whether they considered this specific point when the principle was being settled before the Justice Department people proceeded with the actual drafting of the bill.

The Chairman: If that is the point on which you want information or direction, it would mean asking the minister to appear before the committee.

Senator McIlraith: That is my point precisely.

Senator Flynn: Otherwise the department could consider it in conjunction with the Department of Justice and simply come back and tell us what they feel about it. It is not necessary for the Minister of Industry, Trade and Commerce to appear.

The Chairman: Notwithstanding the information we might get, even on the question of government policy, we can still give the bill our independent consideration.

Senator Flynn: But I would hate to give an opinion at this time. It seems to me more of a complex problem that we can deal with in this committee.

The Chairman: What is the wish of the committee? Shall we adjourn consideration . . .

Senator Flynn: On this point.

The Chairman: . . . on this point, have it referred to the minister, for him to confer with the Department of Justice, and have the department give us a statement as to what the intention was and whether the point was fully considered? Is that agreed?

Hon. Senators: Agreed.

The Chairman: We can probably obtain that information by tomorrow morning. We are proposing to sit tomorrow morning. Therefore we shall adjourn consideration of the bill at this point until tomorrow morning. Do you need any further statement on this, Mr. Ritchie, or can you convey the committee's views to the minister? If the minister wishes to appear, that is fine. If he wishes to authorize someone to appear, he should confer with the Department of Justice.

Mr. Ritchie: Mr. Chairman, you will appreciate that what has been raised here is a policy issue, and we would have to consider whether there were any overriding policy considerations here.

Senator Everett: Before we adjourn, may I say that I do not wish to delay the committee, but if we take this action, that is going to happen. There are two other amendments that can be considered in the same way. One that we might consider here is section 17.(1). I could raise the other tomorrow.

The Chairman: I think you should raise them now.

Senator Everett: Section 33 of the Statistics Act—it is a longer section, so I shall not read it—prevents a person who has this information from using it for speculative purposes. Again, I think that is a policy decision. In the Statistics Act they find it necessary to have such a section to prevent a person from speculating in any way. It is a broad section. Such a section would be useful on this point.

My third point is section 36 of the Statistics Act, which provides a two-year limitation on actions under the Statistics Act for violations of that act. It seems to me again to be good business to have a limitation. I am not sure that the department, in terms of policy, will be happy with that, but in terms of the liberty of the subject there should be a limitation.

The Chairman: You mean that a two-year period should be added here as a limitation?

Senator Everett: There should be a section similar to section 36 of the Statistics Act.

The Chairman: During that period, that is the full range on which any prosecution may be made?

Senator Everett: That is correct.

Mr. Ritchie: On the third of those points I should note there is a limit which will apply, in the absence of any specific limitation, of six months. That is under section 721.(2) of the Criminal Code. That same limitation is implicit in the documents themselves.

Senator Everett: If that is the case, I will withdraw my amendment.

Mr. Ritchie: With respect to the second amendment, senator, we have regard to the Financial Administration Act and to the provisions and circulars relating to "Standard Conduct for Public Employees", and subsequently the "Public Servants Conflict of Interest Guidelines" issued by the Department of Industry, Trade and Commerce. If it is the view of the committee that these provisions are not sufficient, we could again consult with the Department of Justice with respect to the drafting of the section.

Senator Everett: You are dealing with conflict of interest guidelines. That is a convoluted way of going at protection. I think it could be provided more directly in the act itself. After all, that is what the act is for. You are coming to Parliament saying you want direct authority. Therefore, I think direct authority should be provided.

Senator Flynn: I would like to put a question to the witness. Senator Grosart, when speaking on the bill during the second reading debate, said, at page 305 of *Debates of the Senate*:

> What concerns me most about this bill is that this kind of operation could become, and would appear to some to contemplate the setting up of another non-tariff barrier, if the Canadian government were to scrutinize these imports and then consciously subsidize Canadian import substition.

I wonder if the witness would like to comment on that?

Mr. Ritchie: Perhaps the answer has a couple of parts to it. First, in its essence, this is intended not as a non-tariff barrier but as almost the opposite. Rather than erect barriers, we are seeking to move towards a more completely competitive market which is, of course, based on perfect information. We cannot provide perfect information, but we can provide substantially better information in order to an entirely commercial basis, with no additional measures

to support their production, whether they could in fact provide the good which is presently being supplied from abroad.

That, senator, is a far cry from a policy of import substitution behind the protection of non-tariff barriers. In fact it is, as I say, quite the opposite. It is designed to stimulate the expansion of Canadian industry on a wholly competitive basis, without further protection or subsidization.

I should also bring to the attention of honourable senators the fact that this is a quite common practice. Canada is not entirely in the forefront. In the United States, with respect to information contained in vessels' inward manifests and summary statistical reports on importation, they include the name of the consignee, description of the product, quantity and value, name of the vessel, country of despatch, and the whole package. In the United Kingdom it is even more complete. So, it is a fairly common practice which neither Canada nor the other contracting parties of GATT would regard as being a non-tariff barrier measure, but instead a measure designed to promote the healthy expansion of industry on a competitive basis.

The Chairman: I think the statement you read as to what Senator Grosart said, Senator Flynn, really relates to the possibility of abuse by disclosure so as to put pressure on the source of the imported products.

Senator Flynn: Mr. Ritchie says it is a fairly common practice in other countries. Has it ever been used in other countries for the purpose which is feared by Senator Grosart?

Mr. Ritchie: Not to my knowledge, senator, except under the distinct provisions of explicit policy as, for example, we have in Canada under the provisions of the Textile and Clothing Board pursuant to which we undertake an import analysis for the purpose of considering measures of restriction.

Senator Flynn: But it could possibly be used for such purpose under given circumstances?

Mr. Ritchie: If it were used in such a manner, senator, I can assure you that the other countries concerned would be very quick in bringing to our attention the fact that such abuse would have implications as far as our international obligations were concerned. The use, as we envisage it, would not constitute such an infringement.

The Chairman: If there are no other comments, we will adjourn consideration of this bill until tomorrow morning.

Senator Flynn: Mr. Chairman, I am just wondering whether Mr. Ritchie is satisfied that he will have sufficient time in order to have the officials consider these matters.

Senator Walker: We do not know whether the minister will be in town tomorrow.

Senator Flynn: We are not really giving the officials very much time to consider these matters.

Mr. Ritchie: The constraint will be in terms of the amount of time the officials of the Department of Justice will have to consider these issues.

The Chairman: Well, if that cannot be done by tomorrow morning, then we will adjourn consideration of this bill to a later date.

The hearing adjourned.

Thursday, December 5, 1974.

The hearing resumed at 9.30 a.m.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: I call the meeting to order. As a result of the points raised yesterday by Senator Everett, we have some proposed amendments to Bill S-15. Although I understand another amendment may be on its way to us, it has not yet arrived. However, since Senator Everett has to attend as chairman of his own committee at some stage, I thought we could deal with the proposed amendments as far as they go, and he can indicate his view as to whether they meet the points he raised.

Have you had a chance to read this, Senator Everett?

Senator Everett: I am in the process of reading it now. I could continue as Mr. Ritchie is explaining the purport, if you wish.

The Chairman: Are you in a position to explain the effect of these amendments, Mr. Ritchie?

Mr. Ritchie: Mr. Chairman, the purport is to fully reflect the points raised by Senator Everett yesterday. There are two provisions. One would be as Senator Everett proposed, to provide for prosecution in the event of speculation on the basis of information obtained through import analyses. The second provision would make these informations non-compellable in a court of law. Those, as I took them, were Senator Everett's concerns, and this is the draft, subject to a minor correction which the Department of Justice would propose for your and his consideration.

The Chairman: Yes. I will now indicate the amendments. If you would turn to page 2 of the bill, the first proposed amendment is to strike out lines 10 to 12 and substitute for them the following:

> Except for the purposes of a prosecution under subsection (6) or (7), but subject to subsection (5)

Those are the replacement words. I believe that deals with one of your points, Senator Everett?

Senator Everett: Yes, Mr. Chairman.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: Subsection (7) will, presumably, be added.

The Chairman: Yes. It is suggested that immediately after line 51, at the bottom of page 2, the following be added as subsection (7):

> Every person who, after having taken and subscribed an oath or affirmation pursuant to subsection (2), and having been designated by the Minister of Industry, Trade and Commerce for the purposes of this section, uses any information obtained in the examination of copies of invoices or other documents made available by the Minister of National Revenue pursuant to subsection (1) for the purpose of speculating in any stocks, bonds or other security or any product or article is guilty of an offence and is liable on summary conviction to a fine not exceeding $1,000 or to imprisonment for a term not exceeding six months or to both.

That deals with another point you raised yesterday; is that right, Senator Everett?

Senator Everett: Yes, that is right, Mr. Chairman.

The Chairman: It is also proposed to add a subsection (8), which would read as follows:

> Except for the purposes of a prosecution under subsection (6) or (7), any copy of an invoice or other document made available by the Minister of National Revenue pursuant to subsection (1) is privileged and shall not be used as evidence in any proceedings whatever, and no person who has taken and subscribed an oath or affirmation pursuant to subsection (2) and who has been designated by the Minister of Industry, Trade and Commerce for the purposes of this section shall, by an order of any court, tribunal or other body, be required in any proceedings whatever to give oral testimony or to produce any copy of an invoice or other document with respect to any information obtained pursuant to this section.

Certainly that one is right on the nose of your objection, Senator Everett.

Senator Everett: Yes, that is correct.

The Chairman: This, in the form in which it is drafted, appears to meet the points you raised. The contents of the next edition, which is to arrive soon, I do not know. I suggest that we defer further consideration of this until we receive the additional material from the Department of Justice.

Mr. Hopkins: Which I believe is to the same effect, with improved wording.

Senator Macnaughton: Is that to be received today?

Mr. Hopkins: It is supposed to be here now.

The Chairman: I take it that Senator Everett is satisfied with these amendments in the form in which they are. Therefore, if the proposal of the Department of Justice changes wording but not substance, we can proceed with it. Is that correct?

Senator Everett: That is correct.

The Chairman: We cannot interfere with your duties as chairman of another committee, you know.

Senator Everett: Thank you, Mr. Chairman.

———

[*Later*]

The Chairman: I have now received the revised amendments to Bill S-15. the amendments are exactly as honourable senators have before them, except that in the amendment before us they describe the minister as "the Minister of Revenue", not as "the Minister of National Revenue". So the revised edition simply puts in the word "National" in two places. There are no other additions. I also have the French version. If the amendments are acceptable, are honourable senators prepared to support the bill as amended, and shall I so report it?

Hon. Senators: Agreed.

The Chairman: I assume, Mr. macKinnon, that you have nothing to add in connection with these amendments?

Mr. MacKinnon: No, Mr. Chairman. I appreciate your attention.

The hearing concluded.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 11

WEDNESDAY, DECEMBER 4, 1974

First Proceedings on:

"The advance study of the Budget Resolutions respecting income tax and any bill or other matter relating thereto"

(Witnesses: See Minutes of Proceedings)

28446—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, November 21, 1974:

The Honourable Senator Everett for the Honourable Senator Hayden moved, seconded by the Honourable Senator Inman:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and consider any bill based on the Budget Resolutions relating to income tax in advance of any such bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, December 4, 1974
(12)

Pursuant to adjournment of notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10:40 a.m. to consider the following:

"The advance study of the Budget Resolutions respecting income tax or any matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Blois, Buckwold, Cook, Desruisseaux, Everett, Flynn, Gelinas, Laird, Lang, Macnaughton, McIlraith, Molson and Walker. (16)

Present, not of the Committee: The Honourable Senators Bourget and Heath. (2)

In Attendance: Messrs. C.A. Poissant, C.A.; Charles B. Mitchell, C.A.; and A. Peter F. Cumyn, Consultants.

The Committee proceeded to the discussion of the above resolutions following which Mr. Poissant proceeded to a detailed explanation of certain sections thereof during which presentation he made use of a projector in order to display certain charts and examples.

The charts and examples used in Mr. Poissant's presentation are attached hereto as appendices "A" to "T", inclusive.

At 12:20 p.m. the Committee adjourned until 2:30 p.m. this day.

2:30 p.m.
(13)

At 2:30 p.m. the Committee *resumed* consideration of the above matter.

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Blois, Buckwold, Cook, Gelinas, Laird, Lang, Macnaughton, Molson, Sullivan and Walker. (13)

Present, not of the Committee: The Honourable Senator Heath (1)

In Attendance: Messrs. C.A. Poissant, C.A.; Charles B. Mitchell, C.A.; and A. Peter F. Cumyn, Consultants.

Following further consideration and certain explanations the Committee adjourned at 4:35 p.m. its consideration of the above matter.

The Chairman reminded the members that the Committee would meet again on Thursday, December 5, 1974 at 9:30 a.m. in Room 260-N.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, December 4, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 10:30 a.m. to examine and consider the advance study of the Budget Resolutions respecting income tax or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, the meeting this morning is to deal with the advance study of the Budget Resolutions which propose amendments to the Income Tax Act. To aid the committee in its study in this connection we have Mr. Albert Poissant and Mr. Charles Mitchell, both of whom assisted the committee in its study on the White Paper on Taxation and the legislation which arose therefrom. Also with us this morning is Mr. Peter Cumyn, of the law firm of Stikeman, Elliott, of Montreal. These three gentlemen spent a whole day last week in connection with this study and, at my suggestion, have allocated the different portions of the Budget Resolutions respecting income tax amendments. In the course of the meeting this morning, they will indicate to the committee what portions of these Budget Resolutions have survived and have been carried forward from the May 1974 Budget Resolutions and what portions may be regarded as being new. In the course of outlining these matters to the committee, they will make use of a projector which they feel they need in order that the committee may be well informed as to the scope and effect of these proposed amendments.

We have had no indication as yet as to when it is proposed that any legislation based on the Budget Resolutions may be tabled in the other place. I have heard some suggestion that it might be the week following next. If that is so, there would certainly be no question, I should think, of Christmas closure. I do not think such legislation could get through the other place without lengthy debate on at least some aspects of it—one which comes to mind right away being the bill respecting resource industries taxation.

My purpose in referring this matter to the committee at this stage was to avoid the possibility of being pressed against Christmas closure, but if the legislation does not come to us, then we certainly have no responsibility in that regard. We cannot deal with this legislation officially until it has been referred to the Senate. What we are doing now, in effect, is simply educating ourselves in relation to the proposed legislation.

Next week we will hear from a number of witnesses, including the Canadian Chamber of Commerce, but I do not expect that we can prepare a report at this time. I do not expect that even next week we will have the legislation.

As will develop in the course of the presentation, it would appear that in connection with some of the resolutions, some additional language will be needed for the purpose of clarifying or making apparent the limitations or the scope and extent of the resolutions.

Subject to those things, I still feel it is desirable that, at as early a date as possible, this committee be educated as to the scope and effect of these Budget Resolutions. I take responsibility for that, and I hope the committee approves. Certainly, the Senate has approved in that it has referred this matter to the committee.

Before getting underway, I should like to have the views of the committee as to whether this hearing should be *in camera* or whether it should be conducted as a regular meeting of the committee. My first thought in this connection was that it should be *in camera,* but I have since changed my mind. I now feel it should be part of our regular proceedings and hearings.

Is it agreed that this hearing be proceeded with as a regular committee hearing?

Hon. Senators: Agreed.

Senator Molson: What advantage might there have been to proceed *in camera,* Mr. Chairman?

The Chairman: Well, you use the word "advantage" and that presents some difficulty for me.

Senator Molson: Shall I say, what disadvantage would there be in holding an open hearing?

The Chairman: I think there is an advantage in an open hearing in that there is a record, which is of advantage to the members of the committee and the public, because a great many of the public subscribe to the Proceedings of this committee. This is a very important part of our consideration of this legislation in that we are advising ourselves as to the legislation, and for that reason I think the meeting should be an open one.

I will now call on Mr. Poissant to lead off.

Mr. Albert Poissant, Consultant to the Committee: Honourable senators, as your chairman has said, we have prepared, or hope we have been able to prepare with the time available, sufficient documentation respecting the amendments proposed in the Budget Resolutions of November last. We have divided this task into three subjects, the first of which will be dealt with by myself with the aid of an overhead projector. The other two subjects deal with resource industries and the technical amendments respecting corporations and their shareholders. Those two subjects will be dealt with by Mr. Cumyn and Mr. Mitchell respectively.

To give a brief review of the major changes between the May 1974, budget and the budget of last November, not necessarily in order of importance, I have prepared a summary of six points.

First, from 1975 on there will be general deductions in taxes of 8 per cent instead of 5 per cent, which was not changed in the May, 1974 budget.

Secondly, you will recall that the first $1,000 of interest earned was supposed to be deductible. In the November budget this has been amended so as to include, not only interest, but grossed-up dividends received.

Senator Beaubien: The $1,000 is the total?

Mr. Poissant: The total remains unchanged, but it can now be $1,000 of grossed-up dividends instead of straight interest.

The Chairman: The composition has been changed but the total in dollars remains the same.

Mr. Poissant: Thirdly, there is also provision for the first $1,000 of pension payments received to be exempt from income tax. Another amendment in the November budget is the transferability of the deduction of pension received by one of the spouses, which with certain limitations can be deducted from the other spouse's income, without affecting the exemption for this other spouse. I will be showing some slides to explain this in detail later.

Fourthly, in order to help the construction industry, two changes that were not in the May budget have been included in the November budget. The sales tax on construction material will be reduced from 11 or 12 per cent to 5 per cent. Fifthly, the other change consists in permitting that loss created by the claiming of capital cost allowance to be deductible against other income. Under the present rules the losses are refused. Before that loss had to be added to the capital cost of property. Now to help the industry, under the November budget that loss can be applied against other sources of income.

The Chairman: It is not confined to the assets that produced the loss?

Mr. Poissant: Not necessarily. It applied only to what are called multiple-unit residential buildings for rent, or unit housing. It would not apply to any other type of loss arising from depreciation. There is a further restriction. It will apply only to construction that commenced after November 18 and before December 31 next year. This is a very short period, slightly over a year. Anything commenced after that last date will not be eligible for this treatment.

Sixthly, while some commentators have said there have been major modifications in the natural resources industry, others have said that the changes from the May budget are slight. In the natural resources industries there is an increase in the abatement to the petroleum industry.

Where the deduction of exploration development expenses were to be limited in the May budget to 30 per cent, the ceiling has now disappeared and all expenses will be eligible for write-off, with of course the continued write-off of 30 per cent per annum. This will be dealt with in detail by Mr. Mitchell some time later today.

To my mind, these are the changes to the May 1974 budget. Are there any questions?

Senator Gélinas: Would you qualify that first $1,000 deduction on the pension. Does that include government pensions or corporation pensions?

Mr. Poissant: No. It refers to private pensions. In other words, it will not include the federal government old age pension or Quebec government pension received at the age of 65.

Senator Gélinas: Does that include a retirement fund?

Mr. Poissant: It could exclude that benefit, and it could exclude some other types of pension. This will be examined in detail in a few minutes.

Senator Flynn: I understand it is $1,000 or the pension income.

Mr. Poissant: Of course.

Senator Flynn: It is at the age of 65. In fact it is an exemption for people aged 65 or over of $1,000 or less.

Mr. Poissant: Yes. If the pension received is only $650, it will be limited to that amount. The maximum deduction is the amount of the pension received not to exceed $1,000.

Senator Flynn: What about the $500 exemption deductible now to people aged 65?

Mr. Poissant: That remains unchanged. The other one is in arriving at your taxable income; so is the $500 at the age of 65, but that remains. This moves with the cost of living index fluctuation.

I will now show some illustrations on these slides. You will have received the special release on the Budget. We thought this would be easier for you to handle. There are some editorial comments worth while reading in order to understand the proposals. We will follow that today in our explanation of the income tax amendments.

The first illustration is of the deduction for taxes available to all individual taxpayers. The deductions apply this way: In 1973 there was a 5 per cent deduction of tax payable, with a minimum of $100 and a maximum of $500. In 1974, this year, we will still be entitled to 5 per cent tax deduction of the tax payable, but with a minimum of $150 and a maximum of $500. In 1975 we come to one of the changes between the May and November budgets; it will be raised from 5 per cent to 8 per cent; the minimum deduction will be $200 and the maximum will be $750.

Let me give an example of how it will work. Let us say that Mr. A has $1,800 tax payable in any of those three years, 1973, 1974 and 1975, and Mr. B has $20,000 of tax payable for the same three years. Mr. A will be allowed to deduct 5 per cent of $1,800, which would be $90, but because of the minimum he will deduct $100. In 1974, 5 per cent of $1,800 would be $90, but because he is allowed the full minimum of $150 he will benefit by having the $150 figure instead of the $90 figure. In 1975, he is allowed 8 per cent of $1,800, or $144, but again he will be entitled to a minimum of $200 against his tax. His tax liability would be $1,800 less $200. In the case of Mr. B, he has $20,000 of tax payable. He is also restricted to the 5 per cent, but with the maximum. He is the other way around. So 5 per cent of $20,000 would give us a credit of $1,000. But he cannot claim the $1,000. The maximum he is permitted to deduct for 1973 would be the $500. It would be the same for 1974 and the maximum has been raised to $750 in 1975. I notice that, in this current budget, en passant, that in the ways and means motion there is a reference in 1974 to "subsequent years". That is, they have left those words which are not necessary, because it is not true that the $150 and $500 will apply, to subsequent years because in fact it is raised to $200 and $750 for 1975. So we suggest that the words "subsequent years" should be removed because they are not applicable for the years after 1974.

Senator Buckwold: Is this in addition to the changes in the indexing categories?

Mr. Poissant: It is not related. The indexing will still remain there. They have not changed the indexing. It is there until any further amendments to the act are made. But that tax is the deduction from the tax after the indexed figures—like personal exemptions and deductions if you are 65 or over—have been taken into account.

Senator Buckwold: Were there no changes in the indexing which would reduce the categories?

Mr. Poissant: No. There are no changes in the indexing. The indexing, according to the act, floats according to the adjustment to the consumer price index; and there has been no change recommended.

Senator Buckwold: But would there not be a change in the indexing automatically with the higher cost of living in 1975?

Mr. Poissant: There would be a change automatically in 1974, 1975, 1976 and on. This is floating and increasing, presumably, so long as the cost of living goes up.

Mr. P. Cumyn, Consultant to the Committee: I understand that the figure was fixed at 10.1 as the index figure for 1974.

Senator Buckwold: What was it the year before?

Mr. Cumyn: I do not know.

Mr. Charles Mitchell, Consultant to the Committee: 6.6, I believe.

Senator Buckwold: So in fact you get the advantage of both. That is the point.

Mr. Poissant: Now we will consider the deduction for interest and dividends. This is a deduction from the interest you receive or the dividends you receive, and if you do not receive either of those two types of income because this is not applicable.

Now, for 1974, as I mentioned before, this was restricted to net interest earned to a maximum of $1,000. In other words, let us say that I have received $500 of interest on some obligations or bonds, the maximum deduction I would be entitled to reduce to arrive at my taxable income would be limited to $500. In 1975 this will apply to interest as well as to grossed-up dividends for an aggregate maximum of $1,000.

I should like to say here that grossed-up dividends is not actually comparable to the $1,000 of interest. In other words, you will be limited to $750 of dividends because you have to gross that dividend up by one-third. Taking $750 and adding one-third to it will give you your $1,000, which is the maximum that you would be allowed by way of dividends. So grossed-up dividends is a very important qualification.

Senator Flynn: That is not an amendment to the main budget there? That is only an addition for 1975?

Mr. Poissant: It is not really an addition. The only thing they have added here is the $1,000 limit is the grossed-up dividends.

Senator Flynn: So it is an amendment for 1975, but they did not put the amendment into effect for 1974.

Mr. Poissant: You are quite right. It is only applicable to 1975, not 1974. The change is in the November budget, and it applies only to 1975.

Senator Cook: If a taxpayer has both, can he elect?

Mr. Poissant: You can take the choice. It really makes no difference, because you combine your aggregate, all your income: dividends, interest and income from business. Then at the bottom you would be allowed to deduct the interest, $1,000, had you received any interest or dividends. You don't have to qualify that this $1,000 applies against your dividends or against your interest.

Senator Lang: You are better off to use the interest than the dividends, because you do not have to gross the interest up.

Mr. Poissant: Let us say you have $500 of interest and $500 of dividends. You would be entitled to claim not quite the $500 of dividends. You would be entitled to claim the full $500 of interest, but then you have to gross up the $500 of dividends. The grossing up of $500 of dividends would give us $177 so that would be $677, which would be too much. You would be in excess of your $1,000.

Senator Lang: If you had over $1,000 of interest and you had over $1,000 of dividends, presumably you would be better off to use the interest for deduction.

Mr. Mitchell: It should not matter which you apply it against. If you have $1,000 interest income and $1,000 dividend, you have to include in your income the $1,000 of interest plus the $1,333 of dividends which is $2,333. You deduct your $1,000 from the total, leaving $1,333. So you do not really apply it.

Mr. Cumyn: The fact that you claim the deduction does not affect your right to the credit in respect of the dividends, the credit which is the logical sequence to the gross-up.

Mr. Poissant: That is true. At the end we made the calculation and it is still the same, because you are still allowed your dividend tax credit. So you are not losing it. Therefore, whether it be dividend or interest, it makes no difference.

There is some sort of notch provision. It is not quite clear from the motion, but if your wife received a certain amount of interest for 1974-and after, because of that interest you could lose her exemption on your tax return. Let us say that your wife has received $1,800 worth of interest. For purposes of simplifying my example I will eliminate the question of indexation. Now, because you are entitled to claim for her $1,400 less any amount she has received over $300, then, in this case because she has received $1,800 you would lose her entirely.

We have not seen the bill yet, of course, but the way it is going to be is that there will be a particular order for arriving at your taxable income. First you will be obliged to reduce your personal exemption. They say that first she will reduce her personal exemption, and if she reduces her personal exemption, as a result of this she, on her tax return, is entitled to deduct $1,600, just like any other individual. That means her taxable income, as far as she is concerned, and as far as the spouse is concerned, is down to $200. They say that in this case, because the amount received was interest, you will be entitled to reduce that figure down to $200 because of the order of deduction. So you will not lose the entire exemption for her in this case.

Senator Buckwold: May I ask what is construed as interest? For example, if an individual has money on loan to his company, and he gets interest on it—

Mr. Poissant: I am coming to that.

Senator Buckwold: Excuse me.

Mr. Poissant: I did not finish this slide on the interest, by the way.

The Chairman: Here it is, over here.

Mr. Poissant: Thank you, Mr. Chairman. Now, I was just trying to explain that this notch provision leaves room for some tax planning, too, because for example, a man may give or lend $10,000 to his wife, and she might earn income on it. She may lend it to a bank and get income of 10 per cent, so that she would get $1,000 in interest, and that $1,000 may be totally free of tax, so that it might be possible to have a $2,000 exemption.

I have worked out an example of that here. Mr. "A" earns in 1975 interest of $600, and he has received dividends of $900. I have, according to the law, to gross up that dividend by adding one-third to it, and by doing this I get $1,200 worth of dividends received. Now, the aggregate of the type of income that we are looking at is $1,800. Here you have first of all to deduct from that interest received, or dividends received, any interest that you have yourself paid during the year. I presume here that Mr. "A" had paid to his bank $1,200, so he has to take $1,800, less the $1,200, so that the net deductible is $600.

There are other qualifications or restrictions. For instance, if that interest is received from your own privately-held company, that will not be subject to the exemption. However, the type of interest, for instance, earned on money that you might lend to your son in the amount of $1,000, known as a "non-arm's length" type of interest, is refused in the computation. So in other words, it is interest received from a unrelated persons. I am pointing out here what seems to me to be an anomaly. It seems to refer to any interest deducted in the year by the taxpayer, and that is an anomaly as far as I am concerned, because unrelated interest will be deducted from that. Let us take an example. I have been receiving interest from a bank deposit that I made ten years ago, and I have been receiving, say, 9 per cent interest. I have therefore been getting $900 a year from my bank for the last ten years. In 1974, suddenly, I start a small business. I have left that bank deposit there, but I have borrowed money from the bank to start my business with. The interest I would have paid to the bank must be deductible from interest I received. That seems to be unfair, because it should be at least the interest related to the interest received, and not to any type of interest. Maybe the government was after tax planning. They probably felt that you might get tax exemption and be allowed a deduction of interest as an expense, so that you would get it twice that way. They might say, in a case like that, "Poissant, you have $10,000 in the bank. Cash that deposit and use that cash instead of paying interest to the bank." There seems, however, to be a somewhat unfair situation, and that is, the unrelated aspect of it. Instead of bank deposits I could have bonds which I cannot cash because the market price is too low. That, to my mind, is worthwhile examining, because it might be that you would lose your exemption. For instance, say you have been getting dividends all along from Bell Telephone. Now you will have to deduct any interest you are paying on your business. These are unrelated aspects, which is why I have put the word "net" here, to make sure it is the net interest that you receive that is applicable for the $1,000 deduction. In fact, you have to reduce the amount of interest on dividends by any amount of interest you have paid during the year, to arrive at the net deductible amount.

By the way, any dividends you have received from your privately held company would not be subject to that exemption either. It has to be an unrelated transaction. By "unrelated" is meant that you do not have any control over the party that is giving you the interest or dividends received.

Senator Everett: How about an investment company receiving its income from unrelated investments?

Mr. Poissant: This is only applicable to an individual.

Senator Everett: What happens if a taxpayer interposes himself between the investment and investment company? Then tax is paid on everything that comes into the investment company, and then it is grossed up and paid out in the form of a dividend. If it only referred to 1975 that would be a dividend anyhow. Is that not a non-arm's length transaction?

Mr. Poissant: I would say it is non-arm's length. I would have to check the words in the final bill. It is a question of whether it is "directly" or "indirectly". I should point out that we are working on the ways and means motions and we are not entirely sure what will be in the bill. There might be some changes in the wording of the final bill. I should also like to say before going any further that I personally have not explored all the possibilities, all the anomalies or all the errors to be found in those amendments. In other words there is room for correction so that even here we might say at the end of the day that we are adding to it or making modifications to the recommendations in the suggestions we are dealing with now. So that has answered the question about what type of interest was subject to deduction. By the way, I would like to mention that whoever wrote the amendments for the November, 1974 budget has codified the number by adding to the May budget numbers. In other words, there was, for example, resolution number two in May, 1974, and where they have added something close to that resolution in the November version, then they have given it number 2.1. The decimal will mean that it is a November type of amendment. Also for those who would like to go into more detail, CCH has prepared a release which show you either underlined in black the words, paragraphs or phrases that have been either added, deducted or amended from the May, 1974 budget. This is the CCH release and this will tell the reader where the changes are in the november budget.

Something new for 1974 and subsequent taxation year, which I might not have mentioned before, is the bonus on Canada Savings Bonds. This will apply to both individuals and corporations and the taxpayer has a choice of treatments. You have the choice of treating this as income received during the year or considering it as a capital gain. To explain this better I have used an example here.

Let us presume that you have received some sort of bonus given by the federal government on its bonds, and you received it during 1974, but only after May 6, a bonus in the amount of $2,700. Now, you have a choice, and I would say that the best and the maximum credit you could get would be by first reducing that $2,700 by considering this as being income received at $1,000. Then you are left

with the balance of $1,700 of interest or bonus received which I would treat probably as a capital gain. It is treated as an ordinary capital gain and so you divide the amount of the gain by 2 and you arrive at the taxable capital gain. I say this because you may have other losses or expenses or deductions. So the taxable capital gain is one-half of the capital gain or $850.

Why is it to your advantage to do it this way? Simply because that $1,000 of bonus that you have received and that you are treating as interest received is subject to the rule of exemption that we just discussed before. So, in other words, you may claim that $1,000 in the example I have given and in arriving at your taxable income you can deduct that $1,000 as being exempt interest which we discussed before. So this would probably be the best treatment, excepting of course, and this would depend on the taxpayer, there might be other ways whereby you would want to treat all of the $1,700 as current total interest income because you may have loss carried forward or you may need it just to offset your personal exemption for the year, perhaps. So, depending on the circumstances I would say that everything else being equal, this would probably be the best way of treating that bonus on the Canada Savings Bonds.

Now, we have discussed before what is deductible for pension income. That again is only applicable, as I mentioned in my opening remarks, to the 1975 taxation year. In his 65th year a taxpayer will be able to deduct the pension received to a maximum of $1,000. But the word "pension" does not include federal old age security and supplemental payments, federal or provincial Quebec pension, retirement allowances or death benefits received. In other words it is more or less confined to private pension plans or pensions you receive from your employer's plan.

Senator Buckwold: Is the Senate pension plan considered a private plan?

Mr. Poissant: I would say so. I say that because the restrictions are mentioned in the ways and means motion here, and they are restricted to the federal old age security and they do not mention the House of Commons or the Senate's pension, so I would presume this is a private pension which is subject to the $1,000.

Senator Molson: That would then leave it any government pension other than the federal old age security and the Quebec provincial pension?

Mr. Poissant: Yes.

Senator Molson: The civil service pension would be allowed.

Mr. Poissant: Note also that if one of the employees leaves your company and you give him a retirement allowance of $5,000, that will not be subject to those provisions. It is regular income. Certain companies pay benefits in cases of men dying prematurely before becoming entitled to pension. That is also excluded from the word "pension" in the proposed amendment.

The Chairman: I take it also that it would not cover proceeds form retirement savings plans?

Mr. Poissant: I would say that RSP will be subject to that, because it is not included in the restriction. In other words, so long as those four restrictions do not apply anything else is permissible.

Senator Lang: *Inclusio unius est exclusio alterius.*

Mr. Poissant: Secondly, a pension received in any year as a consequence of the death of a spouse will also be reduced to a maximum of $1,000 to arrive at the taxable income. There is no age limitation. In other words, one of the spouses may die and the survivor receives the pension during the first year, say, of $1,200. Because the survivor is receiving the pension due to the death of the spouse he or she would be entitled to reduce the $1,200 by $1,000. In fact a taxpayer may possibly, if applicable, have a $2,000 exemption, part of it with no age restrition.

There is a new proposed provision under the Income Tax Act, which was contained in the May, 1974 budget, known as the Registered Home Ownership Savings Plan, RHOP, or some might call it RHOSP. I have summarized a two-page proposed amendment in an attempt to modify this and make it simpler to understand and to explain. First it allows a deduction of $1,000 in a taxation year, or actual contributions made with a maximum of $1,000, or 60 days after the taxation year. Secondly, the maximum which can be contributed to the fund will be $10,000. So, in fact, this would be a 10-year minimum period. In other words, it could be a maximum or minimum, but the fact that contributions are restricted to $1,000 per year means that it will take 10 years at least to arrive at the maximum. If the yearly maximum is not reached, contributions may continue beyond the 10 years.

This is available only to residents of Canada; they must be 18 years of age or over. The third point I have underlined in red: It applies only to those Canadians who do not own a home in Canada. That means that a Canadian owning a home abroad would be entitled to this, because the three conditions are, first, a resident of Canada, secondly, 18 years of age or over and thirdly, not owning a home in Canada. I have underlined this because a Canadian who owns a home in Florida will be entitled to start his RHOP.

The fourth condition is that the fund must be used to buy a home. Now, I say why not a farm? I do not understand this restriction, so maybe your committee, Mr. Chairman, will wish to ascertain why farms are not included. Why should not a young man who wishes to buy a farm, or even an extension to an existing farm, possibly when living with his parents, be included? Farming is needed by Canada.

Senator Beaubien: If there was a house on the farm, that would be a home.

Mr. Poissant: Yes, except that here efforts are made to assist a young Canadian who wishes to buy a home. That would be a residential home but in my opinion there should be room for a man who lives with his parents to be allowed to invest $10,000, for instance, to purchase a farm. In any event, your committee will probably receive briefs on this point and we will have more time to study it.

It also provides for the purchase of a home or its furnishing. This applies also to a spouse's home. In other words, one of the conditions of contributing to the fund is the purchase and ownership of a home. I could not contribute to one of these funds, but my wife could if she does not own a home. The cash paid into the fund would be made available for the purchase of furnishings for the spouse's house. It as not yet been announced what type of furnishings are proposed, that will be made by regulation. We presume it will be initial furnishings for a home.

Senator Cook: Could a husband and wife each buy a home?

Mr. Poissant: Yes.

Senator Beaubien: They could each buy a house?

Mr. Poissant: Yes.

Senator Beaubien: Two houses could be purchased, then?

Mr. Poissant: Yes; that is further explained in item number eight, drawing from trust. Now, at any time when you draw the money, the withdrawals from the fund will be subject to tax as regular income, except that if you use that money to buy a home,—or furnishings for your home or your wife's home, or any unused portion received from the fund—is taxable in your hands.

Of course, if you do not use that money for any of the items referred to in item four of the illustration, it is taxable but is subject to roll-overs. That is, you can buy other plans like a registered retirement savings plan, or you can use it for an income averaging annuity. In other words, it is taxable, but because of other roll-over costs, you get that income and transfer into some other plan, so that you defer the tax payable.

While the trust administers such a fund, there is no tax payable. The trust is free of tax. There are restrictions, conditions, and there is a fair amount of enumeration of restrictions for the fund to keep its tax exemption. For instance, in number seven of my illustration I say gifts received by a trust must be "restituted". This is not the word used in the ways and means motion. It says "must divest itself of the gift received."

Honourable senators will see the reasoning behind this. If the fund was started by one of your sons, he would put in $1,000 a year—or if any member of your family gives the trust $10,000 or $50,000 by way of gift, by reason of the fact that this fund is free of tax, the fund could invest $50,000, or the fund could make a capital gain, because the fund would be free of tax. The trust would not be taxable while it is administering such a fund.

The act will prevent that by saying that any gift received by the trust must be divested. It says the trust must divest itself of the gift received. There is one thing that I do not understand. Divest, to whom? If a trust gets a gift of $50,000 can it give it back to the donor or someone else? I am not sure whether we have a legal matter here. It may be worthwhile, in your study of the amendments, to look into this matter. There seems to be some sort of anomaly here.

Loans must be repaid. This trust being free of tax, it will be too easy to open the fund to receipt, other than contributions as all sorts of appreciation of income, appreciation of value, is free of tax on this fund.

Let us assume that the trust borrows money from the father of the contributor or the beneficiary—a sum of $10,000—and does not pay any interest. The trust puts that $10,000 into any bank in Canada at 10 per cent, and gets $1,000 a year. The trust not being taxable, that is money that will go indirectly into the son's hands at the end.

However, loans must be repaid. But there is a period to reimburse the loan. In the meantime benefits can accrue, free of tax, in the fund.

Thirdly, let us say that the son is contributing more than $1,000 a year maximum. Let us say that he has given $2,000, that he wants to build it up faster. The law says the maximum is $1,000, so any excess of contribution must be reimbursed within 12 days from the end of the year; if not it is taxed in his hands. It says the excess contribution must be given back to the beneficiary, and any income attributable thereto. So if the fund received an excess contribution from any beneficiary during the year, he must return the money—it is taxable in his hands—plus any income therefrom.

Number eight of my illustration. A plan can be formed for each of the husband and wife.

Number nine: Upon death—that is an important point—any funds not transferred to the wife within 15 months from the date of death will be taxable in the hands of the deceased. The act proposes that it will be deemed to have been received immediately prior to the death of the beneficiary.

In other words, if the money is transferred to the wife within 15 months after death, she has the same prerogative as the beneficiary. In other words, if she has a home and she does not want to use any of the funds that have been built into that trust, she has permission to roll it over to a registered retirement savings plan or buy an income averaging annuity.

Number 10: If you cease to be a resident at any time while you are contributing to the fund, it will be subject to withholding tax at 15 per cent. That is not a bad idea for anyone who wants to use it. It is becoming very cheap. Because the proposal says that the money coming out of this type of fund will be deemed to be pension. Because of that and also because of the United States-Canadian tax treaty, any pension paid to United States residents is free of Canadian withholding tax. It will then be entirely free of tax. There will be no withholding tax because of the tax treaty. If you go to any other country which does not have a tax treaty with Canada providing for such exemption, it will be taxable. Withholding will be 25 per cent after 1975, unless, this again is reduced by tax treaty.

There are anomalies. You will notice that in number nine of my illustration, I said the only provision that will be permitted between the beneficiary and the trust will be that providing for transfer upon death to the wife or vice versa. If you have that clause in your trust deed you can amend it by saying, "I want to eliminate that clause."

I say why should it not be permissible to be transfered to your children? I do not see why, if you have a child 25 years of age—perhaps one of your daughters—why she should not be able to use that money, either to buy a home or have permission to roll over the money received from that fund, as a consequence of your death, to other plans. As it is now, it will be fully taxable in the year of death, and provisions for roll-overs when you are dead are not much of a help.

So I think there should be provision to have transferability to the children, as well as to the wife, or the spouse and the children.

The second anomaly, which is only a technical one, is in connection with ways and means motion 4(a)(i). It mentions that you can only contribute into such a plan if it is to buy a "home". When it comes down to withdrawing provisions from the fund, it says you can use the funds from that trust to buy either "a home or furnishings."

We think it would be better if you were permitted to contribute to a fund under two conditions—apart from the

other considerations, to buy a home and to buy furnishings.

Mr. Chairmman, I do not know if I am taking up too much time.

Senator Buckwold: With regard to number eight, I have a question which I think will be asked often. It concerns the husband and wife. If a young working couple both have an income and they decide that they want to move into this exemption, can each put in $1,000 a year and at the end of ten years buy one house, or would they each have to buy a house?

Mr. Poissant: First of all, the major condition is that they both be working or have an income from some source, because this is a deductible item from income for income tax purposes. The wife could then decide to take that $10,000, plus any interest earned thereon, and consider it as income received with the result that it would be taxable. She might also decide to transfer it to a registered retirement savings plan or an income averaging annuity. Also, the husband could buy the house with the wife deciding to purchase the furniture for that house with her drawings. That is a second possibility. Also, she could buy a summer cottage with that money.

Mr. Cumyn: They could also buy the house as joint tenants.

Mr. Poissant: That is true, yes. In other words, they combine the moneys in their funds, giving them a combined total of $20,000, plus any accrued income in the funds, which they could then use to buy a house as joint owners. There is a fair amount of flexibility.

Senator Buckwold: Assuming my house is in my wife's name, could I start paying into a fund of this type?

Mr. Poissant: Yes. If you do not own a home in Canada, then you are entitled to contribute to such a fund.

Do you agree with me in that respect, Mr. Mitchell?

Mr. Mitchell: Yes, I think you are right.

Senator Buckwold: So that if the home is not in joint ownership, then the party who does not have a joint interest in the home can contribute into such a fund?

Mr. Poissant: Yes.

Senator Lang: As I understand it from reading articles in the press, at the end of 10 years Senator Buckwold, say, could buy the house from his wife, at which time his wife could then start contributing to such a fund for the purpose of buying a home, and at the end of the next 10-year period she could buy the home back from her husband.

The Chairman: That would be a merry-go-round.

Mr. Poissant: I am not sure whether that is right or not. As the legislation is presently drafted, it simply says that this money has to be used by you to buy a house. There may be some legal technicality in the example you have outlined. Perhaps you could buy a home under your own name today and tomorrow transfer it to your wife. That is probably the way you could go about it.

Also, the proposed legislation does not prevent you from having your home under the name of a private corporation. Let us say, for example, you have control over a corporation and that corporation, in turn, owns your home, you could then contribute to this fund. Even though the home is occupied by you, it is not owned in your name, but rather that of the corporation.

Mr. Cumyn: In order for an individual to deduct this $1,000 annually from his taxable income, he cannot own, whether jointly with another person or otherwise, a home in Canada. In other words, if you are joint owner of a home now, you are disqualified under this legislation. If you do not have an interest in a home presently, you can put $1,000 a year into this fund for 10 years, at the end of which that money can then be withdrawn and applied to the purchase of a home, either owned by yourself or jointly with another person. In other words, both the husband and wife, provided neither have an interest in a home in Canada, can deduct $1,000 per year from their taxable income for a period of 10 years for the purpose of buying a home.

Mr. Poissant: The important factor here, in my mind, is that you do not own a home, either jointly or otherwise, in order to qualify to contribute into such a fund.

Senator Buckwold: By the way, is this in effect for 1974?

Mr. Poissant: For 1974 and years thereafter.

Senator Buckwold: Speaking of my personal situation, my wife owns my home and it may be very much in my personal interest to put $1,000 into a plan of this type before the end of December in order that I can deduct that from my income for 1974. You are saying I can do that provided I have no interest in my home presently?

Mr. Cumyn: Yes. I might add, the fact that you may have owned a home some time last year does not affect your ability to qualify for this plan. In other words, if you wished to start from scratch, you could sell your home and then start contributing to this plan.

Mr. Poissant: There is nothing to prevent an individual from selling his or her home in 1975 and start to contribute into this plan for 1976 and the years thereafter. Because he did not own a home at any time in 1976.

Senator Lang: Perhaps Mr. Poissant could comment on the effect of this on the deemed realization provision in respect of a house on death.

Mr. Poissant: Well, both will not apply simultaneously. Either you have a home, in which case you are not entitled to contribute to this fund, or you do not have a home, in which case you would be contributing.

Another question which comes to mind is whether one is disqualified from continuing to contribute to such a plan if, in the fifth year, say, that individual inherits a home property.

Mr. Cumyn: The key time is the time of registration by the minister.

Mr. Poissant: The conditions, as I outlined previously, for qualification are that you be a resident at the time of registration, be 18 years or over, and have no interest in a home or residence in Canada. The plan could become disqualified at a time when those qualifications are not met.

Mr. Mitchell: I should think that registration in such a plan could be revoked if you inherited a home.

Mr. Poissant: There might be room in that respect for a possible recommendation or an amendment. It is revoked.

it becomes taxable immediately, and that is important. I think there should be provisions permitting the use of whatever amount is built into that fund to buy a home or furnishings.

Senator Lang: What I am getting at is this. What does "home" mean? Under the regulations as they now stand on deemed realization, my estate can claim that my home is another piece of property that I own; I live with my wife in one, she has on her estate an exemption and I have an exemption on my estate. That is now contained in the regulations, or is admitted as an interpretation. Under those regulations "home" has a quite different meaning from a place in which you reside permanently, whereas here it seems to have a different meaning.

Mr. Poissant: Under the regulations there is no definition of "home" as they stand. There is a definition of "resident," and even that is rather weak; it says that a resident is a person who is ordinarily resident in Canada. There is no definition of "home" for income tax purposes. It has not yet been defined.

Mr. Cumyn: Are you talking about "principal residence?"

Senator Lang: Yes.

Mr. Poissant: That is defined in the regulations. They should perhaps have said, "principal residence" instead of "home".

Senator Lang: It may be a better word.

Mr. Cumyn: They are very close. If you compare the definition of "owner-occupier home" in this new provision of the budget with the definition "principal residence" it runs along very much the same lines. Why not use the same wording perhaps to avoid any confusion?

Mr. Mitchell: I think this definition is less onerous than the "principal residence" test.

Senator Lang: We had better not raise it.

Senator Buckwold: These are the kinds of questions the public ask. If a couple lived in a mobile home temporarily, would it include them?

Mr. Poissant: According to the regulation, a mobile home will qualify as a "principal residence." But this may not qualify as a "home" under the proposed plan.

Senator Buckwold: Suppose a young couple lived in an apartment and owned a small summer cabin somewhere up at the lake, a small summer place, which is not their permanent residence. Would that disqualify them from contributing?

Mr. Poissant: It would again depend on who has title to it.

Senator Buckwold: Does the ownership of a summer place—I use the word "place" rather than home, because I am not thinking of a large elaborate mansion, but a couple owning a cabin somewhere—be precluded in joint ownership from contributing?

Mr. Poissant: There would be room for qualifying.

Mr. Mitchell: I would think that ownership of a cottage used for their own purposes rather than renting would disqualify you from setting up such a plan. The arrangement would be to have the cottage owned by your wife, which would then not disqualify you from setting up a plan.

Mr. Cumyn: In fact, it goes further than that. You do not qualify if you own, whether jointly with another person or otherwise, real property in Canada, any real property in Canada, any portion of which was used at any time in the year as a dwelling place by any individual. In other words, if you own an apartment building that you have never set foot into in your life, you are disqualified.

Senator Buckwold: But if a corporation in which you are a shareholder owns it you would not be disqualified?

Mr. Cumyn: I don't believe so.

Mr. Poissant: There is a small problem here. It says, "inhabited by the taxpayer at any time in the year." That means any time that has been defined by courts, which could be even one day; that is any time in the year. Therefore, if you have occupied one home for one day you might not be able to use the benefit of that. It might be hard to prove to the department.

Let me go over some of the other amendments. First there is the "small business deduction." As it stands, small business corporations are entitled to the lower rate of taxation on the first $50,000 of taxable income. This has been raised to $100,000. There is another limit. This lower rate is allowed as long as you do not accumulate in "surplus income," to make it simpler, more than $400,000. This has been increased to $500,000. In other words, any small company can have $100,000 of income in a year, and they will be entitled to have the low rate of taxation on that instead of $50,000. That is quite an advantage.

Senator Cook: That accumulates from when? When does the $500,000 start to accumulate?

Mr. Poissant: I think 1974.

Mr. Cumyn: Yes, 1974.

Senator Cook: At the beginning of tax reform?

Mr. Poissant: I thought yo were asking about this increase. This differential tax treatment started with the tax reform in 1972. Before that there were low rates of taxation, but they were different.

In my view, there is still what I call an existing anomaly for the unincorporated businessman. He has to pay the full graduated rate of tax on all his taxable income from a small business. This has nothing to do with the budget, but it is still an anomaly. If you are not incorporated, $100,000 is quite a lot on which to pay taxes, whereas a man who is incorporated gets this tax benefit. I admit it is not easy to find a way out of that discrepency, but that is something you suffer if you are not incorporated.

I now refer to corporate surtax. That was in the May budget and that has not been removed in the current budget. There is a surtax of 10 per cent on the federal tax payable. There are some minor technical definitions here that are not of too much merit to the discussion today. The tax will apply at 10 per cent of the federal tax payable on income other than manufacturing and processing profits, and also profit derived from oil and gas wells or mineral resources, because they are being taxed in a different manner. They therefore say there will be no surtax; the surtax will not be applicable. It is only for a restricted period. It is only applicable to profits derived between May 1st of this year and April 30, 1975. Also not subject to that

surtax are small businesses, investment corporations, mortgage investment corporations, N.R.O's, mutual fund corporations, and also deposit insurance corporations. In fact, that surtax is applicable more or less to service industries, because any large company with manufacturing or processing profit is exempt from tax. So, therefore, the tax finally is applicable to a small segment—well, it could still take a large impact, but finally all segments are affected by that surcharge of 10 per cent.

Senator Cook: What is an NRO?

Mr. Poissant: It is a non-resident-owned investment corporation. These are companies in Canada owned by non-residents to hold investment.

Senator Buckwold: Is this additional surcharge of 10 per cent going to add to the provincial income tax? Will it automatically mean an increase in the provincial tax?

Mr. Poissant: Not an automatic increase, because as it works now you calculate your tax and the federal grants of 10 per cent reduction for provincial taxes, wherever you are in Canada. Now, the company goes and makes its provincial return either in Ontario or Quebec, because they are the only two provinces which have their own tax returns. If not, then you add back to your federal tax payable whatever rate is applicable to the other provinces. Byt thaBut that does not affect the differential. It is only the federal tax payable that is being increased by this 10 per cent surtax.

Now, there is also a new problem or a new limitation which is that any interest paid and property taxes on land for resale purposes will not be deductible at arriving at your taxable income for that year. It must be added to cost. So let us say that a company has $500,000 worth of land and that it had borrowed money or that it owed the money to the vendor on which they are paying interest. That interest and the property taxes will no longer be deductible from other income. From now on this interest has to be added to the value of the land. Unfortunately, as it is drafted now in the proposal there is one anomaly I have found. The denied deduction is incorrectly treated in the ways and means motions. In other words, the wording used to treat the interest will get nowhere. It just says that you have to take that disallowed interest, let us say it is $10,000 which have been refused, and they say that you have to add that to your inventory. That is section 10 of the Income Tax Act, but section 10 is made up of two elements, "cost" and "fair market value" of inventory. They say in the proposal, add it to your cost, but section 10 deals with value of inventory, and not only cost. You arrive at your inventory by using either of the two figures, the fair market value of your land or your costs, whichever is lower. Now, by having this added to the cost alone, as required, the denied charges may be lost. Either you are going to lose it entirely because you will not get the benefit of deducting the interest at all. Here they say, "Don't deduct it from your other income in the current year," but at least the law should be drafted in a way that you do not lose it. Eventually you would get it back by way of having an increased cost. But that is not properly treated as it stands now. Maybe the bill will cure that.

Coming back to the illustration, if you were to get any other income, say, rental income from that land, now, going back to my example, I have paid $10,000 of interest to the mortgagee and I have received rental income of $1,000. It seems, as it is worded now, that I would have to add the $10,000 to the cost of the land and be taxed on the $1,000. It should be amended to say that it is the net carrying charges that should be added back. In other words, you should be allowed $10,000 less the incidental income you received from that property.

Now, there are, of course, exemptions to this that will not apply to all land. Land does not mean a building and it also excludes the land upon which the building is built. Now, with respect to land adjacent to your building, it is not entirely clear if the interest and property taxes you are paying on that land surrounding your building will be treated or disallowed in that year.

Senator Everett: Take the case of a shopping centre. What you are saying is that on the parking areas taxes and interest are not deductible. They must be included under the cost of the land.

Mr. Poissant: "Land does not include any property that is a building affixed to land, or the land subjacent thereto." So as far as a parking lot in a shopping centre is concerned, that is a good question.

Senator Everett: This is not land held for resale or development.

Mr. Poissant: That is where it is aimed at. That means that with respect to any land held for subdividing or for resale purposes, the amendment is to disallow that type of interest. That is the main objective.

Senator Everett: I know that is the intention, but I want to know what the operation of the act is. You are suggesting that the operation of the act would make it apply to a parking lot.

Mr. Poissant: If a parking lot was one on which you were getting property income, that would be one thing, but let us go back to the parking lot on which the parking is free, as is the case with shopping centres. You could argue that, although you are not getting income from that parking lot because the parking is free, on the other hand, it is to service the adjacent property. I think the intention is not to refuse that, but it may not be clear that it is refused.

Senator Everett: The language does not read that way.

Mr. Mitchell: There may well be a technical problem, but the intention was not to catch a situation like that.

Senator Everett: But I can see Revenue thinking it was.

Mr. Poissant: The question is whether ownership of the shopping centre including parking facilities constitutes a business operation or is, the parking held primarily to earn income from the land

Mr. Comyn: If I may just clarify that, 12(b) talks of land "held primarily for the purpose of gaining or producing income of the taxpayer from the land for that year." If you omit the words "from the land" it would improve the meaning of it. I think your parking lot could then be considered to be held primarily for the purpose of producing and gaining income.

Senator Everett: The other area is that there could be a discussion with Revenue as to what constituted a reasonable parking lot. It should be clear in there. I can see them saying with respect to a shopping centre, "No, you are only entitled to so much: one foot of parking for each foot of store, or two feet for each foot of store. If you go beyond that . . ." In other words, they are not leaving it to good business judgment.

Mr. Comyn: I think if you paved it and put little white lines on it, they would have no leg to stand on. However, if it was just vacant grass and rubble, that would be different.

Mr. Poissant: Perhaps, Senator Everett, you might think of an amendment which would clarify that. There are no doubts in my mind with respect to the parking lot from which you derive income. If you get a profit out of it because you are charging for parking, that is one thing, but a non-charging parking lot is quite another. Where does it stop? If it is paved you may have a point. If it is unpaved, where are the limits? The committee will probably want to examine that problem.

The Chairman: I suppose part of the answer is that you can park on the street.

Mr. Poissant: It could be.

Senator Heath: I wonder if I could ask Mr. Poissant a question before we leave this point. Perhaps I could give the example of, say, a university that may own and may want to keep undeveloped land for endowment purposes, or resale value, and so on. Now, it seems to me, from what you have said, and if I have understood it, that universities under no circumstances would be penalized.

Mr. Poissant: Universities are exempt from tax.

Senator Heath: A private university as well?

Mr. Poissant: If it exists for the purposes of education, and if it is a non-profit organization, it is tax exempt under section 149.

Senator Heath: So they could continue to own land for the purposes of endowment.

Mr. Poissant: Yes, and even charge some rental to their students, as they do, for parking; but the funds are to be used for education. The act says that the income from those persons will be exempt, and universities are included in that.

Senator Heath: So that is all right.

Senator Molson: Does that apply even when the land that we are discussing is held by the university for investment purposes as distinct from educational purposes?

Mr. Poissant: With some conditions. They have to use all of their income for the purposes for which they were incorporated. In other words, if they were to carry on a business in a profitable way there might be room for discussion; but if all of their income is used for the advancement of education, or religious affairs, it will be free of tax. They have got to use those funds for that purpose.

Senator Molson: Let me ask one other question, unrelated to this particular aspect, but connected with land. What about land that is held for the qualification of senators?

Mr. Poissant: I am not aware.

Senator Molson: Of membership in the Senate. Is that held for development?

Mr. Poissant: I do not know.

The Chairman: Well, senators, this might be a good place to break off. What I was going to suggest was that we might adjourn until 2.30, and I think the Senate itself will clear us so that we may carry on, even though the Senate is sitting, after 2.30. We have our staff here, and they have plotted their work, and I think we should try to get through it today, if we can or to the extent that we can. Is that agreeable?

Hon. Senators: Agreed.

The Chairman: Then we will adjourn until 2.30 p.m., and we will assume we will have the necessary consent.

The committee adjourned.

The committee resumed at 2.30 p.m.

The Chairman: Since time marches on, we will ask Mr. Poissant to resume where he left off.

Mr. Poissant: On this slide I have dealt with three resolutions, numbers 15, 17 and 3. There was some sort of anomaly.

The Chairman: Those numbers, can you identify them or where did you find them?

Mr. Poissant: They refer to numbers in the ways and means motions.

The Chairman: So they are in *De Boo*'s special release.

Mr. Poissant: Yes, the ways and means motions. The first one deals with the situation where an employee has been transferred by his employer to another city. Now, if, because of the bilingual program in Canada, he wants to have his children attend a particular school, the benefit he would receive from his employer would not constitute a taxable benefit, that is the benefit he receives towards the cost of education of his children. Now it would not be taxed as long as the children attend the school, but it must be the closest school. Le t us say, for example, that a French person from the province of Quebec is transferred by his company to Manitoba, and this taxpayer wants his children to continue attending a French school in Manitoba, and his employer gives him an additional allowance for this purpose, it is taxable unless it is being used towards the cost of the education of the children but the condition is that the children must attend the closest school that he can attend. Now we find a problem here. We think that while it says "the closest suitable school" there is the consideration that the closest suitable school may not be in a position to accept the children because they already have too many students. Therefore your committee might want to study the possibility that it should state the closest suitable school where he can be accepted for registration.

The Chairman: But you could deal with that by putting in the word "available" at that point.

Mr. Poissant: Yes, that would be suitable. One word would do all the changes.

Then we come to WMM 17 which is the one which deals with an employee who has to have another employee working for him because it is required by his employers. This ways and means motion number 17 says that the only expenses he can deduct, in addition to the assistant's salary, are amounts paid in respect of unemployment insurance, the Canada Pension Plan or a provincial pension plan. We feel he should be able to deduct as well all costs related to that employment like workmen's compensation, minimum wages, and some other types of expenses. If you

have to hire an employee to work for you, you should be able to deduct not only his salary and the expenses mentioned in ways and means motion 17, but also all the other costs related to that. This, we feel, is an anomaly.

Senator Cook: What do you mean by an employee having an assistant?

Mr. Poissant: It could happen in a case like this: let us say you have a special assignment and this assignment necessitates a helper or a secretary or a researcher. Now you will be allowed to deduct his salary and the expenses referred to in ways and means motion 17 but there you are restricted to one or two expenses, and we say that you should be able to deduct all the expenses related to the employment. There are not too many cases of this type, but that would be one of them. Employees are very seldom employers, but it could be that an employee would become an employer for a special assignment for his own employer and so we say that all expenses should be included. I have not had personal practical experience of that, Senator Cook, but I know there are such cases.

Thirdly, and here I am referring to a question of wording, it says in ways and means motion 3 that a blind person or a person confined to bed or to a wheelchair will be allowed an extension in the medical expenses deduction. However, it says of a person confined to bed or a wheelchair that he has to be necessarily confined for a substantial period of time each day. We feel that this expression is too restrictive. We feel that it should be replaced, perhaps, by "ordinarily" confined to bed or to a wheelchair.

The Chairman: That would make more sense.

Mr. Poissant: We come then to a new amendment to the act, ways and means motion 18. Interestingly enough, financial companies were entitled to report their interest income either on a cash basis or an accrual basis, so in May, 1974—this year—it was proposed that from 1972 on, they were to be forced to record their income from interest on the accrual basis. The proposal is now to take effect in 1975. So from 1975, all financial corporations across Canada will have to report their interest income on an accrual basis.

The cash basis has been available to all such corporations in respect of interest income, but some of them never used that method in reporting income. Therefore, when they realized that, because of the amendment, others were using the cash basis, they said, "It is unfair to us." Because they have been reporting income on an accrual basis all along. So this has been amended to give the benefit to those taxpayers who were on an accrual basis. They can be temporarily on a cash basis, that is for 1972 to 1974 and then in 1975 everybody will be on an accrual basis. In other words they are giving a benefit to those companies who were not reporting their income on a cash basis. They say that "for 1973 and 1974 we will grant you that benefit, but after that you will be like all the others." This applies mostly to banks, life insurance companies, trust companies and loan corporations.

Ways and means motions 17.1, 23 and 45.1 contain amendments to the wording of certains sections of the act; these sections are 12, 20 and 64. In each case, the word "receivable" is replaced by the word "due". Perhaps I should give you an explanation of how it works. These are reserves for amounts not received until a following year. It works this way: If any taxpayer in Canada sells a property for, say, $100,000 and its cost had been $50,000, he then has a profit of $50,000. Let us say that $100,000 was payable this way: a cash payment of $20,000 and the balance of $80,000 payable in eight equal annual instalments. In other words, the program of payment would be the first year, $10,000, the second year, $10,000, and so on until the $100,000 sale price had been reached. In the first year, the taxpayer in Canada says that it is unfair to be taxed on $50,000 profit when, in fact, he is only collecting 20 per cent of the downpayment on the house. For the last 15 years or so the practice has been that the vendor has been allowed to claim a reserve. The income tax people have allowed the vendor to report, for instance, only 20 per cent of the profit for the year if only 20 per cent of the price was receivable. The remainder, in this case the $80,000, was allowed as a reserve, and each subsequent year the amount taken into income would be 10 per cent of the profit. So the first year he would report as a gain made during the year $10,000, or 20 per cent of $50,000, and after that it would be 10 per cent, or $5,000, and that would continue until the eight years were completed and the full $50,000 of income had been reported.

Now they have changed one word. I do not know why they changed it, but instead of the word "receivable" they are using the word "due". The lawyers will know better than the laymen just what is connoted by the word "due" as opposed to the word "receivable". Perhaps Mr. Cumyn has an explanation of why the change was made.

Mr. Cumyn: There may have been some embarrassment over an application for a ruling drawing a fine line between the two words, in which case they would have wanted to eliminate what they thought was a problem. Just reading from the editorial comments, the word "due" connotes immediate enforceability of a right to payment. In other words, it is literally payable today; whereas the word "receivable" connotes no more than an existing right that may not be enforceable until some point of time in the future. That is the difference.

The Chairman: I think you can argue both ways on that.

Senator Buckwold: Does this affect capital gains as well?

Mr. Poissant: That is under section 40. The other section is 64, resource industries, where you are allowed reserves when you get into resource properties, and section 20(1)(n), when you are in business, too. But there are qualifications there. If you are in the business of selling land and the balance is not payable until one year and a day after the sale, you are then allowed this reserve. If it is for anything else but land in a business, it has to be two years and one day after the sale takes place that the amount is not receivable.

Senator Buckwold: Would you have the same right of deferral on a capital gain, though?

Mr. Poissant: Yes, you would do the same thing with a capital gain. To refer to an example let us say the capital gain is $100,000. As you know, we are only taxed on 50 per cent of the capital gain. So the taxable capital gain there would be $50,000. So, in fact, you would report in that year only a taxable capital gain of $10,000 and the rest would be the reserve allowed under section 40 as not deemed to be a gain for the year.

Mr. Cumyn: Interestingly enough, section 40 already uses the word "due".

Mr. Poissant: That is right, but the other sections use the word "receivable". Maybe it is only to have matching wording.

Ways and means motion 19 introduces something new as regards the determination of the capital cost of property. There was a court case involving a company called G.T.E. Sylvania Ltd. That company had received under Quebec provincial income tax law a reduction of its taxes. As you know, there are different types of grants or subsidies which can be given to promote manufacturing by assisting any new company or new project which has been started. In the province of Quebec, which is the province in which this plan is located, one such method is to allow a tax credit based on the investment you are putting into a new plant. Sylvania had received a reduction—for the sake of argument let us say $10,000—in their provincial Quebec taxes payable. When they arrived at the point of figuring their capital cost they decided that this was not a grant but was a reduction of taxes and therefore they would not reduce the cost of their property by the amount of the tax reduction. Rather, they would claim a capital cost on the original capital cost amount. The Federal Court and the Federal Court of Appeal held that their view was correct.

Now the federal government has decided in this budget that any assistance you receive for the purchase of property after November 18, 1974 by way of a grant, subsidy, deduction from tax or otherwise from a government, whether it is federal, provincial or municipal, will be deducted in arriving at the cost of the property for depreciation purposes and capital gains. The way the act is worded it is going to work this way: for capital cost purposes you take the $100,000 you have paid for the building, less the amount of assistance receivable, plus whatever you have to refund to the government. The province of Ontario, for instance, makes loans, but you have to refund part of the loan if you don't meet all of the conditions. Most of the governments work this way. They will give you so much, but if you do not meet all of the conditions you are required to meet then you have to refund part of it. They say anything you refund is added back to the cost but, of course, you will have already deducted the amount you received from the government. So, in my example, it would be $90,000 on which you would be entitled to claim depreciation, and not $100,000.

The Chairman: Well, if the amount of the assistance is, say, $60,000, and the amount that you have to agree to refund is $40,000, then it is only the $20,000, no matter at what time you may make the refund. Is that correct?

Mr. Poissant: I think it has to be.

The Chairman: Or is it when you make the refund?

Mr. Poissant: You have to make the refund. If you have not made the refund, you do not take it into consideration. In other words, the way it will work normally is that you get, say, $100,000 of assistance, and you do not refund it immediately. You would reduce the cost of the property by $100,000, and would only add back amounts actually refunded. One thing we question here is the fact that the act says that any assistance includes "received or receivable". This I do not like because the "receivable" may never come. In other words, this $100,000 is not necessarily the amount of money that you have actually received from the government. It is the amount received or receivable from the government. In my mind, this is something you should examine.

I see Senator Molson is here, and I would like to apologize to you, Senator Molson, for not having understood your question of this morning. My mind must have been on something else. You asked a question about the cost of the property that a senator has to have in order to qualify under the law relating to the Senate. I suppose there must be some sort of an act in that regard.

Senator Molson: The British North America Act. I only asked the question because you dealt with so many different kinds of property, and it occurred to me that we did have a property situation right here that you have not yet explained.

Mr. Poissant: I think it is a very pertinent question. I do not know all the ramifications of the British North America Act, however. In this regard could I ask what value you must possess?

Senator Molson: $4,000.

Mr. Poissant: That is $4,000 of paid value. Now, let us say the property you have is a property worth $10,000, on which you have an equity of $4,000, if I can express myself in this way, and let us say you pay interest on the balance of $6,000.

Senator Cook: You are not allowed to have a mortgage. It has to be $4,000 clear. It has to be clear and unencumbered.

Mr. Poissant: How about a loan?

Senator Cook: I do not know about that. That is getting too close to the truth now.

Mr. Poissant: I will not discuss the question of whether you can have a loan, but anyway, let us say you have to have an equity, or a paid value of $4,000, or whatever you wish to call it. The question is, because you have to have that property, and you have to pay interest on that $6,000, is that interest that you are paying a deductible item? My answer to this, Senator Molson, would be that you would not be entitled to deduct the interest, on the ground that this might be a personally owned property. Remember, furthermore, that under the act you are not allowed, as it stands now, to deduct any interest paid on your personal home, for example, or furnishings, or anything that is personal use property. You are not allowed any deduction of interest. This follows the normal income tax pattern. The act allows you interest as long as it is for the purpose of earning income. If this were a farm, or some other property, or land, that you have to have, which land is held primarily to earn income therefrom, chances are that it could be allowed. Of course, there may be more restrictions as well, so I do not know if I would try it, personally.

There is something else in the act that I wanted to mention. As you know, there are what are called involuntary dispositions. That means, that in terms of this reform you have to put some kind of application rules on capital gains. One example of this is when you sell the property involved, or if you should die, or if you should cease to be a resident. Further, the Income Tax Department say also, "We have to look at the involuntary dispositions" as in the case of expropriation.

Under the Income Tax Act as it stood before, it was not clear enough which was to be the date when the proceeds were obtained under expropriations. Let us remember that you make a capital gain under the Income Tax Act when you have proceeds of disposition. Now the question is,

when do you have the proceeds of disposition when, for example, you have been expropriated? We hope this has been clear up to now with this proposal. They have, however, put in an amendment covering certain dates, and it has to be one of the earliest dates upon which you will be deemed to have disposed of the property for purposes of capital gains tax. Please note that I use the example of expropriation, but it could be a question of stolen property, or it could be other things, but expropriation is certainly the most normal and the most frequent one.

In this case you can postpone the gain until the earliest of the following dates:

First, the day the taxpayer has agreed to full compensation. In other words, you agree with the government that the compensation they will give you is satisfactory. That is the day on which you have disposed of that property.

Secondly, the day final compensation is determined by the courts. That is very important. You may not accept the expropriation value you are first offered, and so you go to court and you appeal, and it is the final settlement that will decide what is the date of recognition of the disposal.

Thirdly, when cases one and two do not apply, that is, you have not appealed to court, and you have not agreed with the expropriating party, you have two years after the date of the expropriation.

Fourthly, if you die sooner than any of those three dates, before two years are up, the date of disposition is the day you die.

Fifthly, there is the case of the date on which you cease to be a resident, if the property is not a taxable Canadian property. This is if you own a property outside Canada, chiefly because, when we are talking about expropriation, we usually talk of real estate, and real estate is a Canadian taxable property for tax purposes. Let us therefore say that you own a property in New York, and you cease to be a resident. In that case, the date you cease to be a resident is important only if the expropriation we are dealing with is an expropriation of a property that is not in Canada. If it is in Canada all of the other limits will count, because it is a taxable Canadian property and is some sort of a guarantee that even if you cease to be a resident the tax is still collectable. It would therefore be the soonest of any one of those dates upon which the gain or the loss will be deemed to be realized.

Let me turn to the question of what would be the fair market value. This is a problem. Let us say that the two years have expired. I would say that the problem will lie in number four here of my illustration. Let us say a court decision is still pending and the taxpayer dies. The property is then deemed to be disposed of on the day of his death. On that date, what will be the fair market value of that disposition? Let us remember that it is deemed to have been disposed of, and you measure your capital gain by the fair market value less your cost. This is your gain. If the taxpayer dies in the meantime, what will the fair market value be? We suggest that perhaps there should be a roll-over. I do not think the date of death should have any bearing on that type of involuntary disposition. We think that the pending legal matters should go to the estate, which should realize its loss or gain upon the occurrence of the dates referred hereto, as if the death had not occurred. In other words, if it were going to be settled five months after the death, why should the estate, or the representatives of the estate, not settle that as the taxpayer's residue?

I read a very interesting article given by Douglas Ewen at the Tax Foundation meeting on this very problem. He raised the point that in Ontario, as soon as you are expropriated you are no longer the owner of the expropriated property. If you are not the owner, two questions arise: First, can you still claim depreciation on that property? Here under the present proposal they say you are not deemed to have disposed of it until, say, two years have passed; so in fact the federal government says that you can still depreciate that property, because you are not deemed to have disposed of it yet.

But in Ontario they say you do not own it because that is what the Ontario Expropriation Act says, and this is probably the case in Quebec, and also in every province across Canada. Where does the taxpayer legally stand? We therefore question the validity of that amendment, especially where the provinces are involved as far as expropriation is concerned.

I worked out an example on ways and means motions 37 and 38 to facilitate its explanation. Let us say you have transferred Bell Telephone shares as a payment of your contribution in a year to a pension plan (deferred on note). The Bell Telephone shares are worth $100. This is the yearly contribution you are allowed. You do not in fact have to give money. You bought those shares at a time in the past for $175, so in fact you have made a loss of $75, upon that transfer. All you had was those Bell Telephone shares and you said to the trust, "Take those shares as my contribution to my pension plan." You made a loss. That loss is refused to the taxpayer.

It has been added in this way on the illustration. The shares received have the fair market value, $100, and the trust is allowed to add the loss that the taxpayer had, so that is not bad so far. In other words, he adds the loss of $75 that the taxpayer made, so the trust increases his base; The act says to the trustee, "Your shares cost you $175." Let us say the man is at the end of the program and is due for retirement and wants to get his pension. The trustee, to meet his obligation, sell those Bell Telephone shares for $175. According to the Income Tax Act amendments, this cost is deemed to be $175. I think we all agree with that, because the loss is carried forward and someone has the benefit of the loss. He is getting $175 cost; therefore he has no loss and no gain, as shown in the illustration.

Where I question it is that Mr. A's position is as follows. He received as a taxable pension $175. That pension, just like salary or anything else, is taxable. He has previously deducted only $100 from his income in the year he made his contribution to the fund. Pension contributions are allowed for deduction. That $75, simply because it went through a trust, is lost. Had he kept the shares himself at the time they had cost him $175 and sold them for $100, he would have had a capital loss of $75, 50 per cent of which was deductible against other income. Because he went through the trustee, between the trustee and himself the base does not change, but the tax treatment defers as far as the taxpayer himself is concerned. You will notice that I say Mr. A is unfairly taxed on $75. To me there is possible room for amendment which you may want to examine.

With the May, 1974, budget that R.R.S.P. works this way under income tax. If you or your employer are not contributing to a pension plan, you have a $4,000 maximum deduction. As soon as, say a Member of Parliament, or anyone in the government, contributes to a pension plan even $1 a year, that maximum goes from $4,000 down to $2,500, and from that $2,500 you must reduce the contribu-

tions paid by yourself or your employer. There was a very awkward case of a newly elected government member last year; the government contributed, since he was a Member of Parliament, a very small contribution, so immediately his ceiling dropped from $4,000 to $2,500.

I would say this is an existing anomaly in the act now. If an employee or employer is contributing or if it is a professional such as dentists, who usually do not have any employers contributing to a pension plan, their maximum is $4,000. If they do not want to use that $4,000 they can start a new plan for their wife. Any unused portion of the maximum amount can be transferred to the spouse.

This is a debatable and questionable thing. Why not leave the ceiling at $4,000 in all cases? I think all taxpayers in Canada should be treated fairly. I think it is unfair that because $1 is contributed to a fund the maximum should be $2,500 less $1 because the employer is contributing to a fund, so that the man is left with $2,499, whereas it should be $4,000.

Before, payments had to be made for the wife for her maintenance or the children's maintenance. This was a serious anomaly, because people who were divorced would make payments for the benefit of the wife, but they were not allowed to if it was paid to a third party. As soon as it is for the benefit of the maintenance of the spouse, the expenses, even though they are not paid to her directly but paid on her behalf such as her rental—it does not have to be for a mortgage, it may be rental—would be deductible expenses that in the past were not deductible.

The Chairman: There must still be an order of the court.

Mr. Poissant: There must still be an order of the court giving proper authority.

Mr. Cumyn: Or a written agreement.

The Chairman: Yes, or a written agreement.

Senator Lang: Under the old act was that moneys paid to her for the benefit of a spouse or just to a spouse?

Mr. Mitchell: I think it was to a spouse.

Mr. Poissant: It could have been for the benefit. I remember one court decision involving a man who had paid the mortgage for the house in which his ex-wife was living, and they refused that. Perhaps that was because she did not own the house, although she was still occupying it. They therefore said it was not a true benefit conferred upon her because it was coming back to the husband, so why should that expense be allowed?

Mr. Cumyn: Funnily enough, it does not say directly; it says the payment is required to be made to the spouse. It refers to an amount paid by the taxpayer in the year under a court order or agreement whereby he is required to make a payment to the spouse.

Senator Laird: That makes it plain, does it not, if it does not appear in the court order?

Mr. Cumyn: The sort of difficulty that arises is where the spouse, although there was a court order or agreement, short-circuited his estranged wife and made the payment directly to a mortgage company or to a school for tuition for the children.

Senator Laird: Sometimes he is required under a court order to pay x dollars per month, and he choses to pay a portion of that on account of the mortgage, and that could comply with the court order.

Mr. Cumyn: That is right but it would not get him full deduction under the act as worded. He would not get the deduction because it was not paid to her.

Senator Laird: Is that right?

Mr. Cumyn: The department did not like to do it and they were refusing deductions.

The Chairman: However, this is tidying it up.

Senator Lang: Off-times there was a trust in there receiving moneys for the divorced spouse.

Mr. Poissant: That is the last one. I have perhaps five or six more, but they are all technical amendments. However, I have one here that may have some merit relating to some sort of education savings plan where you can contribute. Now there are certain requirements in the act, one being that at the time of registration there must be at least 150 members in the plan. In other words they do not want just a self-made plan. So the only thing we discussed here is the fact that as soon as the number of the members in the plan is reduced, by reason of people attending school or university, then the plan may be revoked and if there are less than 150 members the entire thing is taxable in that year. We think that is unfair. We think once it has met the registration qualifications and qualifies with 150 members at least at the time of registration, then we think it should remain a registered plan and not be revoked. But the amendment suggests that the plan can be revoked once the original qualifications are no longer met and we feel that should be removed. Once you have been registered and qualified, then it should remain that way. You have something of the same situation in respect to a private corporation who wants to be deemed to be a public corporation. It needs to have 150 shareholders holding so many shares. Now, once you meet that requirement under the Income Tax Act, even though the number of shareholders is reduced to below 150 you do not lose your original qualification. You can still remain a plublicly-held corporation. We think the same situation should apply here, that once you meet the requirements at the beginning of the plan, then it should remain that way.

There may be some other small amendments, Mr. Chairman, and I have left a fair amount out, because I just mentioned those that had more merit than the others, but I want to leave some time for my colleagues. I have already taken a fair amount of it. However, we will be here to answer any questions you may have to ask on the subject.

The Chairman: Are you going to go next Mr. Cumyn?

Mr. Cumyn: Yes.

The Chairman: And what are you going to deal with?

Mr. Cumyn: With resource industries, partnerships, trusts, the international area and what is known as FAPI, the rules affecting offshore subsidiaries activities. The resource industries is the area in which perhaps the most contentious modifications have been made vis-à-vis the spring budget. I am referring here to paragraphs 7, 7.1 and 8. This concerns situations where petroleum and mining companies are obliged to add back to their income certain royalties, taxes and similar payments made by them to the Crown in the right of Canada or a province, to an agent of the Crown or to a Crown corporation. I think the mention

of the Crown in the right of Canada there is to make it look a little more broad-minded. What they are really after, obviously, are the provincial royalties. A new provision vis-à-vis last spring is in 7.1. This casts a slightly wider net and applies this add-back to bonus payments and payments related to the acquisition, development or ownership of Canadian resource properties. One of the things that 7.1 has which 7 has not is that 7.1 exempts or excludes payments of municipal or school taxes. Number 7 applies in effect to payments made from last spring's budget date to this fall's budget date and 7.1 applies thereafter. It seems unfair to me that municipal and school taxes which should be added back to the resource companies' income and then refused as a deduction should only be excluded as from the fall budget date because they are caught by 7 in respect of payments made since last spring. So if a resource company has to pay municipal taxes out west, it will not be permitted to deduct these taxes from its income. These municipal taxes will be added to its income and they will not be deductible.

Senator Cook: What is the rationale for that?

Mr. Cumyn: I have no idea. Being an exempting provision rather than a punitive or taxing provision they could very easily have made it retroactive to the inception of this add-back system. I think that is one of the things you might want to consider.

Without going into the federal viewpoint, I would refer you to the statement made by the Minister of Finance in his budget speech at page 12 where he gave justifications which he felt related to this add-back. He said that traditionally provincial royalties have been deductible as business expenses but with the tax reform in 1972 Canada had begun the process of cutting down the deductibility of these royalties by increasing provincial abatements so that the provinces could get their taxes in that manner. He felt and he expressed the view that the royalties had now risen to such a high level in certain provinces that they were really disguised income taxes and while he conceded that petroleum and mining industries were potentially overtaxed, he felt that the overtaxation was not the federal government's fault but the provincial governments' fault. In order to alleviate the situation somewhat, he made new proposals with respect to the abatements so that effectively in addition to the present 10 per cent corporate abatement, further abatements would bring federal taxes on petroleum products down to 30 per cent in 1974, 28 per cent in 1975 and 25 per cent in 1976 and following years, and on mining profits to 25 per cent in 1974 and following years thereby leaving the field of taxation more open to the provinces than in any other industry. Likewise the 10 per cent surtax we were talking about this morning does not apply to these companies.

One of the interesting aspects of these further abatements I have just mentioned is that they are not available in respect of income earned in a province. In other words if a resource company carried on most of its activities in the Northwest Territories or in the Yukon, it would still get this abatement of the federal tax to bring its income tax rate down to 25 per cent vis-à-vis the federal government notwithstanding that it was not necessarily paying any tax in any province. Most abatements in our tax system are in respect of income earned in a province, but this abatement is not expressed in this way.

I have several specific observations about this, and one thing you might be interested in is the constitutional aspect. It would appear that because the taxing powers of the federal and provincial governments are independent of each other in the British North America Act there is no constitutional objection to double taxation although if such taxation exceeds 100 per cent, it may be that for collection purposes only the so-called paramountcy doctrine owuld govern and the federal government would get the first crack at the pot. The authorities here seem to be unanimous. An exception to this principle could arise where a taxing power was being used to camouflage control of local or provincial commerce. But I think that when one thinks about the add-back of provincial taxes to the income of the resource company and then the refusal of these taxes as a deduction, it is really a question of the federal government's determining its tax; it isn't really seeking to regulate these industries. But I will leave that to your judgment.

The Chairman: On the question of abatement, the extra 10 points being provided in respect of oil and gas profits making the effective rate 30 per cent for 1974, let us take the province of Alberta, for example. When you add to that the combination of that 30 per cent plus the Alberta income tax rate, what would be the effective rate then?

Mr. Cumyn: The Albertan rate is 11 per cent so we are really up to 41 per cent. Of course, the principal tax is levied by Alberta—and I couldn't fix the exact amount—by way of these royalties.

The Chairman: Yes. I was just trying to get at the corporate rate structure income tax-wise. So the combination of provincial in Alberta plus federal for 1974 would be 30 per cent plus 11 per cent, or 41 per cent.

Mr. Cumyn: That is so, unless Alberta has a special surtax on resource profits, which I would not be able to tell from the federal act.

Senator Cook: Are school taxes and that sort of thing deductible from the incomes of manufacturing companies and other companies?

Mr. Cumyn: Yes, they are.

Senator Cook: But they are not deductible from the profits of mining companies.

Mr. Cumyn: They will be in respect of payments made after November 18, 1974, but in respect of payments made between May 6 and November 18 they will not be deductible, which seems anomalous.

Senator Cook: Particularly because in many cases, as I know from personal knowledge, the schools in certain areas have been built by some of the mining companies. They put up the buildings in the first place.

The Chairman: How do you distinguish between the treatment of school taxes and municipal property taxes? How do you rationalize it?

Senator Cook: Municipal taxes are not deductible either.

Mr. Cumyn: My comments apply equally to both school and municipal taxes.

The Chairman: I understand that as of November 18 the school tax is a deductible item.

Mr. Cumyn: That is right, and the municipal tax.

The Chairman: Oh, both.

Mr. Cumyn: Yes.

The Chairman: But it is for the period from May 6 to November 18 that there is a hiatus.

Mr. Cumyn: That is right.

Senator Beaubien: Is that not an oversight?

Mr. Cumyn: No, it seems deliberate, because if you compare 7, which reproduces the text of the proposal last spring, to 7.1 which seeks to cast the wider net, you see that nonetheless in 7.1 there is this deliberate exemption, which is not to be found in 7—I would remind you that 7 is the one that applies from the spring on and 7.1 is the one that applies from the fall on—it says, "other than a tax or portion thereof that may reasonably be considered to be a municipal or school tax levied for the purpose of providing services in the immediate area of the property of the taxpayer."

This is something that could be cured quite easily. It could just be inserted in the first provision as well as in the second.

The Chairman: Put it in 7 as well as in 7.1. There is one thing you might comment on. I believe there is a provision that eliminates the effect of the court decision in the Bethlehem Steel case.

Mr. Cumyn: That is right. The Bethlehem Steel case was on a different matter, was it not?

The Chairman: It was a question of what is an operating mine.

Mr. Cumyn: That is right. I think it was on a slightly different matter. The court, in its *ratio decidendi*, in any event in its reasons for judgment commented or made the remark that the income from the operation of a mine was only from the extraction of the minerals from the ground and not from their further refining to the prime metal stage. In the past we have had a three-year tax holiday for new mines. This is being phased out. It is in the process of being phased out right now. But the departmental practice in administering this had been to exempt not only extractive profits but also, likewise, profits from refinement to the prime metal stage. So when the Bethlehem Steel case reversed this and held that income from the operation of a mine was only the extraction and not the further refining, the department was rather embarassed because it had been administering the three-year tax holiday more generously. Accordingly, the act is now to be amended retroactively to provide that the income from the operation of a mine, for purposes of the three-year tax holiday, should include not only extraction but also refinement to the prime metal stage.

Senator Beaubien: That would be retroactive?

Mr. Cumyn: That is retroactive even as far back as 1972, sir. It may even go further back than that.

The Chairman: It says here that it is prior to 1972.

Mr. Cumyn: There are some problems in this add-back concept. It is a slightly repugnant concept because in certain cases it is adding back to the resource company's income money that it never even received in the first place, apart from then refusing the deductibility of the item. It can create some delicate problems. Without getting into the idea of surplus too much, if you have retained earnings in a company and there is a control change, you can have what is called designated surplus. You can sometimes have designated surplus in your books of account without actually having any money in the bank, so to speak. This is called "phantom designated surplus," because it means that you would have difficulties winding up the company or distributing its earnings. First, you have to go through this paper surplus, the phantom surplus, before you do anything else. There has been a question raised as to whether this add-back which gives you, or which deems you to have had, something which you never got might not create a phantom designated surplus.

There is another problem which I will comment on. We are switching over under the fall budget from the old automatic depletion system to the earned depletion system. The earned depletion system is basically this: A mine is considered a wasting asset. Therefore, the owner or operator of a mine is entitled to deduct up to as much as one-third of his mining profits in a year from his income in order to reflect the wasting nature of the mine. In the past this was an automatic deduction. In the future you will only get so many dollars of deduction, because of depletion, by virtue of spending so many more dollars on exploration and development.

One of the limits in the new regulations on earned depletion concerns the amount of your resource profits for the year. It is not clear whether this strange add-back creates income which should be called a resource profit for the purposes of these regulations.

I will go back to depletion in a moment to explain it a little more comprehensively.

There is also the possibility under 7.1 that this money added back gets added back to more than one taxpayer, because it can be added back to a person owning a mining property or to one who has a right to take resources from the property. So you have to ask yourself, if one person had income by virtue of owning the property and another by virtue of operating the property, whether the taxes paid by either one or, indeed, both, could, technically, by virtue of the way it is worded, be added back to both of their incomes. This is a crazy thing, but the way it is drafted I think it is possible. These are rather detailed matters which we can perhaps take up later.

There are one or two other anomalies in this. I will pass on, then, to depletion.

Senator Buckwold: If I could ask a question on royalty, I gather that this is just for Canadian properties as against foreign-owned properties of Canadian companies who would still be allowed to deduct the royalties as an expense if the property was outside of Canada.

Mr. Cumyn: That is so. It is all a part of the fight over taxing jurisdiction in respect of resource profits.

Senator Buckwold: This seems a very strange anomaly. If a company owns outside of Canada they deduct it, but if it is in Canada they cannot.

Mr. Cumyn: I am sure you are better informed than I am, but I understand that exploration groups are literally removing their equipment to the United States and other places to explore, because they feel that the fiscal climate in the resource industry here is so unsettled right now that they would rather make plans elsewhere. The problem is that once this machinery and technology goes out and the people with it, it is committed for several years. You do not get it back all that easily.

Senator Buckwold: You may rest assured that out west this is a very lively topic.

Mr. Cumyn: I feel almost unjustified in talking about it, since I am an easterner!

We come to earned depletion, then. Originally, earned depletion, as opposed to automatic depletion, was to have come into effect on or after January 1, 1977. The delay was intended to help those wells and those mines which had been financed on the assumption that depletion would be automatic in the future, so as to go on and continue their operations, and so forth, and meet their financial commitments; and that is why earned depletion, which was first talked about in the White Paper, was not implemented immediately.

Another advantage of this delay was that the exploration and development expenses incurred by the companies which would earn their right to depletion were those made since November 7, 1969. This eight year period, therefore, was one during which they could literally bank exploration and development expenses. Let us say that over eight years they spent $20 million in expenses. Then they had a bank of expenditures which would earn for them a certain amount of depletion. Of course, the other limitation on depletion would still apply, that is, you could only deduct up to one-third of your resource profits. So the first change here is that earned depletion is going to be brought in two and half years earlier.

Another change is the following. The limitation on earned depletion was originally intended to be that for every three dollars of exploration and development expenditures you could take one dollar off depletion. That has now changed. It is going to be $4 to $1. In other words, it is less generous. I suppose it is really necessary to view all of these various resource proposals together, because some of them are bad, and others, as we shall see now are not quite so bad. They are favourable.

The Chairman: What have you to say about the Canadian exploration expenses?

Mr. Cumyn: That is where I am now.

The Chairman: You are coming to that.

Mr. Cumyn: Yes. Exploration and development expenses, which include a very wide range of expenses, were, until the November budget, expected to be subject to a 30 per cent write-off. In basic accounting principles these, of course, are viewed as capital expenditures, so it is not a question of deducting them, but, rather, a question of writing them off. The 30 per cent write-off is now to be maintained for development expenses, but you can now have a 100 per cent write-off for exploration expenses. This means that for the first time in the act we are obliged to make a distinction between exploration expenses on the one hand, and development expenses on the other. This is to take effect in respect of expenses made or incurred after May 6, 1974.

Most of the new legislation we are going to see here is concerned with the splitting up of expenses into exploration expenses on the one hand and development expenses on the other. This is in paragraph 10 and 10.1

You will see that exploration expenses, for instance, include certain expenses incurred in drilling an oil or gas well in Canada, building temporary access roads and stie preparation in respect of the well.

One of the things that I think we should ask ourselves is, how does this apply to offshore drilling? Not being in the industry I do not know exactly what expenses I might be referring to, but it seems to me that something like temporary access roads and site preparation must have an analagous type of expenditure in the case of offshore drilling. It seems that this definition of exploration expenses has only really been conceived in terms of onshore drilling, and of course, offshore drilling is very important right now.

The Chairman: They must have done a Lord Nelson and put the telescope to their bad eye.

Mr. Cumyn: Yes. I do not know if it was voluntary, but this is something that would surely be worth looking at.

Another thing is that if a well which has been drilled like this is on a well-known oil field, it is not considered to be exploration, but is considered to be development, and so you have two very subjective tests here to determine whether or not a well can be written off at 100 per cent as an exploration expenditure, or whether it has got to be written off at 30 per cent as a development expenditure. One sees quite easily what the tests are getting at, but one wonders whether they are very well conceived. The first test is that a drilled well will be considered to be exploration if it is determined that the well is the first well capable of production in commercial quantities from an accumulation of petroleum or natural gas other than a mineral resource not previously known to exist. The state of knowledge of whether or not an accumulation existed is something which could obviously give rise to an awful lot of contention. I do not know if that is really very good drafting.

The other subjective test is in the words, "reasonable to expect that the well will not come into production in commercial quantities within 12 months of its completion." For instance, a dry hole, or one that perhaps they just want to cap. But again, "reasonable to expect" at what time? And in whose minds? Both of these tests depend on whether or not someone knew there was an accumulation of petroleum and natural gas underneath, and whether or not someone expected it would be brought into production in commercial quantities within the next 12 months. They are very subjective tests.

The Chairman: The problem of administration would be very difficult and arbitrary.

Mr. Cumyn: Right. Now, there are a couple of drafting anomalies here that we should perhaps just keep our eye on, and wait and see what the bill looks like, but I guess I should not talk about them now. There are also one or two miscellaneous provisions concerning the resource industries which are really very technical. I rather think I will skip over those.

I will next deal with partnerships.

Senator Cook: Before you leave resource industries, has anyone any idea as to how much more revenue will be obtained through the passing of these amendments or changes?

Mr. Cumyn: I do not believe I have seen a figure.

Mr. Mitchell: I do not think so. The industries have prepared statistics, and I think those figures can be made available to the Committee. In fact, I think one of the submissions next Wednesday will contain figures of that type.

Senator Cook: Thank you.

The Chairman: When we get to the departmental stage, as and when the bill comes forward, or before that, if the departmental officers are prepared to come, we should get those figures.

Mr. Cumyn: Now I come to partnerships. There are two changes, really, in this area. One deals with the situation of a retiring partner, and the other deals with the carrying forward of 1971 receivables.

Basically, a retiring partner in any sort of a partnership is deemed to dispose of his partnership interest, at which time he may then have a gain or a loss, which would normally be on capital account. Under the present rules, until all the rights to receive property, of or from the partnership, in satisfaction of his interest, are satisfied in full, a former partner is deemed to have a continuing partnership interest, in which case he remains subject to tax on the income he withdraws from the partnership; but he delays the date on which he is deemed to dispose of his partnership interest, and therefore the day of reckoning of his capital gain.

There were a number of difficulties in applying these privisions, and these are now clarified. The idea of the continuing partnership interest is replaced by the concept of a residual interest, which is going to be one retained by a former partner until such time as all of his rights, other than a right to share in income, to receive any property from the partnership in satisfaction of residual interest are satisfied in full. I guess this sounds a bit like the other one but it does clear up one or two anomalies.

The new amendment will make it clear that, where a right to a share in income is contracted for with the other partners that income will be taxable in the hands of the former partner and excluded from the income of the on-going partners. That was one thing that was not clear before. The amendments also provide that this right can be assigned, in which case the proceeds are treated as income, and if the taxpayer dies holding such a right to receive income from the partnership of which he was a former partner, the right will qualify to be included in a special separate tax return on his death, and effectively it is then given special tax treatment.

As for 1971 receivables, you will recall that when tax reform was introduced professionals were entitled to keep their accounts on a cash basis only until the end of 1971, whereupon they had to go over to a modified accrual basis; that is to say, if they had sent out a bill to somebody in December of a year and were only paid in January and their year was a calendar year, since the bill had gone out the amount was receivable, and therefore was income inn the first and not the second year.

As a transitional measure, 1971 receivables—that is to say, the ones receivable at the end of 1971—were maintained in a sort of an account, and as the years went by subsequently this account could linger there so that there would not be a sudden rush of income in the fiscal sense in any given year. In the spring it had been proposed to phase this out over ten years, and there was a certain outcry. This will now no longer be the case. Furthermore, it is now clear that if a professional goes from one partnership to another this will not prejudice his right to carry on 1971 receivables.

Finally, when a man dies, if he still has an accumulation of 1971 receivables attributable to him, since again this could give him a fairly substantial income in a given year and put his rate up quite high, his executors are at least entitled to pay the resulting tax over six annual instalments.

Senator Lang: Surely he could write those off as bad debts after 10 years, I would think.

Mr. Cumyn: The rule is, in simplified terms, that if, your 1971 receivables were $100,000, and at the end of 1972, you have receivables, not necessarily the same ones, of $90,000, then you are only going to bring $10,000 out of your reserve of $100,000 into income in 1972. Let us say in 1973 your receivables carrying into 1974, but again not necessarily the same ones, are likewise $90,000, you still preserve your $90,000 account.

Senator Lang: You are rolling it forward.

The Chairman: The answer is, you have got to eat into those accounts receivable to maintain a level of accounts receivable to in succeeding years. Is that right?

Mr. Cumyn: Effectively. I am really over-simplifying, because it is not calculated in respect of receivables at the year end, it is calculated in respect of a strange thing called your partnership interest.

Mr. Mitchell: The term "1971 receivables" is rather misleading too. It simply denotes the maximum amount that can be deferred. All of the accounts underlying the 1971 receivables may have long since been collected, but you can carry this reserve forward as long as you have a sufficient partnership interest to cover it.

Senator Lang: So you finally wind it up.

Mr. Mitchell: It tends to be confusing.

Mr. Cumyn: In the area of trusts, one main change is that non-residents earning income from Canadian sources will no longer be able to use a trust in the way they could previously to somehow or other reduce their exposure to Canadian tax. This is essentially in paragraph 79. Without going into detail, I think it can be lauded as a praiseworthy measure. One of the nice things about it is that if you were a non-resident beneficiary of a Canadian trust and the Canadian trust had some business income, the previous rule was that none of the payments to the beneficiary in a year were deductible by the trust. The rule is now pro-rated, so that in this example, only business income is not deductible. Other payments made to the beneficiary can be deducted, so it is a fairer rule than it was previously.

Another thing involving non-resident beneficiaries in a Canadian trust is that there was a bit of a hiatus. Previously a trust could deduct an amount payable to a beneficiary, whether or not it was actually paid, but non-resident beneficiaries on the other hand were subject to Canadian withholding tax on amounts paid or credited to them by the trust, so some sharp thinkers were trying to make a payment fall between payable, on the one hand, by the trust and paid or credited, on the other hand, to the beneficiary, thereby avoiding both the domestic tax and the withholding tax. That is a loophole which I personally have never seen abused, but of course it must have been and it has now been closed.

One area that I think will be of great interest to you is the departure tax. This is the notorious exit tax. For instance, when a British executive gets transferred to Canada he is deemed to acquire most of his capital prop-

erty at that time; that is his cost as he enters the country and that is his cost for purposes of capital gains tax here in Canada. In other words, if he bought some British securities in a given year for $100 and when he entered Canada and became a Canadian resident they were worth $130, the act pardons him tax on the difference between $130, which is the value of the securities on coming into the country, and $100, which is the cost, but any increase in value from that date on he is taxed on.

One of the very inequitable results or corrolaries of this rule is that if he bought the securities for $130 and they were worth $100 when he entered Canada, the act disregards the loss. I think this is highly unfair. It can perhaps be justified in some way because of the symmetry between the treatment of gains and losses. Where a man who has already had an accrued gain, and then comes into Canada and has more gain and is only taxed on the Canadian part of the gain, he may feel satisfied with the tax system; however he may feel pretty aggrieved if what Canada taxes him on is really something that he never had as a gain. For instance, let us say he bought his securities for $100,000 and emigrates to Canada, and at that time they were worth only $70,000. Next year he sells them and they are saleable for only $75,000. The $70,000 figure is for him a fiction. He bought for $100,000 and sold for $75,000. As far as he is concerned he has made a loss of $25,000. What the act says now is, "You came into the country and they were worth $70,000. We will under no circumstances consider the $100,000 figure. You have made a gain of $5,000." It is really rubbing salt in the wound. Not only has he had a loss, but he is getting taxed on a notional gain.

This is not the result of the fall budget, or even the spring budget; it has been the case all along. But it has only become a critical problem now that everybody has so many losses. It is a real problem, and one that is also unfortunately susceptible of being solved by some hanky-panky, which is pretty devious, but which I will not bother you with. The taxpayer should not be driven into doing this sort of thing. Furthermore, one is not sure it would stand up to the scrutiny of the courts. I think that is a great inequity myself, and something I feel rather strongly about.

Senator Lang: Is that problem dealt with in the budget?

Mr. Cumyn: The section is, so one could perhaps raise the problem, but this particular problem is not dealt with in the budget. A change is made to the relevant section, (48), in the budget. If a person comes to Canada for under five years—for example he has been temporarily posted from the States or Great Britain—he is not going to be deemed to dispose of his assets when he leaves the country again, as everybody else is, ourselves included, if we ever ceased residing here; he will not be deemed to have disposed of his assets when he leaves the country. After all, he is only here for just five years. This is the essence of the change proposed in the budget, but it has a fairly limited application, because it does not excuse him in respect of all his assets, but only in respect of assets which he owned when he came into the country, or assets which he acquired by inheritance while a resident of the country, so that any man who comes here for two or three years is deemed to have disposed of virtually all his assets, except if he can show that he held them throughout the period of his residence here.

The Chairman: He can show he brought them in or that he has inherited them.

Mr. Cumyn: The rule was changed in the act by extending it from three years to five years, but the question is how many people sit on exactly the same securities for such a long period of time.

Senator Lang: Mr. Chairman, the problem referred to on the board seems to be capable of being resolved by the same sort of gimmick that you had in the tax-free zone election.

Mr. Cumyn: Exactly, sir. If you were to amend the act to say that the tax-free zone rules would be applicable to him, but instead of giving a V-day value you give him the E-day value—the emigration day value—it would be perfectly resolved.

Mr. Mitchell: But that raises some new problems too.

The Chairman: Well, every time you squeeze the balloon in one place, something is going to happen somewhere else.

Mr. Cumyn: Another change which is interesting in the international field is dealt with in paragraph 86 which applies to Canadian employees being posted overseas. This is not quite as notorious as the exit tax provision, but it has caused a fair amount of concern. If a Canadian is employed by a Canadian company and is posted to the and these exemption are being broadened slowly. But it still seems slightly repugnant to our system United States or to Germany or wherever, he continues to pay Canadian tax unless he can come within certain exemptions of taxation that we should tax somebody living in some far country just because his salary is being paid from Canada. If he happens to work for a bank, for instnace, then the bank is going to pay him itself because banks operating in other countries do not usually incorporate subsidiaries. The Canadian Imperial Bank of Commerce in London is a branch; it is not a separate company. So if he is employed by them and if he ever resided in Canada at any previous time, he will be subject to this rule and the only way he can get out of it is by showing one of two things. He can either demonstrate that the remuneration that he is being paid from Canada is subject to a tax in some foreign country—not necessarily the country in which his employer's business is being carried on—or he can show that the remuneration is being paid to him in connection with certain enumerated activities carried out in the ordinary course of a business carried on by the employer or a company related to the employer. These exceptions, and you have to come in under one or the other in order not to pay Canadian tax on your salary, are not entirely satisfactory. For example, CUSO volunteers going to Nigeria and such places are taxed by Canada under these provisions because the department takes the position that CUSO does not carry on a business but that it is doing something else. That does not seem to be very fair. People who are posted to Britain may or not be able to show that their remuneration is subject to tax in Britain because the British rule has now been changed so that people who are posted there for middle or short-term periods pay tax on half their earnings. So there is to be a question as to whether or not the other half is subject to tax by Canada. It seems strange to me anyway to fix Canadian tax liability on the basis of whether the foreign country is levying taxes, because, after all, it may not be levying income taxes but may have very high sale taxes or it may not give much by way of public services in return for tax.

The other non-resident provisions deal with various slight changes in the withholding tax field. One important thing is in the ITARS—the income tax application rules—which effectively maintains the level of withholding tax on items paid to the United States at 15 per cent after 1975. After 1975 our withholding tax rate is to rise to 25 per cent, and this very fact would have the strange result of nullifying the applicable provision in the Canada-United States Tax Treaty because it is what we call a self-destructive provision so that ITAR 1 provides that effectively the withholding tax rate vis-à-vis the United States and pending negotiations for a new treaty will nontheless remain at 15 per cent.

Other changes in the withholding tax area tighten up the rules applicable to non-resident partnerships. That is an investment form commonly used by Germans to invest in real estate in Canada, for example.

The last part that I would like to talk about is FAPI and is in paragraph 74.

The Chairman: You had better spell it out because there may be some new members.

Mr. Cumyn: FAPI, as the expression is compendiously used, is an acronym for foreign accrual property income. Effectively it is the way by which Canada intends, starting in 1976, to tax the earnings of subsidiaries of Canadian taxpayers offshore. The FAPI rules as originally introduced in tax reform have been changed very significantly. They have been watered down a lot and tightened up a lot, and are now probably in relatively final form. Changes made since the last spring budget are significant but they are not really changes to the structure of the thing but only to the form.

To summarize the FAPI rules as they now are, first of all FAPI means income other than income from an active business, and I shall come back to that later. Effectively it would include investment income or income from anything other than a really active business.

Where a Canadian taxpayer, whether an individual or a corporation, has an interest in a company or a trust resident outside of Canada, you first have to ask yourself if that corporation or trust is a controlled foreign affiliate and effectively it will be if there is 51 per cent ownership (or more), in the case of a company. In the case of a trust the rules are rather different and I think we should leave trusts aside for the moment. Where there is a controlled foreign affiliate then the FAPI of that foreign affiliate—i.e. its investment-type income, will be attributed to the Canadian taxpayer and will be deemed to have been income of that Canadian taxpayer in the year it has been earned by the foreign affiliate.

For example, if a Canadian pop star sets up a Bermudan company to sell his services as a singer in London or New York, and if that Bermudan company belongs to him 100 per cent, then the income of that Bermudan company, which is deemed to be FAPI under these rules, is deemed to be his income for the year in which it is earned, and that is that, he has to pay tax on it in Canada. That does not appear to be an unreasonable result.

So now we have the notion of a controlled foreign affiliate and then we have to ask ourselves what will its FAPI be. First of all, if it is under $5,000 then the whole thing is just disregarded. There is a basic *de minimis* rule whereby if it is below $5,000 there is no FAPI implication at all.

You don't have a FAPI problem if the controlled foreign affiliate has earned dividends from other affiliates. In other words, if a large corporation has a holding company in Holland which in turn owns a lot of operating companies around the world, the mere payment of dividends by these operating companies to the holding company will not generate income which is attributable to the corporation here in Canada to be taxable in that year. So FAPI will not include inter-affiliate dividends.

It will not include dividends received from taxable Canadian corporations. I suppose if you have a foreign company you normally would not use it to earn income from Canada, but you might, for instance, have inherited an estate which could be deemed to be a foreign affiliate, from a father who is living in some other country and who had Canadian investments, so that would be relevant.

FAPI will not include active business income from such things as a refinery or a tractor factory in South America. FAPI will not include income pertaining to an active business. An example of that would be if you had an insurance company in Bermuda in order to insure the risks of your various factories around the world within a corporate group up to $1 million. The insurance company on the basis of proper insurance principles would have to have reserves and the investment income from these reserves would be income pertaining to the insurance business and therefore that would not be FAPI.

Furthermore FAPI will not include amounts deductible by other affiliates from their active business income. In other words, this same insurance company, for instance, could use some of its surplus funds to lend to the group's British manufacturing subsidiary and the interest earned on these loans would be excluded from FAPI.

Finally, FAPI will not include capital gains from dispositions of property used principally in an active business. For instance, if a British subsidiary had a factory on the outskirts of London and decided to move further out into the country to have more space and had to sell its London location, the capital gain arising on the sale of that location would not be FAPI, because the plant had been used principally in an active business.

On the other hand, at the other end of the spectrum, if you wish, we have certain statutory inclusions in FAPI. FAPI will be deemed to arise where you have: income from property or income from a business other than an active business (that might be just a sham business, perhaps); capital gains other than from dispositions of properties used principally in an active business—in other words, if you are holding securities, all your capital gains may be of FAPI; payments for services which are deductible by related Canadian taxpayers and service income for services performed by a related individual resident in Canada.

Part of the FAPI rules is to give appropriate relief to any foreign tax suffered by the affiliate. These work out pretty well now.

In the case of trusts, if you have a testamentary trust arising on a death in 1976 or after, it may be a foreign affiliate and you can have FAPI problems. Likewise, if you have an *inter vivos* trust created after 1960, it can be a foreign affiliate and you can have FAPI problems.

The rules in the case of trusts, though, are pretty complicated and I do not think we need to go into them.

By way of summary, I suppose my own feeling is that the FAPI rules are now reasonably workable, but one of

the real problems will be reporting. Where you have a company which has subsidiaries in many countries, it is going to be extremely difficult for it to get accounts from these subsidiaries in time to include whatever FAPI there might be in its own income. Corporate comptrollers are desperate about this. One wise solution, which would probably merely recognize reality, might be that where you do have a FAPI situation the company or the taxpayer can file a separate return including the amounts in his income and will have an additional eight or twelve months to file that return. That is the end of my contribution.

Mr. Mitchell: Mr. Chairman, the sections of the ways and means motion that I have to deal with include paragraph (47) and paragraphs (58) through to (73). These provisions relate to corporate reorganizations, rollover provisions and other items of that general type. Most of the provisions are similar to those contained in the May 6 budget. There have been some technical amendments, however, in the present ways and means motion which I will touch upon on the way through.

The first motion I have to deal with is paragraph (47) which relates to situations where property is distributed, by a corporation on winding up, to its shareholders. Prior to this proposed amendment, it was unclear whether a shareholder who received property on the winding up of a corporation acquired it at any cost base. For example, if you had a corporation of your own which, let us say, had as its only asset a piece of land and a building, and the company distributed that land and building to you on winding up, there was some question as to whether you could claim any cost base for the land and building or whether the cost base to you was nil. This amendment makes it quite clear that shareholders in these situations will be deemed to have acquired the property at an amount equal to its fair market value immediately before its winding up, which is exactly the same figure as the corporation is deemed to have received on winding up.

The Chairman: That seems to be flying in the face of some pretty good English law. That is, if you went through the liquidator process in the winding up, in the English cases that has been held to be a distribution and not income.

Mr. Mitchell: I do not know if Mr. Cumyn has any thoughts to the contrary on this, but I question the department's interpretation on the existing law. In my view, the shareholder probably had good grounds for claiming some cost for the asset. What is your view on that, Mr. Cumyn?

Mr. Cumyn: I think they can do it.

Mr. Mitchell: Yes, but you agree that the purpose of this particular provision was to achieve that result, do you?

Mr. Cumyn: Yes.

Mr. Mitchell: The other amendment contained in paragraph (47) is a relieving provision so far as the taxpayers are concerned. As I mentioned previously, a corporation on winding up is deemed to have distributed it property at an amount equal to the fair market value. If that fair market value gave rise to a loss to the corporation concerned and the property was distributed to a controlling shareholder, the loss was not recognized as a deduction for tax purposes. With this amendment it will be recognized as a deductible item.

The next ways and means motion I have to deal with is contained in paragraph (58). This relates to section 83 elections. A section 83 election is an election which a corporation must make if it wishes to declare a non-taxable dividend out of 1971 capital surplus or tax-paid on undistributed income at hand. The due time for filing this election is before the dividend becomes payable. if the election is not filed by that date, then it would be treated as a taxable dividend in the shareholder's hand. The amendment is again of an alleviating nature, inasmuch as it enables a corporation to rectify its failure to file a timely election and gives it up to February 28 of the year following the year-end to do so. However, there is a catch inasmuch as a corporation will be liable to a penalty when filing such late election.

Ways and means motion (59) deals with transfers of property to Canadian corporations. This contains quite a number of amendments, to the present section 85 of the Income Tax Act, the section which enables a taxpayer to transfer property under a tax-free rollover to a corporation, provided that he owns 80 per cent of the outstanding shares of the company immediately following the transfer. This was quite a restrictive rollover provision, and one of the effects of this amendment is to broaden the circumstances in which the rollover will be available. It has in fact eliminated the 80 per cent requirement, so that a shareholder who transfers assets to a corporation will qualify for rollover within the guidelines set out in 59 provided he receives shares for it as at least part of the consideration.

It further broadens the scope of the present section 85. As the law now stands at the moment, section 85 relates only to the transfer of capital property, eligible capital property and resource property, and would not cover a transfer of inventory. With this amendment, transfers of inventory will also qualify for rollover treatment. As Mr. Cumyn has pointed out, there is another change in this particular respect, in that real property which is owned by a non-resident will no longer qualify for rollover treatment.

Mr. Chairman, paragraph 59 contains a lot of detailed rules as to the various limitations on the amount which the taxpayer can choose.

The Chairman: Generally speaking, though, would you say that the overall effect is relieving?

Mr. Mitchell: The overall effect of paragraph 59 is relieving, yes.

The Chairman: I think that is good enough.

Mr. Mitchell: Paragraph (60) relates to elections under subsection 85. This is the election which must be filed in order to qualify for rollover treatment on transfer of the property to a corporation. This section is also relieving in nature. Under the law as it now stands the election has to be filed by the due date for filing the return for the year in which the transfer to the corporation was made. If it was not filed within that time limitation, no rollover is available. As a result of this amendment, the due date for filing has been extended by one year, so that you now have, in effect, what could in some circumstances be up to two and a half years in which to file the election. Again, a penalty, as spelled out in the act, is payable if the election is not filed within the present time limits and adventage is taken of the extension of time.

Paragraph (61) of the ways and means motion again extends the rollover provisions, and again is, generally speaking, to the taxpayer's advantage. It provides now that

where, for example, one corporation proposes to make a bid for the shares of another corporation, the shareholders who surrender their shares to the other corporation under the takeover offer can, if they so wish, claim rollover treatment, and defer any recognition of capital gain until such time as they have actually disposed of the new shares acquired on the takeover. I might add there are quite a number of restrictions on the availability of this rollover provision, but it is probably too late in the afternoon to deal with it in any great detail.

The Chairman: The important fact is that it is an attempt to relieve the rigour of what is presently the law.

Mr. Mitchell: Yes. One of the committee's very strong objections to the tax reform proposals, when studied it in 1971, and I guess the last time round also, was that the rollover provisions were too restrictive. They were not wide enough. This provision, the share-for-share exchange, meets some of the committee's objectives as does the amendment to section 85, which have just dealt with.

The Chairman: I think it is fair to say that these are all things we referred to in our report.

Mr. Mitchell: That is correct. I might also add that the next resolution, paragraph (63), relating to statutory amalgamations, also widens the rollover provisions and gain is pretty well consistent with what the Committee asked for in previous recommendations.

By and large, where two companies are amalgamated, a rollover was available to shareholders only if the shareholders of the particular predecessor corporation obtained 25 per cent of the shares of the amalgamated company. That limitation has now been dropped from the act and again it meets the Committee's objectives.

Paragraph (62) deals with an exchange of shares by shareholders in the course of reorganization of capital. This is largely a technical amendment. One might say it is relieving, in the sense that it does simplify how a taxpayer would compute the cost of shares acquired in the reorganization of a company, and with that, I guess, no further detail is necessary at this time.

I must apologize for rushing through the motions in this manner. A lot of the provisions are highly technical. Some of them I have not had an opportunity to consider in enough detail.

The Chairman: Of course, we will have a look at them again when we are dealing with the bill.

Senator Cook: We are coming back to them again. We only want the highlights now, do we not?

The Chairman: We want to know if they are relieving.

Mr. Mitchell: That is correct.

Paragraph (65) deals with winding-up of wholly-owned Canadian corporations. The effect of the amendment, generally, is to bring these winding-up provisions pretty well into line with the statutory amalgamation provisions. Again it tends to simplify the treatment under the Income Tax Act, and I think for that reason we might regard that as being of a relieving nature.

There are changes in paragraph (67) to the definition of paid-up capital of a corporation. Prior to the introduction of this amendment, paid-up capital of a corporation simply consisted of the amount that was legally considered to be the corporation's paid-up capital. This treatment could have given rise to some anomalies. If, for example, shares with a par value of let us say $100 were issued after December 31, 1971, for, say, a price of $200. The $100 paid-up capital amount was quite clearly recognized as forming part of the company's paid-up capital and could eventually be distributed to shareholders as a non-taxable distribution, subject to certain restrictions. However, the remaining $100 in excess of the paid-up capital fell into a sort of no man's land. In effect, it might simply be regarded as post-1971 earnings; and the only manner in which it could have been distributed by way of taxable dividend. This amendment to the definition of paid-up capital removes this anomaly in the act, and in fact, enables a company which receives $200 by way of capital to distribute it as a return of capital.

The Chairman: The premium is regarded as part of the paid-up capital.

Mr. Mitchell: Yes. A premium on the shares are regarded as part of paid-up capital.

There are varioius other resolutions that are consequential upon the changes in paragraphs (67) through to paragraph (68). Paragraphs (69) through to paragraph (73), deal with changes in the definition of paid-up capital deficiency which, as you may gather, is a highly technical term, 1971 capital surplus in hand, and also introduces a new concept which is called corporation's a "debt limit."

As regards the changes in the definition of paid-up capital deficiency, and 1971 capital surplus, that most of these are largely technical in nature. There may well be some anomalies, or some deficiencies, in the legislation which we will have to get into in further detail as time goes along. I should point out, however, that included in these changes in the meaning of paid-up capital deficiency, 1971 capital surplus in the concept of debt limit is an attempt by the department of codify to some extent some of the dividend stripping provisions contained in section 247 of the Income Tax Act. At least, this is the way I view the changes. One would have hoped that, in codifying at least to some extent the dividend, stripping provisions, it might have been possible for the department to repeal section 247, or at least limit its application. Unfortunately, section 247, the dividend stripping provision, remains, and in addition to that they have these other weapons on top.

I am not too sure to what extent the two sets of provisions overlap and to what extent the department has a choice of attacking one way or the other. It is conceivable that with the introduction of these amendments the purpose is to catch forward stripping, and quite a number of lawyers really question whether the present section 247 does catch a number of the forward stripping type situations. Whether or not it did, they will be clearly caught now within these amendments, again, this is something we perhaps could get into in more detail later on.

The Chairman: When we get to the bill.

Mr. Mitchell: Gentlemen, that is a very brief summary, touching briefly on the sections I have to cover. I am sure that as we go through the bill and study the resolutions we will get into it in much more detail. Would you wish me to go into more detail now?

The Chairman: No. I think the detail you have given at this stage is the sort of thing we want, because when we are doing a section by section study we will get into more detail. Mind you, we do not have the bill yet, and there

may be some language changes in the bill as against the resolutions that may clarify some of the situations. I therefore think that to know there are a lot of relieving provisions is a good thing, and also to know that a number of them arise out of our calling the attention of the department to particular items, in our reports on the income tax bill. This just reinforces our feeling that we thought we were doing a good job at the time, but it turns out that we may have done a pretty good job. Maybe that is self-praise, but if we do not give it to ourselves, where do we get it? Is there anything else?

Mr. Mitchell: No, I think that deals with the sections I have to cover.

The Chairman: Albert—excuse me using the first name, but you have appeared so many times that you have become part of the family—Charles, and now Peter who has been introduced into the family, I want to thank you for the work you did in preparing for today. Please do not think that you are now relieved fully of your obligations. You will be expected to appear on the next round. Next week or the following week we are hearing from the Canadian Chamber of Commerce and maybe one other brief, but I will give you due notice.

Before we adjourn, I should tell you that I understand Mr. Ritchie has said he will be here in the morning at 9.30. He has not indicated whether he is coming with his reinforcements. If he does not come with his reinforcements, I am not sure how far the matter will progress.

The other thing I should tell you is that on the competition bill the committee in the other place had its first meeting last night. The minister and his assistants appeared, and the minister presented a book of amendments, which I think must be an inch or an inch-an-a-half thick. We have not had a chance to digest them all, but we will by tomorrow morning. Some of the amendments are exactly in line with the points that were developed here, such as the treatment of underwriters. I think they have yielded everything in that regard. They have eliminated amateur sport from the professional and amateur sports section. They have done quite a number of other things. I think this is simply because of the publicity that developed during the hearings that we had here.

Tomorrow morning, our staff, Bob Cowling and John Lewis, will be here, and they will explain or correlate these amendments. We will then have to make a decision as to what to do at that stage, whether this is the time for an interim report. At first, and for a long time, I felt we should file an interim report. However, the committee in the other place will not start public hearings until some time in January, because they have given the public until January 1 to file briefs, so if they do have any more sittings in the meantime in the other place it will be to hear departmental officers.

You know that we invited departmental officers to appear here and open our hearings. The answer we got at that time was that they were too busy working on amendments to afford the time to come here. I took that with a grain of salt. I think at that stage maybe they did not wich to be subjected to questioning or examination by this committee. Be that as it may, in those circumstances I am going to ask the committee tomorrow morning whether we should defer making a report at this time and wait until the public hearings move along a little further. While they are still in session, I think we should put in an interim report. Remember, if we put one in at this time it is not debatable in the Senate. The only thing that could happen is that the chairman could be permitted to give an explanation of what is in the report. I would like you to think about whether, in all the circumstances, tactically speaking—and I underline the words "tactically speaking"—we should put in an interim report, or whether we should wait and see how the situation develops.

We are still getting quite a number of briefs. Some of them call things to our attention, some raise the same problems as other briefs that have been presented, and some have asked to appear before us. We will not be able to deal with all of them before what I anticipate will be the Christmas adjournment. I have not consulted an oracle or anything else, but I am just guessing that it might be December 20 when Parliament adjourns. For how long, I do not know. If they follow the practice in the past it may be for a fair length of time. If we present a report at this time it may get lost in the Christmas festivities. That may be one good reason for deferring the presentation until a later date. However, we can deal with that in the morning.

The committee adjourned.

APPENDIX "A"

DEDUCTION FROM TAX

1.
1.1

	1973	1974	1975
	5% of tax PAYABLE	5% of tax PAYABLE	8% of tax PAYABLE
Min.	100.	150.*	200.
Max.	500.	500.*	750.

EXAMPLE

1. Mr. A. has $1,800. of tax payable.

2. Mr. B. has $20,000. of tax payable.

Deductions Allowed

Mr. A.	$100.	$150.	$200.
Mr. B.	$500.	$500.	$750.

* Ways and Means motion refer to "SUBSEQUENT YEARS". Words not needed.

APPENDIX "B"

DEDUCTION OF INTEREST AND DIVIDENDS

2.
2.1

	1974	1975
Deductible	net interest earned or max. $1,000,	net interest earned plus grossed up dividend or max. $1,000.

Notch provision application: In certain cases the taxpayer will not lose his spouse's exemption because of his spouse's interest or dividend income.

EXAMPLE:

Mr. A. earns in 1975			
Interest		$600	$ 600
Dividend	900.	1/3 $300	$1,200
			$1,800
less: interest paid to bank			1,200
net deductible			$ 600

ANOMOLY

Unrelated interest expenses are to be deducted.

APPENDIX "C"

BONUS ON CSB

Individuals or Corporations

Choice of Treatment

EITHER Interest Income *

or

Capital Gains

SAMPLE:

Bonus received	$2,700
could be treated as income	1,000
Balance	1,700
Taxable capital gain 1/2 or	850

* Subject to $1,000 rule exemption

APPENDIX "D"

DEDUCTION FOR PENSION INCOME

1975

2.3

I	In 65th year may deduct pension received	max.	$1000.
II	At any age pension received as a consequence of spouse's death	max.	$1000.

"PENSION" Excludes

Federal old age security and supplements payments Federal or Provincial of Quebec pension

Retiring allowances
Death benefit

III Pension received by spouse in his or her 65th year

max. $1000.

APPENDIX "E"

REGISTERED HOME OWNERSHIP SAVINGS PLAN

4. R.H.O.P.

1. $1,000 a year max. deduction or (60 days after)
2. $10,000 total or 10 year min.
3. Resident - 18 years or over - owns no home in Canada.
4. To buy a home (why not a farm!) or furnishings for his home or his spouse's.
5. Drawings from trust not used in (4) becomes taxable - rollovers to other plans are permissible - R.R.S.P. [illegible].
6. Trust free of taxes.
7. Gift received by Trust must be restituted
   Loan must be repaid - to whom!
   Excess contribution must be reimbursed within 120 days.
8. One plan each - husband and wife.
9. On death - If not transferred to wife within 15 months taxable at time of death.
10. Non-Resident - taxed at 15% (25% after 1975).

Anomalies

1. Transferable to children?
2. Para. 4(a)(i) refers only to purchase of home whereas (c) is also to furnishings

APPENDIX "F"

SMALL BUSINESS DEDUCTION

5.

1st $100,000 of active business income will be elligible to the reduced rate instead of $50,000.

Small business can accumulate $500,000 of such income before losing its right to the low rate (now limited at $400,000).

EXISTING ANOMALY

No such benefit is granted to unincorporated small business.

APPENDIX "G"

CORPORATE SURTAX
May 1, 1974 to April 39, 1975

6.

10% of Federal tax payable on income OTHER than manufacturing and processing profits derived from oil and gas wells or mineral resources,

ARE EXEMPT:

1. small business
2. Investment corporation
3. Mortgage investment corporation
4. N.R.O. (non-resident owner)
5. Mutual fund corporation
6. Deposit insurance corporation.

APPENDIX "H"

PROPERTY TAXES AND INTEREST PAID ON LAND

12.

Disallowed after May 6, 1974.

Must be added to cost.

ANOMALIES

1. Incidental or other revenues received from land are not taken into account.

2. The desired deduction is incorrectly treated in the Ways and Means motions.

APPENDIX "I"

SPECIAL ALLOWANCES RECEIVED BY EMPLOYEE, FOR EDUCATION BENEFITS - NOT TAXABLE

15.

ANOMALY: Closest suitable school where he was accepted.

17.

Employees having an assistant

ANOMALY: Should be entitled to deduct all costs relating to employment, e.g. workmens compensation minimum wage, etc.

[illegible].

Blind Persons, Bedridden or Wheelchair Patients

Re: Bedridden or wheelchair - time factor

"substantial" should be replaced by "ordinarily".

APPENDIX "J"

INTEREST INCOME OF FINANCIAL CORPORATION

18.

Accrual methods of reporting interest income begins with 1975 taxation year.

May use cash basis for 1974 bank, credit union, life insurance corporations, trust company and loan making corporations.

AMOUNT "RECEIVABLE"

17.1

The world "receivable" is substituted for the word "due".

APPENDIX "K"

CAPITAL COST OF PROPERTY

19

After November 18, 1974 capital cost of property will be the aggregate of

a)	Capital cost	$100,000
	plus	
b)	Refund of the Assistance	40,000
		140,000
	LESS	
	The amount of the assistance	50,000
		$ 90,000

ANOMALY:

Assistance includes received or "receivable" grants, etc.

APPENDIX "L"

INVOLUNTARY DISPOSITION -
DEEMED TO OCCUR AFTER MAY 6, 1974

30

Expropriation, etc.

Postpone the date of disposition to earliest of

1) the date taxpayer agrees to full compensation

2) the date final compensation is determined by courts

3. when (1) or (2) do not apply, two years from the occurance

4. the date taxpayer dies

5. the date he ceases to be resident if the property is not a taxable Canadian property.

ANOMALY:

1. what would be the F.M.V. under (4) and (5)?

2. why not rollover the right to the beneficiary in case of death?

3. can C.C.A. be claimed on expropriated property?

APPENDIX "M"

TRANSFERS TO PENSION PLANS

Transfers to Pension Plan (Trust) will Constitute a Disposition

37.
38.

ANOMALY:

The transferor's loss, if any, when offset by Trustee's gain is lost.

Example

Mr. A. transferred shares to trust as a contribution to his R.R.S.P.		$100.00
his cost (for shares) was (A.C.B.)		175.00
loss (refused in his hands)		$ 75.00

Trustee's Position

Shares received (F.M.V.)	$100.00	
add		
loss refused to Mr. A.[A]	75.00	
A.C.B. of shares		$175.00
Shares are sold and proceeds distributed to Mr. A. (as pension)		175.00
no gain no loss for trustee		--

Mr. A.'s position

Received and is taxed on (as pension)	$175.00
He had deducted from income	100.00
Mr. A. is UNFAIRLY taxed on	$ 75.00

A.C.B.- Adjusted Cost basis

[A] Amendments in Budget

APPENDIX "N"

OLD AGE EXEMPTION - TRANSFER TO SPOUSE

81.2

Wife

Aged 65
Entitled - age exemption S 109(i)(h) $1,174.00

Unuseable part of $1,175 to Husband

How to determine unuseable part?

say wife income $2,400

Motion 82.1 - must deduct S 109 first

Wife's S 109 deductions are:

Basic ... 109(i)(c) ...	$1,878
Age ... 109(i)(h)	$1,174

Is $1,878 deducted first?

Is a proportion of $1,878 and $1,174 decucted?

Answer affects age exemption transfer.

Motion 82.1 should state order of deductions within S 109.

APPENDIX "O"

R.R.S.P.

101

Unused taxpayer's contribution can be transferred to spouse.

EXISTING ANOMALY:

Where an employer contribute to a pension plan for an employee the $4,000.00 maximum is reduced to $2,500.

ALIMONY PAYMENTS

102.

Payments made to third parties for the maintenance of a former spouse are deductable E.G. (mortgage payments).

APPENDIX "P"

EDUCATION SAVINGS PLAN

102.

Para. (K) - Non compliance plan requirements[*]

Possible plan revocation.

With growing number university entrants - subscribers fall below 150.

Plan should not be revocable as result.

Para. (K) should so provide

[*] Registration requirements Para (a). Para. (a) includes minimum 150 subscribers.

APPENDIX "Q"

ESTATE LOSSES REDUCED DECEASED'S GAINS

108.

Death, October 1, 1974

Land deemed disposed - F.M.V.[A]	$50,000
A.C.B.	(20,000)
Capital Gain - Deceased	$30,000
Estate Cost	50,000
Estate sale within 1st fiscal year	35,000
Estate Capital Loss	($15,000)

$30,000 offset by $15,000 - (Para. 108)

Can all be done within 1st fiscal year?

Note motion Para. 49 - Vesting Period ... 15 months ...

Suggest Para. 108 Read

"Within 1st two taxation years".

[A] F.M.V. Fair Market Value

APPENDIX "R"

ROLLOVER PROPERTY TO CORPORATION

ITAR (5)(c)

Employs word "sale"

Transaction (ROLLOVER) contemplates section 85 rules

Section 85 uses

"Disposed of" and
"Disposition of" - (never "sale")

Why inconsistent terminology?

APPENDIX "S"

TAX FREE ZONE OR F.M.V. ELECTION METHOD

ITAR(6)

Retroactive to 1972

Taxpayer needn't choose method under certain circumstances

But ITAR (6) non-existant - 1972 and 1973

Perhaps Taxpayer chose F.M.V. method

He needn't have ... but did

Provision needed to allow negating election.

.....

Actually, nowhere is Minister bound to reassess return refiled as consequence of any retroactive legislation.

E.G.: Motion (3)(a) and (b)
Motion (22)
Motion (28)
Motion (29)
etcetera

APPENDIX "T"

PRINCIPLE RESIDENCE BECOMES INCOME PRODUCING

ITAR (11)

Pre 1972 change in use deemed to occur January 1, 1972

Para. (b)(ii) infers C.C.A. claimed in 1972 and 1973 allowed to stand as filed
BUT
should so state.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 12

THURSDAY, DECEMBER 5, 1974

Sixth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, December 5, 1974.
(15)

Pursuant to notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 10:05 a.m. to further consider the following:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Blois, Cook, Everett, Macnaughton, Molson and Walker. (9)

In Attendance: Mr. R. J. Cowling, Legal Counsel, and Mr. John F. Lewis, C.A., Adviser.

The Committee proceeded to the discussion of the Departmental amendments, as presented in the House of Commons Committee, assisted therein by explanations by the advisory staff.

After discussion it was Agreed that an interim report not be presented at this time.

At 12:10 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, December 5, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 10.05 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: We will now revert to the competition bill. I told you yesterday that the Minister of Consumer and Corporate Affairs had tabled a series of amendments in the first meeting of the committee in the other place. We have secured copies of them and Mr. Jackson will distribute them. They are quite substantial and the two members of our staff, John Lewis and Bod Cowling, between them, are prepared to indicate to you the nature and scope of the amendments. John, I think you are ready to go first, are you?

Mr. J. F. Lewis, C.A., Advisor to the Committee: If ever, sir.

The Chairman: If ever, yes.

Mr. Lewis: Honourable senators, in order to avoid confusion perhaps we should review briefly the status of the existing amendments. You will remerber that the original Bill C-7 is now in the form of Bill C-2, and the main bill consists of a set of amendments to the Combines Investigation Act. These amendments are really a second or revised set to the amendments which were brought forward in the House of Commons committee some time during last April. I am therefore sure there will be a little confusion when we discuss the amendments, but we will endeavour to avoid that.

I should also inform the committee that the numbering on this set of amendments refers to the bill itself, Bill C-2, not to the working paper which we use and which is a very good tool, in the little blue book. Therefore, if you are following any of the numbering, it is in the original Bill C-2.

Mr. R. J. Cowling, Special Counsel to the Committee: And page numbers are indicated at the top right corner of these pages.

Mr. Lewis: Yes, that refers to Bill C-2. Some of these amendments are purely technical and are really editing of the bill itself, while others are new amendments which were not brought forward in April. Still others are important changes to the original amendments. We will endeavour to identify them as we proceed, in order to save time.

If it meets with your pleasure, Mr. Chairman, we will follow them in this order, which is not necessarily the order of importance, but the order in which the amendments have been brought out. The first one has to do with the definitions section, section 2, and merely adds to the words "tickets or like evidence . . ." the words "or of a right to transportation, and" which means tickets, airplane tickets, train tickets, and is merely an enlargement of the meaning in order to avoid any ambiguity. Section 4 relating to collective barganing. This does not add anything of importance to the original bill. It is really a revision or editing of technical wording.

The Chairman: On the change in section 4, paragraph (a), which exempts employees and workmen from being charged under the Combines Investigation Act for their getting together, they have restored the working in the original act rather than the wording which they had in Bills C-7 and C-2. I was wondering when that was coming, because the original wording was broader, and in my view the provisions in Bill C-2 shortchanged them a bit. So you have a broader provision of exemption, is that correct?

Mr. Lewis: That is right, sir. It reverts to the original wording in the Combines Investigation Act itself. The rest of it is really re-editing and technical changes in order to make it read better. But nothing of great import has been either added or deleted.

Mr. Cowling: I do not believe we had any representations on this particular section of the bill.

The Chairman: No. Honourable Senator will see that this section in the amendment is followed by quite a lengthy comment, which they can read at their leisure.

Senator Walker: What page is that?

Mr. Cowling: Unfortunately, senator, the pages of this sheaf of amendments are not numbered numerically. Each amendment is dealt with separately and has page numbers, but unfortunately there is no complete sequence of numbering, which makes it a little hard to follow. The one we are talking about now actually begins on the third piece of paper in the package.

Senator Cook: That is number 2.

Mr. Cowling: Clause 2, pages 3 and 4 of the bill.

The Chairman: That is the one we have been talking about.

Mr. Cowling: That is right.

The Chairman: On pages 3 and 4 there is some language change, is that right?

Mr. Lewis: Yes. I think the reasons for the changes are explained in the commentary on pages 3 and 4 of these amendments. They really result, in effect, in a re-editing or technical changes, but do not add or delete anything from the bill itself.

Mr. Cowling: I think the idea of the previous provision in Bill C-2 was to exempt groups of employees or unions who had been certified in some way or other under provincial legislation, and paragraph (a) of subsection 4(1) dealt with that. However, there was also another subparagraph which was a little larger than that and did not refer to certification under provincial laws. They have combined the two and taken out the requirement that the activity must be authorized under provincial law, so that it extends to any group of employees.

Mr. Lewis: I think, for instance, there was a brief by a group of employed engineers in the province of Quebec who were not covered under present laws and felt they were being exempted from the bill. So re-editing has now permitted them to be included.

Mr. Cowling: One would have thought they would have been covered by former paragraph (c) of the bill. I think that what happened here is that the entire section has been cleaned up from a draftsmanship point of view; and, of course, there is one quite important change in that employers' associations have been recognized in new paragraph (c).

The Chairman: That is on page 3.

Mr. Cowling: On the first page of the part that deals with this particular amendment.

The Chairman: At the bottom of the page which contains the changes to section 4, you will see that in dealing with employers they are exempt under that language. It says:

> contracts, agreements or arrangements between or among two or more employers in a trade, industry or profession whether effected directly between or among such employers or through the instrumentality of a corporation or association of which such employers are members, pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment.

So we have exemptions on both sides—on the employees' side with their organization, and on the employers' side where they may directly have an organization or may operate through an association.

We do not see anything in the amendments we have discussed so far to which we should take any objection. Is that not right?

Mr. Lewis: That is right, sir.

Mr. Cowling: The next amendment, honourable senators, deals with the exemption of the securities industry. We had fairly extensive representations on that from the Investment Dealers Association.

The Chairman: We had a very good brief from them. It would appear that these amendments cover everything that the Investment Dealers Association asked for in their brief and in their appearance before us.

Mr. Cowling: At least in so far as sections 32 and 38 of the act are concerned. The main difficulty there was that an underwriting agreement involves not only different underwriters, but the security issuer and perhaps other parties. The old wording just spoke of agreements between underwriters, whereas the new wording is, "or between or among such persons and the issuer of a specific security . . ."

I suppose the investment dealers will be looking at this proposed amendment and perhaps they will get back to us if it does not meet their difficulties entirely. The Investment Dealers Association, of course, complained about other things in the bill, and I am not sure that those matters have been dealt with as completely as their complaints in relation to section 4.1. In some cases, the complaints mentioned in the brief in the Investment Dealers Association were not entirely confined to the investment business itself, but rather with the effect on business in general terms in which, of course, the investment dealers have a great interest.

Senator Macnaughton: Mr. Chairman, perhaps it would be of assistance to members of the committee if you could refer to the proposed amendment, giving the page number on which it appears, and then giving the clause and page number of the bill to which the amendment relates.

The Chairman: The problem with that is that the pages are not numbered numerically. They are numbered in relation to each amendment. It starts by giving you the clause of the bill. For example, you have section 4.1 relating to the underwriting of securities, and if you turn to the bill you will find that that is dealt with on page 4.

Mr. Cowling: At the top of the page you have "Clause 2", and that refers to the clause of Bill C-2. Of course, clause 2 of Bill C-2 may cover pages and pages of the proposed amendments. Under "Clause 2" you have "Page 4", which refers to page 4 of the bill where you will find the subject being discussed. In other words, "Page 4" at the top of the page does not refer to page 4 of this package of amendments and comments, but rather to page 4 of the bill itself.

Turning three pages beyond this page you again come to "Clause 2", and again they are referring to page 4 of the bill. In this instance, they are inserting something brand new. This relates to amateur sport. Of course, amateur and professional sport are dealt with in the bill at a later stage, but the drafting technique which they have followed here in order to virtually exempt amateur sport from the application of Bill C-2 is to insert a provision right at the beginning to the effect that the Combines Investigation Act will not be applicable to amateur sport.

This is a subject on which the committee spent some time in previous meetings, so perhaps we should look at this proposed amendment a little more thoroughly.

The Chairman: If I might just interject, you will notice that in this amendment which we are now looking at "amateur sport" is defined as a "sport in which the participants receive no remuneration for their services as participants." That may be a very substantial limitation. As I understand it, athletes retain their amateur status even though they may receive remuneration. Certainly, that is true in so far as hockey is concerned. Is that not right, Senator Molson?

Senator Molson: I think, generally, that is true, Mr. Chairman. I have the feeling that they are falling right into the same old trap that is causing all of the consternation in both Olympic and international competition. This effort to define amateur sport in this instance is, I think, going far afield. In fact, the real constraint in amateur sport is in the international field. In my view, we ought to follow the criterion of Olympic competition or some other sports body in this regard.

I should also like to call your attention to the explanation at the end of the first paragraph on the next page, that

page being numbered 2, for some obscure reason. At the end of the first paragraph it states:

> Even though this represents an over-reaction to the provisions,—

That is the suggestion that amateur volunteers might quit.

> such abandonment is conceivable,—

And that is really quite a profound observation.

> and it therefore appears that some other way must be found to protect participants in amateur sport—

And here is what I am coming to, Mr. Chairman.

> if the public continues to believe this is necessary.

Personally, I do not believe the public think it is necessary. I thind that at some stage we ought to invite someone here to tell us how they know the public considers this to be necessary. I do not think that is true.

The Chairman: This is part of the comments explaining the reason for the legislative part of section 4.2(1). The explanation seems to be, if I may say, awfully wobbly. First of all, it says, "if the public continues to believe this is necessary." That, I think, is an invitation to the public to tell the government some other way of taking care of this situation. I do not think that should be any part of the consideration to swing you one way or the other in connection with this particular question of amateur sport.

Senator Cook: Does it really matter whether the public thinks it is necessary?

Senator Molson: The whole question of sport, as it is dealt with in this bill, is like someone riding a hobbyhorse, Mr. Chairman. I do not know who it is, but whoever it may be he is certainly riding it terribly hard.

The Chairman: I do not think the amendmant covers the situation that we have in amateur sport, particularly in hockey and a number of other amateur sports. We know that the element of remuneration enters into this question and yet, for international purposes, even with that element, the amateur status of these people is recognized.

Senator Cook: Is it necessary to define it at all? Is it necessary to have paragraph (2)?

The Chairman: I do not think the definition of amateur sport is satisfactory. I do not think paragraph (2) is necessary.

Senator Molson: As a matter of fact, Mr. Chairman, at some stage we should consider whether the whole question of sport, whether amateur or professional, is really necessary or, in fact, is properly dealt with in this bill.

The Chairman: Of course, that is my view already.

Senator Molson: I think that at some stage we should consider that question. Certainly, some of the observations made by Mr. Cambell seem to be quite reasonable.

The Chairman: They were right in point.

Senator Molson: As far as baseball is concerned, for example, the Supreme Court of the United States exempted it from the provisions of the U.S. anti-trust or combines legislation.

Mr. Cowling: From the comments on amateur sport, it seems to me that the question of regulation of amteur sport, if necessary at all, should be dealt with in some other piece of legislation where a specially tailored law could be brought down. It would seem that, if that is true for amateur sport, it would hold true for professional sport.

The Chairman: The definition has no place in the bill, because it defeats the situation that exists—that is, that there is remuneration in connection with amateur sport and it does not destroy the amateur standing, apparently, internationally.

Senator Molson: We had representation from a large group—about 60 sports, I think.

The Chairman: About 30 or 35. They were all lined along the wall.

Senator Molson: There was a large number, of sports, all of which are different and have different means of remuneration. A general definition like this probably does not suit half of those people—we do not know—or, at least, a great number of them because this is not according to life today and those bodies are recognized as amateur sports—the swimmers, the rowers, lacrosse and hockey. Those are amateur organizations, so-called. Whether they all fit this definition in this amendment to the Combines Act is another question.

The Chairman: I suppose possibly a better definition—and this is just talking off the top of my head now—might be that amateur sport is any sport, in the area in which it operates nationally or internationally, whose status is recognized as being an amateur sport. You stay away from the question or remuneration. They have tried to soften their path here. Obviously, I suppose, the minister and his officials were attempting to justify or ease themselves out of the problem of having included amateur sport, because they add a paragraph of explanation, where they say:

> Amateur sport does not by its nature have a fundamental commercial purpose, whereas the competition which the Combines Act is designed to protect is a rivalry among sellers by virtue of which each is constrained by the efforts of the others, and by potential new rivals, to strive continuously to offer better terms to buyers. It is therefore reasonable to exempt amateur sport from the application of section 32, where as in the definition given in 4.2(2) its non-commercial character is clear.

I do not see why we have to be concerned about the commercial or non-commercial character: it is simply what is recognized in sport as being amateur sport. It is like "custom of a trade" or something like that. Their definition still leaves most of the amateur sport under section 32, because there must not be any remuneration for the services performed to get the exemption here, and that would rule out a large body of amateur sport.

Senator Walker: Is it not the opinion of the committee that amateur sport, or anything referring to amateur sport, should be dropped from this bill, in any event?

The Chairman: The best way of doing that would be to adopt Senator Molson's suggestion and take section 32 out altogether.

Senator Molson: Yes.

The Chairman: But at some stage we may have to express some view about what they proposed and why it is ineffective.

Senator Walker: If we are dropping it altogether, their view in connection with the definition is not necessary, is it?

The Chairman: I do not think so. I do not think it adds anything.

We go on to the next page, which has a heading, "Clause 9". That is clause 9 of the bill, on page 8 of the bill. It states:

Section 27 relating to privacy and publicity in connection with inquiries and proceedings.

Mr. Cowling: I do not think the amendment here would be too controversial, Mr. Chairman. The act and the bill provided that proceedings before the commission would be public—that is to say, that anybody who was interested, in addition to the parties, could attend. The new proposed amendment would insert a provision whereby the commission could order that all or any portion of the proceedings be conducted in private. In the comment that you find on that page and the following page, the explanation is that in the evidence laid before the commission there might be matters which were confidential and which the parties would prefer to be kept that way. In that case, the chairman of the commission, I suppose, could order that any spectators get out of the room.

The Chairman: This is the practice under the present law at the stage when an inquiry is being conducted by a member of the Restrictive Practices Commission. Under his direction, at some part of the proceedings he may say, "We will hear this in private." The chairman also has the authority, if he is hearing one group, to refuse access to that hearing to a competitive group. So what they are proposing now simply is because they had provided in the bill that all the proceedings would be public. Now they are saying that the chairman may order that all or any portion of such proceedings be conducted in private. There were representations on that point, were there not?

Mr. Cowling: I think so, Mr. Chairman.

Mr. Lewis: The Canadian Bar Association was one.

The Chairman: Yes. I think it is necessary. There is nothing controversial about it.

Senator Beaubien: Agreed.

The Chairman: Turning over, we come to clause 10 of the bill, on pages 9, 10 and 11.

Mr. Cowling: Here an entire amendment which Bill C-2 would have made to the act has been virtually withdrawn, if I understand it correctly. It is in relation to the abuse of industrial or intellectual property. The comment explains that it is contemplated that there will be amendments to trade mark legislation and other legislation, which have not yet been brought forward but which it is anticipated will be brought forward, and so it was thought better not to confuse the issue by making any more amendments at this stage.

That just about sums it up and, as I say, the amendment proposed in Bill C-2 is gone and we are left with what was section 29 of the act.

The Chairman: That leaves the original section 29 in force.

Mr. Cowling: That is correct.

The Chairman: Did we have any representations on that?

Mr. Lewis: There were a number, Mr. Chairman.

Mr. Cowling: I do not think that in any of the groups that actually appeared before the committee this particular section was raised, but certainly in some of the written briefs it has been raised.

The Chairman: Then we move on clause 12 of the bill, pages 16 and 17. This gets us into Part IV, which is a part on which we heard very considerable evidence.

Mr. Cowling: That is correct. If you read the proposed amendments, you will note that they respond, in part, in the direction in which the representations made to the committee went.

The Chairman: So, certainly, reading the pages of this clause 12, dealing with section 31.2, relating to refusal to deal, it is quite obvious that the departmental officers, who had observers at our committee meeting and also copies of the *Proceedings*, have attempted to reflect the points which were developed before us and in the briefs which were submitted. Whether this goes sufficiently far is another question. Is there any comment on that, Mr. Cowling?

Mr. Cowling: Yes, Mr. Chairman, there is. They have made one sort of technical change with respect to section 31.2 and with respect to the provisions dealing with exclusive dealing, market restriction, tied selling and so on in regard to the hearing which would be held before the commission. It is now made clear that the commission cannot make any findings until the supplier or suppliers involved have been afforded an opportunity to be heard. The previous wording gave the impression that the commission could do some preliminary work without the presence of the supplier, come to certain conclusions and then afford the supplier an opportunity to be heard and make any defence it cared. However, it is now quite clear that all the findings of the commission must be made in the light of representations made by the suppliers. You will see that the wording underlined at the beginning of section 31.2(1) reads as follows:

—and after affording every supplier against whom an order is sought a reasonable opportunity to be heard,—

That phrase crops up over and over again in these proposed amendments.

Senator Cook: That is a worthwhile amendment.

Mr. Cowling: It seems to be.

The Chairman: I do not believe they have dealt fully with the points which were developed before us, particularly by Mr. McIntosh of Blake, Cassels, who appeared representing 12 or 13 large companies. We still do not have a definition, do we, of "usual trade terms"?

Mr. Cowling: Yes, Mr. Chairman, but in the drafting scheme followed that comes later, appearing at page 7 of this set of amendments.

The Chairman: That is where it reads:

Add a new sub-section 31.2(3) as follows: "(3) For the purposes of this section, the expression 'trade terms' means terms in respect of payment, units of purchase and reasonable technical and servicing requirements."

I believe our view at the moment to be that we have a much better and broader definition and we do not consider this goes far enough.

Mr. Cowling: That would be an improvement, Mr. Chairman, but I wonder if I may read into the record at this stage an amendment that was suggested by one of the parties who appeared before us. That would suggest something along these lines:

> (i) any standards or conditions established by the supplier as a condition of accepting such person or a customer as a customer of the supplier, provided that such standards or conditions do not, to the knowledge of the supplier, constitute part of a practice of discriminating between such person or customer and competitors of such person or customer in like circumstances and do not substantially lessen competition in the market;

The Chairman: We also heard much evidence in relation to adequate supplies and insufficient competition as it appears in the bill in section 31.2(d), which reads as follows:

> (d) the reason for the inability of the person to obtain adequate supplies of the product is an inadequate degree of competition in the market,

The complaint was that these were vague and confusing terms, "adequate supplies" and the "inadequate degree of competition". We have had some submissions in favour of re-writing those terms, "adequate supplies of the product" and "inadequate degree of competition". Do you have them, Mr. Cowling?

Mr. Cowling: Yes, Mr. Chairman, they are extremely lengthy, though, and I question whether it would be practical to read them into the record at this stage. A change has been made in these proposed ministerial amendments, if I may identify them in that manner. Whether or not it really constitutes a change, I am not yet certain. They say in paragraph (b):

> the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition—

And they have inserted the words: "among suppliers of the product" and continue with the words "in the market,".

The Chairman: Have they defined "product" in these amendments?

Mr. Cowling: "Product", of course, is defined at the very beginning, in the definitions section, but as we proceed through these amendments you will see that there has been a re-definition of "product" just for these particular sections, which is designed to react to the representations made as to whether or not a product could be taken to mean a brand name. We will come to that in the next few pages.

The Chairman: Yes. I remember Senator Buckwold, in his statement, repeated many times an inquiry as to what the reference to "product" means, for instance, in the case of cameras, whether the person who was unable to obtain supplies required a Kodak camera as a source of supply and how broad should the provisions of this section be. Should the person who is saying he has been substantially affected because he cannot obtain supplies, or is precluded from going into business because he cannot obtain supplies, be entitled to ask only concerning Kodak cameras, or should it be the generic term?

Mr. Cowling: The answer they have given to that, Mr. Chairman, appears on page 6 of this section. It is extremely important and perhaps I may read it into the record. It is suggested that a new subsection 31.2(2) be added, reading as follows: "For the purposes of this section—" that is to say, the provisions dealing with refusal to deal, tied selling and so on. The proposed new subsection reads as follows:

> For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade mark, proprietary name, or the like, unless the article so differentiated—

And this is the important part:

> —occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless he has access to the article so differentiated

In other words, this envisages a situation in which inability to obtain a particular brand name product may give grounds for review by the commission.

Mr. Lewis: I think Mr. Chairman, that this last amendment which Mr. Cowling has just read out is one which is going to give the layman, particularly, a great deal of difficulty in understanding. It might even go further than that, to create confusion in the minds of even experts in trying to interpret it. In looking at the intention of this amendment, it reads along these lines, that one firm so dominates his industry that without supplies of his branded lines a dealer cannot stay in business; whereas the amendment which has just been read out limits this to a person's ability to carry on business in that class of article or product, or is so limited or is substantially limited and comes within this exemption—that is, the "unless" part.

In other words, to take an example, perhaps a general or department store has many different lines or classes of products and finds that it cannot get a particular class of article or an article which is differentiated by a trade name. He might say, "I cannot operate the department without that particular name-brand product." Therefore, he can request an order to be made by the commission.

The way it reads in this amendment does not appear to carry out the intention—that is, the test that he cannot stay in business just because a department or general store, even a drug store, carrying many lines cannot get a particular brand name. He might claim, "I cannot carry on that department and, therefore, I want an order made," without that condition really affecting his ability to carry on business. He could carry on business. It does not affect his business substantially, but because it affects one department, he might ask for an order to be made. Therefore, I think it would create a tremendous number of very small claims.

The Chairman: A camera department in a store might say, "If we cannot get a Kodak camera, we cannot operate that camera department." Would that be an illustration of the point you are making?

Mr. Cowling: That would appear to be what they are driving at, or the way that this new definition would be interpreted. I must say as a lawyer, that I find it strange that a substantive change is made in a definition to a section. Also it does not really accord with the comment which follows this particular chapter.

Senator Barrow: Why could you not finish it and say "affect the ability of a person to carry on business."

Mr. Cowling: That is correct; or take out the words, "in that class of articles unless he has access to the article so differentiated." What the words "in that class of articles" are doing there, I do not quite understand.

The Chairman: I suppose you could negative the whole effect of this proposed amendment from our point of view by removing the qualifying word "unless, and if you took out the part of this amendment on page 6 in connection with section 31.2(2). If you take out all that follows the word "unless", you are taking the sting out of the whole thing, and you have got down to the position that Senator Buckwold was talking about.

Senator Molson: I am a little bothered in that definition about the fact that the article is not a separate product only because it is differentiated by a trademark, proprietary name, or the like. Surely, you get into design and materials. A Kodak camera does not look like a Monox; it has a different trademark, but there are also other differences.

The Chairman: That is a good point, Senator Molson. I do not know whether this is done intentionally, but it looks as though they have done exactly the opposite to what they may have intended to do. That is, they are saying that a Kodak camera is not a separate product only because it is differentiated from other articles in its class by a trademark, et cetera. That seems to be what they are saying. That is exactly the opposite to the point we wanted to make and the submissions we had. We wanted to say that "product" has to recognize a separation into classes, that you can have classes of cameras. Also, they have not dealt with the limitation I wanted in the section—of course, we could put it in ourselves—when we are talking about a man in business who claims that he is adversely or substantially affected because of his inability to get supplies. They talk about "his business". I suggested that in connection with that type of man, who complains to the director and there is an application made on his behalf to the commission, the limitation on his business should be the business which he is then carrying on, and he cannot continue that business because he cannot get the product that is being used in his business at that time.

Mr. Cowling: His business should be looked at as a totality. That is to say, if his is an all-purpose store, selling lawnmowers, perfumes, cameras and other things, it should be the sum total of his operations that should be looked at in relation to whether or not he is substantially affected. I think we should note that the proposed amendments have changed "adversely" to "substantially".

Senator Cook: I think I can give a practical example. For instance, there is a manufacturer called Rexall, a distributor of licensed drug stores which sells various products. Twice a year they have one-cent sale. In other words, you buy a bottle of pills for $1 and for one cent you get a second bottle. They only license so many drug stores in each market. In a small place they would not license two drug stores. In that case, would the second drug store be able to compel Rexall to deal with them?

Senator Beaubien: Probably.

Senator Cook: There is nothing peculiar about anything they manufacture. There are other drugs and articles of the same kind, but without the "Rexall" name on them.

Mr. Cowling: The qualification is unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business. They would have to demonstrate that the Rexall product was so dominant that they could not carry on without them. I do not know if that properly answers your question, senator?

Senator Cook: It says "affect the ability of the person to carry on business." It is not quite as strong as you put it. It does not say that he cannot carry on business. It has only to affect his ability to carry on business in that class of article. It certainly does. He can show quite clearly that his competitor has a much better chance in these sales, and certainly it is a much sought after franchise.

Senator Molson: Mr. Chairman, I think this clarifies, too, what I was fumbling with a few moments ago. For example, the Rexall toothpaste has a different trademark, but its composition is different from any other. Under this definition, an individual could actually obtain an order to sell Rexall, which surely is not intended. This goes back to this business with Kodak. As long as that individual has 12 brands of toothpaste, why should he need the Rexall brand?

The Chairman: That is one point. Another point is that drugstores carry many articles, so the question arises as to what will be used as a measure. Do you take the article he is unable to obtain and measure his business as being substantially affected as a totality, or just in connection with that one particular article?

Mr. Cowling: In terms of the toothpaste shelf.

The Chairman: Yes. There are many, many brands of toothpaste, some of which may be the particular rage at the moment. You may have an individual carrying a number of brands but, because of the rage of a particular brand at any given time, he may want to obtain that particular brand for its particular attraction at that time, but is unable to do so. If he makes an application, should there not be some requirement or limitation.

To establish whether his business is substantially affected, you must, first of all, look at the business he is carrying on, and to look at that you have to look at the totality of the business. It may well be that whether he gets this particular line or not, the totality of his business is still a very successful concern.

Mr. Lewis: Mr. Chairman, to improve the wording and to carry out the express purpose of the amendment, as contained in the comment, perhaps the solution would be to insert the word "his" before the word "business". In other words, it would read, " . . . substantially affect the ability of a person to carry on his business . . . ", leaving out the rest of that paragraph. That is already in the record; that is, a person who is substantially affected in his business. If that does not need definition or defining, it should be clear in the later amendments.

The Chairman: There seems to be a difference in the comment as to the position which they are seeking to establish by reason of the amendment. The amendment does not coincide with the comment as to why they are proposing this amendment.

Senator Cook: I think everyone is in agreement that there should be some amendment to protect the person in the operation of his business. The amendment simply says,

" . . . substantially affect the ability of a person to carry on business in that class of articles . . . " The comment is much more severe, shall we say, or would indicate a more serious state of affairs, whereas the amendment leaves it wide open.

In my view, it would certainly improve the amendment if it were to read, " . . . substantially affect the ability of a person to carry on his business . . . ", leaving out the balance. That would certaily be a tremendous improvement, in my view.

The Chairman: We do have some drafting in relation to this particular section and on these very points which, to some extent, reconstructs the provisions of section 31.2. That is correct, is it not, Mr. Cowling?

Mr. Cowling: That is right, Mr. Chairman.

The Chairman: The only understanding we need to reach at the moment is that these proposed amendments do not go as far as the representations which were made to us would have indicated, nor do they appear to go to the points set forth in the comments as being the reasons for which the amendments are proposed.

What we can do when we get to the stage of drafting our recommendations, subject to any further submissions we may hear, is keep these things in mind. I have seen the draft and I am certainly satisfied that it covers the points we are discussing now. Our committee *Proceedings* are full of discussions on the interpretation of section 31.2. For that reason, I think we can leave it at that. I think I understand the views of the committee, and I think it is in line with the views of the staff.

Senator Cook: Just for my information, Mr. Chairman, before we leave this subject, what is the effect of the word "adversely" being deleted, and the word "substantially" being substituted therefor in that connection? Does that carry us any further, or what is the effect of that?

The Chairman: You are now referring to clause 12?

Senator Cook: Yes.

Mr. Cowling: I suppose the word "substantially" gives a more important connotation of degree than does "adversely". To be affected adversely could mean affected adversely even in the smallest degree, whereas "substantially" implies some quantity.

Senator Cook: No one is going to complain if they are affected in a good way, but I am wondering whether it should not read "substantially and adversely."

The Chairman: In that connection, the comment reads:

> In sub-paragraph 31.2 (a) in the Bill the word "adversely" has been replaced by the word "substantially" with the intention of clarifying the threshold below which the section would have no possible application.

That would appear to be in line with the difference between "adversely" and "substantially", as set out by Mr. Cowling.

Senator Cook: I am not complaining, Mr. Chairman. I am simply wondering whether it should not read "substantially and adversely affected . . .". Perhaps that is silly, because you could be substantially affected in a good way.

The Chairman: In that event, you would not be complaining.

Senator Cook: True enough, Mr. Chairman.

Senator Beaubien: I am just wondering what the quorum is for this committee. There is a meeting of the Internal Economy Committee which I should attend.

The Chairman: Well, we still have a quorum. There is really no reason for us to plough along all day. There are a good many other things to be done. There is one point I should raise, that being whether the committee should make an interim report. My own feeling at the moment is that this is not the time for an interim report, particularly since the amendments which have been tabled in the committee of the other place have not as yet been fully developed or discussed in that committee. We, ourselves, have not had time to analyse these proposed amendments in relation to the representations which have been made to our committee. Also, the public hearings of the committee of the other place will not proceed until some time well into January. The people wishing to appear before that committee, or to make representations to that committee, have been given until January 1 to file their briefs.

My feeling, therefore, is that the only kind of report we should consider making at this stage is what I would call a progress report, giving the number of meetings we have held, the number of groups heard from, and the number of briefs filed.

We can add that some have been heard and the others have not requested to be heard. Also, I think we should refer to the fact that these amendments, substantial in number and to a large extent dealing with points that were raised before us, are contained in the *Proceedings* of our committee.

That would be the progress. Then we could say: "Your committee will sit again as and when there is time and material." We still have briefs coming in. We have not been able to give dates to all those who have requested dates so far, and when we are pressing against what might be regarded as a deadline, the commencement of the Christmas recess, this presents added difficulties. I think that is the only kind of report we should make at this time—that is, a progress report.

Senator Beaubien: I agree, Mr. Chairman.

Senator Cook: It is a pity these amendments cannot get wider circulation, because from what I have seen of them they have gone a long way—in other words, the minister seems to be receptive to the suggestions that he has received.

The Chairman: When you say "a long way"—

Senator Cook: Subject to further improvement in the language.

Mr. Cowling: The right direction.

The Chairman: They are going in the right direction. In other words, these amendments indicate that they have been looking at the material which has been presented to us and they have been looking at the *Proceedings* of our committee and have been paying attention. Now, that is a good sign.

There are some points that are not dealt with, and one I am thinking about is the professions. A query is: Should not a regulated profession be exempt from this bill? Let me illustrate what I mean. I do not know whether I did so the other day or not.

In Ontario, for instance, the fees that lawyers charge in any matters in court, et cetera, are regulated by the provisions of the Judicature Act. The Judicature Act provides for a rules committee, and that rules committee is made up of judges and lawyers. They promulgate rules for the conduct of proceedings in the courts, and they provide tariffs of charges for proceedings in court on a party-and-party basis and on a solicitor-and-client basis. Then there is also provision for a master, who is called the taxing officer. The client who thinks he has been charged too much for services rendered may demand that the bill be taxed. He goes before the taxing officer. The taxing officer has freedom to exercise his judgment, reasonably, and he may require evidence to be given supporting the basis of the charge in relation to the importance of the service. When the taxing officer issues his certificate, there is a right of appeal from that decision. I think that in the first instance it would go to a judge in chambers.

There you have what I call a regulated profession. The lawyers do not get together and settle what the fees are that must be charged for those services in court or relating to court proceedings.

It is true that in relation to real estate transactions there is a tariff established by the County of York Law Association, which is an unincorporated body, made up of lawyers. That tariff sets fees to be charged in relation to purchases or sales of land, or mortgages on real estate, on a percentage basis in relation to the dollars involved in the transaction. But there is no compulsion or any lawyer to follow that tariff. If the client does not feel satisfied with the bill which he has got, he can refuse to pay it. If the lawyer sues him for the amount, it is no part of the evidence that the lawyer can give to support his claim, to say that the County of York tariff is thus and so: he has to establish on a quantum meruit basis the value of the service that was rendered and its importance.

So certainly the legal profession in Ontario—and I think there are similar situations in other provinces—comes within the category of a regulated profession.

These things may very well apply to medicine, engineering, architecture. In those circumstances, the bringing of a regulated profession under the scope of the Combines Investigation Act just does not make sense, because there is control to challenge charges that are made, and it is control that—so far as proceedings in court are concerned—does not exist in the lawyer. The lawyer prepares his bill. There are tariffs, and if costs are awarded in any proceedings a judge may award those costs on a basis of party and party or on the basis of solicitor and client. The client, when he gets the bill, can insist that it be taxed. Yet, if you bring the regulated profession under the Combines Investigation Act, why, six persons can get together and file a complaint with the director, and you have a full-scale inquiry. So I think we have to give some very serious thought to the inclusion of professions.

Senator Barrow: Mr. Chairman, are you saying all professions are regulated like the legal profession? Because, in my opinion, they are not.

The Chairman: No. What I said was that I would think there is regulation in the other professions. I have not checked into this, but I think we should. Let us take the medical profession. Certainly, in Medicare in Ontario there is a scale of charges which is established by a provincial body, under which if you are in the Medicare plan the doctor can send his bill to this association and receive payment according to whatever his charge may be, and that may be reduced to the scale that has been established by this association.

Mr. Lewis: Mr. Chairman, I might mention at this time that, as we all probably know, in the province of Quebec we have a new professional code and all professions are regulated. So this creates a problem perhaps in other provinces. There are a few where the professions are not regulated. Some are and some are not.

Senator Cook: Regulated as regards charges to the public, you mean?

Mr. Lewis: Regulated by government licensing—that is, by an exclusive licence to practise a particular profession within the province, and the bodies, incorporated bodies in some cases, are established, such as institutes and associations and professional corporations, to control the profession—with, in some cases, the power to establish a tariff with minimum fees, but not in all, I think.

The Chairman: Of course, Senator Barrow, with respect to the question you raised, you will notice I used the language "regulated." There should be no place in this bill for a regulated profession. However, there are some professions which are not regulated in the sense of "regulated" as I have used the word here and illustrated by reference to the legal profession in Ontario. If they are not so regulated, then they are not a regulated profession.

Senator Blois: Mr. Chairman, there is also a great difference in regulated charges between one province and another, which causes great difficulty. You mentioned Medicare, in which there is a very great difference in the Medicare fees in Nova Scotia compared with those of Ontario and other places.

Senator Barrow: And the Medicare fees are not the total fees which must be paid, but just the fees paid under the Medicare service.

The Chairman: Are you speaking of Nova Scotia?

Senator Barrow: Yes.

Senator Blois: But they do not compare at all with what goes on in Ontario. I have had a great deal of experience in this and have been charged certain fees in Ontario which Nova Scotia will not pay.

The Chairman: I can understand how fees in different provinces might differ, because living conditions may be different.

Senator Blois: Not very much today.

The Chairman: Maybe not, but I would think, for instance, of doctors living in certain areas. Certainly their fees should reimburse them their costs. In any event, reference was made to a complaint existing in that area.

Senator Blois: But I think you will find that a doctor in a small community will receive much less in the form of fees than one in the city of Halifax, for instance. It is probably also more in Ottawa than it would be 50 or 70 miles out in the country.

The Chairman: You see, Ottawa is avoiding that issue by using the expression "regulated profession." As I said, I do not think there is any place in this bill for a "regulated profession."

Senator Blois: That is correct.

The Chairman: This might be a convenient point at which to adjourn. The Standing Committee on Internal Economy, Budgets and Administration is meeting this morning, and I know that the subject matter to be discussed is very important.

We are meeting next Wednesday, when we will have three submissions during the morning in connection with the Competition Act and one in the afternoon in connection with the income tax bill. With respect to the latter, the bill itself is not expected to be tabled and made public before next week. At that stage I understand also that there is no intention of pushing it against a deadline of the commencement of the Christmas recess, which we have been terming "Christmas closure". There is no need for that, really, because the provisions are effective as of budget night, November 18. Therefore, whenever the bill passes into law it is effective from November 18 unless it stipulates a later date or is made retroactive, as it is in some particulars. Usually, however, in cases of retroactivity it is of a beneficial nature, as you saw yesterday when we discussed the bill.

Senator Cook: Except in one case. It was not beneficial in that it does not allow companies to deduct their municipal taxes.

The Chairman: Well, there is a question as to whether that is fully retroactive. There is another difficulty. The bill will be tighter in language than that used in the resolutions, because consideration has been given to the choice of words, as to whether they cover only what is intended or make it broader or narrower. There is therefore a limit to what we can do in the way of study until we have the bill, and if it is not available until next week there certainly will not be much opportunity for witnesses to be heard between that time and the commencement of the Christmas recess. However, we will not be delaying things.

Whether we conclude that we should sit on Tuesday will depend on whether the adjournment of the Senate to next week is to Monday night or Tuesday afternoon. The Order Paper contains quite a number of bills and it could well be that the Senate will adjourn until Monday night next week. However, we may feel that we should sit on Tuesday morning and continue the study of these amendments. I personally feel that to be a course of action that possibly we should take so as not to lose any time in our understanding of how far these go to meet the positions which were developed before us. We will also consider how far we are prepared to go to support those positions and what, if anything, has to be done with these amendments in order to fit them into the representations which were made and to our view as to how far the bill should go. I do not think we would gain anything by delaying. Therefore, I think we may very well sit next Tuesday morning if the Senate adjourns until Monday evening. Otherwise it would be some time during the day on Tuesday, but we will give you due notice.

This is a good time to adjourn this meeting. We have lost our quorum now. I do not suppose we can be selfish about this. Thank you very much, gentlemen.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 13

TUESDAY, DECEMBER 10, 1974

Seventh Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, December 10, 1974
(16)

Pursuant to adjournment and notice the Standing Senate Committee on the Banking, Trade and Commerce met this day at 3:30 p.m. to further consider the following:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*), Blois, Cook, Laird, Macnaughton, McIlraith and Walker. (7)

Present, not of the Committee: The Honourable Senator Riley. (1)

In attendance: Messrs. R. J. Cowling and John F. Lewis, C.A., Advisors.

The Committee resumed their consideration of the Departmental amendments as presented in the House of Commons committee, assisted therein with explanations by the advisory staff.

At 5:35 p.m. the Committee adjourned until 9:30 a.m. Wednesday, December 11, 1974.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, December 10, 1974

The Standing Senate Committee on Banking, Trade and Commerce met this day at 3.30 p.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, I thought that today we would resume consideration of, and get out of the way the effect of, the rest of the amendments that were tabled in the Commons committee. You each have a copy of the amendments. We had got as far as section 31.2, subsection (2), which you will find on pages 16 and 17 of the bill.

Mr. R. J. Cowling, Special Counsel to the Committee: Those are the amendments relating to the refusal to deal. I think we had pretty well finished with that one. The next one, therefore, would be section 31.3, which deals with consignment selling.

The Chairman: It is page 17 of the bill, section 31.3, relating to consignment selling.

Mr. Cowling: There is just a technical amendment here. While we are going over it, I might say something about it in general. In the case of the re-sale price maintenance provisions of the act, where there is a principal and agency relationship the seller can retain some control over the price at which the goods are sold. In other words, instead of the manufacturer selling to a distributor and the distributor re-selling, the manufacturer sometimes sells on consignment to the distributor, and when the distributor makes a sale he is really making the sale on behalf of the manufacturer. Therefore, the manufacturer has some control over the re-sale price. The amendments to the act which Bill C-2 would have brought in by the new section 31.3 would have prevented this kind of an arrangement where it could be established that the consignment arrangement was entered into only for the purpose of evading the re-sale price maintenance provisions of the bill. The proposed ministerial amendment to section 31.3 is just the same technical one that we have already seen in our discussion of 31.2—that is, move the words "and after affording the supplier against whom an order is sought a reasonable opportunity to be heard," up above, for the reasons we discussed on the last occasion. That is really the only change, as explained in the very short comment on page 2.

The Chairman: What opportunity has the owner of the article which he consigns by way of defence? He has to try to convince—

Mr. Cowling: —the tribunal or the commission, I suppose, that there is some other good business reason for a consignment selling arrangement being in existence.

The Chairman: Yes.

Mr. Cowling: I suppose he could show this was always the way it was dealt with in the past, or by reason of the nature of the goods in question that this was the reasonable and businesslike way to distribute them.

The Chairman: A difficulty I see in it is that in consignment selling the title to the goods remains in the supplier or the dealer, and it is only when the person to whom those goods are consigned makes a sale that he then can complete the transaction. The effect of this section in the bill really would be to prevent that, because in the case of the seller on consignment they are his goods somebody else is selling, and if he cannot say at what price they are going to be sold I suppose that very effectively does away with consignment selling.

Senator Walker: Is that what you want?

The Chairman: I do not know. We have not had any submissions on that, but I would say there is quite a fair amount of consignment selling in business.

Senator Walker: A terrific amount.

The Chairman: The owner may want to protect his goods.

Senator Laird: This particular point may apply to art commodities like paintings. Any number of paintings are sold after they are shipped on consignment.

The Chairman: Just so as to retain title, until it is paid.

Senator Laird: right.

Senator Cook: It is not consignment selling they are against, it is the controlling of the price, or discriminating?

Mr. Cowling: Yes, but by use of the consignment selling arrangement.

Senator Cook: Why cannot he go on to consignment selling as long as he does not control the price or discriminate? What it says here is that the commission may order the supplier to cease to carry on the practice of consignment selling. My only point—and it may not be a good one—is that what they are complaining about is the controlling of the price or discriminating. Consignment selling in another matter altogether.

Mr. J. F. Lewis, C.A., Advisor to the Committee: Mr. Chairman, what the drafters are trying to get at here is a change in policy—that is, a supplier whose ordinary policy, whose usual policy is to sell directly, say, to the wholesaler or directly to the consumer-retailer, then in order to influ-

ence the price and protect or keep a higher price he changes and switches into certain areas to certain consumers, retailers, through consignment selling. This is what I think the drafters are trying to get at, but I think it becomes a little bit lost in the drafting.

Senator Cook: Should not it be that the commission could order the supplier to cease controlling the price or to cease discriminating? It is not consignment selling which is the evil; it is not consignment selling tied to controlling the price or discriminating.

Mr. Lewis: I do not think the intention is to appear to be against consignment selling, which is a recognized business practice.

The Chairman: Except that if you read this section:

> Where, on application by the Director, the Commission finds that the practice of consignment selling has been introduced by a supplier of a product who ordinarily sells the product for resale,

Then it goes on to say, "for the purpose of", and so on.

Surely, there are a few more words needed there? Surely, the words that are needed would be "who ordinarily sells the product for resale on other than a consignment basis"? That would clarify it. Otherwise, I do not know what the language means, "who ordinarily sells the product for resale". What does that mean? If it means what Mr. Lewis thinks they are trying to get at, this is what they must intend to cover; that is, that you find a supplier selling a product for resale, not on consignment, and then he introduces this element of consignment for the purposes of controlling the price. If you have the works in there "who ordinarily sells the product for resale on other than a consignment basis" then you have this in. It limits it. It gets at the evil that the department thinks is in there. Is there any comment on that?

Mr. Cowling: I am making a note of it, Mr. Chairman.

The Chairman: Otherwise, frankly, I do not know what it means, when they have left something out, the person "who ordinarily sells the product for resale", it must mean for resale on other than a consignment basis, and I am wondering, if I deliver goods on consignment, whether that is, not a sale. Therefore when they say "resale" they must mean resale on other than a consignment basis.

Mr. Lewis: I think the wording would be better read something on these lines:

> Whose ordinary business practice consisted of selling directly rather than selling by consignment.

The Chairman: Yes, something on that line.

Senator Laird: Does that mean he has an established practice? That is what would worry me. Can he not start a new business?

The Chairman: Turning to the next amendment, have you a comment, Mr. Cowling?

Mr. Cowling: The next one is on the next page and relates to the new section 31.4, dealing with exclusive dealing, market restriction, and tied selling. You will see that the words "or primarily" have been inserted in subparagraph (i). The comment says:

> The point has been raised that the intention of subparagraph (i) could be defeated if the supplier permitted the customer to deal only in one or two insignificant articles obtained from sources other than the supplier. The new words would obviate such danger.

In other words, if a manufacturer of skis wished to attach a condition to the sale of those skis to a retailer, that he could not deal in any other kind of skis, that provision of the act might be defeated by his saying, "You can deal in my kind of skis and one other kind of skis." And yet the provision of the act is still being defeated. The proposed amendment is designed to change that by putting in the words "or primarily".

Senator Cook: Why don't they use the word "substantially"? The word "primarily" is a new word again. They use "substantially" in other sections. Why do they not use "substantially" here?

Mr. Cowling: I do not know. I do not think we have any representations on that particular aspect of it. This would be a provision which, I suppose, strengthens the provision. I do not think that we had any representations to the effect that the section was not strong enough.

The Chairman: No. We have not had much in the way of submissions. I think we have to ride our own thinking on this.

Mr. Cowling: There is a more interesting change to this whole section in subsection (2) where you can see the underlined words "lessen competition substantially by impeding". If you read the comment which follows on that, there is a question in my mind, Mr. Chairman, at any rate, as to whether this new language which has been inserted in the amendment really takes care of the difficulty as expressed in the comment. You see, the comment reads as follows:

> Concern has been expressed that as it stands in the Bill, sub-section 31.4(2) does not provide the Commission with proper guidance about the meaning of the word "impede" and that the proper test should be whether entry is impeded to such an extent that competition is likely to be lessened substantially.

The Chairman: Well, this section, "Exclusive Dealing," is intended to apply, I take it, to any situation where the supplier insists that he will supply only if the person who acquires the goods does not handle any other goods.

Mr. Cowling: That is right.

The Chairman: They are trying to make doubly sure in the amendment that it will not happen, but they seem to think that the intent might be defeated if the supplier were to say, "Well, you can buy certain quantities of this, that and the other thing," or perhaps were to list some articles that were non-competitive with the articles that the supplier was dealing with. So that is why they have added the words "or primarily". I assume by "primarily" they mean "substantially".

It is exercising more control over the supplier. It is strange, but I do not think we have had submissions on the point.

Senator Walker: Are we going to have submissions on it, Mr. Chairman?

The Chairman: I do not know. We have not had so far, but we will have a couple of submissions tomorrow and there may be something on this point then.

Mr. Cowling: It might be that some of the people we hear from here on will have had the opportunity of looking at these proposed amendments and may be making some representations on them.

The Chairman: I can tell you that on Wednesday, the 18th, we are hearing from the Canadian Institute of Chartered Accountants and the Consumers Association of Canada as well as the Association of Canadian Advertisers. We do have the chartered accountants' brief now. So this point may be developed either tomorrow or the following Wednesday. As far as our purposes are concerned, I think we should just suspend any consideration of the form of the amendment at this time.

Senator Cook: Perhaps we should just familiarize ourselves with the amendments without debating too extensively the merits or otherwise.

The Chairman: That is right, because on balance the question is whether exclusive selling is something that should be prohibited or something that should be limited in application. They have afforded some opportunity for defence, I think. The Commission has to decide that this exclusive selling is likely to lessen competition.

Mr. Cowling: That is correct, and in subsection (4) there is a list of what you might call defences. The opening words there are: "The Commission shall not make an order under this section where, in its opinion," and so on and so forth. For example, where it is only engaged in for a temporary period of where there is a technological relationship between the products in so far as tied selling is concerned.

The Chairman: Yes. These are new things. Actually, they are not in the existing statute. Isn't that right?

Mr. Cowling: That is correct.

The Chairman: Yes.

Mr. Cowling: If you want to jump ahead a little, right on subsection (4), paragraph (c), there has been a proposed amendment which you find on page 4 of the package of amendments.

Paragraph (c) provides a sort of defence where the tied selling is engaged in by a person in the business of lending money and for the purpose of better securing loans made by him, and the words, "and is reasonably necessary for such purpose" have been added. And in the comment that follows on page 4 it says that without those words a bank might insist, for example, as the *quid pro quo* of granting a loan that somebody buy pay-roll services from them, and that that would not be reasonably necessary for the purpose of securing a loan. On the other hand, the inclusion of those words might not prevent the bank from insisting on the customer's maintaining what they call a compensating balance, as security for the loan.

The Chairman: We have not much to go on in this area, because these are new elements that they have introduced in this bill. We have to see if we can get some help from the people who still have to appear before us. The Consumers Association may very well help.

Mr. Lewis: Mr. Chairman, the point about tied selling and the banks is covered in the brief of the chartered accountants.

The Chairman: Yes, and we are hearing them on the 18th, so we will be able to develop something there.

Senator Walker: Mr. Chairman, all this comment and the suggested amendments and so on is not really sufficient, is it, without a little more knowledge of what is in mind?

The Chairman: No, and the comment is very elaborate in its verbiage.

Senator Walker: As far as the reasons for the amendments are concerned, we have to guess at a lot of them, don't we, until we get some oral evidence from someone?

The Chairman: Yes, I think so. That is the way I feel about it. It is dealt with in the chartered accountants' brief, and may be in a couple of the other briefs that will be in any day now. I see that in the comment at page 4 they say:

> Concern has been expressed that as it stands in the Bill sub-paragraph 31.4(4)(c) is too wide in the exemption it affords, because it would enable a bank to require a customer to buy pay-roll services for example from the bank, which are not reasonably related to his loan or to security in respect of such loan.

They say that the change in the amendment proposed to that section by the minister is for the purpose of preventing that effect.

In (c), which you will find on page 20 of the bill, are words added by the department. Paragraph (c) reads:

> tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by him

Now, that is what the bill says, and the amendment says this:

> and is reasonably necessary for such purpose,

They propose to add that so as to keep the bank from tying in payroll services to the making of a loan.

Senator Laird: I, like Senator Walker, do not think that is too sound a reason. I do not think that that is a very powerful reason for the change. This is a rather feeble comment, in my opinion.

The Chairman: Yes. Quite true.

Senator Laird: Are we going to get a chance to examine somebody from the department on these comments?

The Chairman: Oh, yes. That is, if the departmental officials ever decide they have enough time to visit us. Their answer, when we invited them before, was that they were too busy working on the amendments. If they had come then, perhaps the amendments might be a little clearer.

Senator Laird: Exactly.

Senator Walker: Well, I guess the minister would not be much help, would be?

The Chairman: Not at this stage. I do not mean that unkindly.

Senator Walker: It is not unkind to say that he would not understand.

Senator Cook: What would be the effect of a breach of this section if it stays as it is now? What would happen to the bank?

Mr. Cowling: Well, this is a reviewable practice. In other words, it is not a *per se* offence. Somebody would have to complain to the director, who would, as it were, bring a proceeding before the commission, which, after hearing the bank, would look into the situation and make an order.

Senator Cook: To cease and desist.

The Chairman: That is correct. And if they did not, then they would be prosecuted. This is converting a civil right, by the authority of the commission, into an offence, by attaching a penalty of prosecution if the person concerned does not obey the order.

Senator Cook: And the onus on the lender would be to show that it is reasonably related to the loan, or reasonably necessary.

The Chairman: Perhaps it is some defence that, say, a bank could put forward, and maybe therefore it does not fall into the category of a strict liability offence, where, if you do it, you are guilty, and you can only offer evidence for purposes of mitigation of the penalty; but these are things that we have to prove with the departmental officers, I think.

Senator Cook: Well, on the face of it I would not see any reason why a bank should not be stopped. I mean, why should they sell a lot of services to a customer which the customer may not want? I cannot see, on the face of it, why it should not come up, if you like, for discussion, as long as that is all that would happen to it.

The Chairman: Yes. That is why the word "reasonably" may not be a bad word to have in there. Perhaps there is some reasonable justification for insisting, if the customer wants the other facilities of the bank directed in his favour, that he must give them more of his volume of business. That is something that is not confined to banks. I would say there are many areas of business where that sort of principle is followed.

Senator Walker: I know some ambitious new law firms that have the same idea.

The Chairman: I do not think there is any prohibition in here against that.

What is next, Mr. Cowling?

Mr. Cowling: Well, the next one is in this same section, senator. I do not know that it is too important, but in subsection (5), still on page 20, there is a sort of exclusion where the practices are between a parent company and its subsidiary. There are also certain definitions there. One of the definitions is in subparagraph (iii), which says, if

> (iii) both are controlled by the same person, or

It was evidently thought by the draftsman, or the minister, that the word "controlled" was too vague, and so he has brought in a definition of control which you will find on page 5 of the package of amendments. Should I read it out?

The Chairman: Yes.

Mr. Cowling: It is quite short. They would add a subsection (6) and say:

> (6) for the purposes of this section a company is deemed to be controlled by a person if shares of the company carrying voting rights sufficient to elect a majority of the directors of the company are held, other than by way of security only, by or on behalf of that person.

I am not a corporation lawyer, but I have an initial difficulty with the words "carrying voting rights sufficient to elect a majority of the electors." I do not know if that fits in with company law as we know it, or the usual provisions that you find attaching to stock, unless you had two classes of shares.

The Chairman: Well, the usual provision is, voting control. It might inhibit, though, as well as the other thing, because there might be lack of agreement among those who have enough voting shares to elect a majority of the directors if they could agree on who they were going to vote for; but this development on page 20 starts out by providing, in connection with the business of exclusive dealing or market restriction, that:

> . . . no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

So this is an escape route if those situations exist, and the minister felt that in subparagraph (iii), that Mr. Cowling referred to in paragraph (5) on page 20, the word "controlled" was not clear, so he has attempted a definition of it. In due course, I suppose we can decide, because as I recall it, somewhere in the submissions that we will be looking at tomorrow—I think it is in that of companies—their concern is with the relationship of the agent to the principal, and they want to get an exemption with regard to that relationship. We will hear that developed tomorrow, so I think we can keep an open mind. All the minister sees wrong with it is that the word "control" might not be fully understood, and I am not sure that the attempt to define it, as we have heard it read to us, makes it any clearer.

Senator Laird: It does not, Mr. Chairman, for the simple reason that often with a widely-held company a solid vote as low as 25 per cent can elect a majority of the board of directors. Is that the kind of control they are trying to get at with this first amendment?

The Chairman: It may be that they are trying to deal with the situation insofar as it concerns effective control rather than actual control, and the question is: Should they?

Mr. Cowling: But if you have control would you then have sufficient control to elect the entire board of directors? You can have either one or the other. Either you cannot get anybody on the board, or if you have sufficient control you can elect everybody you want on the board. So I think it was a step in the right direction to try to provide a better definition of "control". But I am concerned as to whether the one they give here is really any less vague than the other.

The Chairman: It is at least as confusing and perhaps even more confusing than what is already in the bill.

Mr. Lewis: Mr. Chairman, I think what the drafters are trying to get at is that a company is not affiliated unless there is actual control of 50 per cent or more—say, 51 per cent. If the voting control drops below 50 per cent, there is no exemption for such a company calling itself an affiliate and, therefore, it is subject to the tied selling provision. This is what the drafters are trying to get at, and it is a bit

obscure because it involves an amendment to an amendment.

Mr. Cowling: There have been quite a few representations made on this kind of thing, this question of exempting affiliates and so on, but the thrust of the representations we have had is that, instead of just confining the exemptions to this one section 31.4, they should be made applicable to all types of offences and other things covered by the act. It would appear that these representations have not been heeded, and I think we are going to have to deal with them, Mr. Chairman.

Senator Cook: What bearing does the last sentence of the comment have? It says:

> Where control is exercised with less than a majority shareholding therefore, other shareholders as well as consumers may have an interest in maintaining the possibility of review by the Commission.

Mr. Lewis: I think by "others" there, Mr. Chairman, they are referring to minority shareholders—some of the minority or maybe even some of the majority.

Senator Cook: I understand that, but how does the new subsection (6) help this?

The Chairman: The comment does not support the amendment. By that I mean that the reason they give in the comment does not relate to the amendment they propose.

Senator Cook: I cannot see where this new subsection (6) helps the minority shareholders who want to have a review by the Commission.

The Chairman: You will notice that in the comment they say, "Where control is exercised with less than a majority shareholding . . .". Now the definition of "control" which they are proposing is where there are voting rights sufficient to elect a majority of the board of directors of the company held in such-and-such a fashion. Why do they not use the same language about where the majority of shares are held in such a fashion? They say:

> Where control is exercised with less than a majority shareholding therefore, other shareholders as well as consumers may have an interest in maintaining the possibility of review by the Commission.

Senator Cook: But how can control be exercised by less than the majority of shareholders?

Mr. Lewis: Mr. Chairman, I would say that in the case of a widely distributed company, a public corporation, 25 per cent in many cases is considered to be effective control. An example that would illustrate the suggestion here would be that of a Canadian company owning, let us say, 40 per cent of another Canadian company and therefore effectively, even if not actually, controlling it, and saying to that second company, "You cannot sell such-and-such an article; we, that is to say our company, will produce it." This is a market restriction. They may say, "You cannot sell your products in a certain area; we will sell them." I think this is what the drafters were trying to get at.

The Chairman: They certainly have not got at it so far.

Mr. Lewis: Whereas what they are saying here is that if a company owns not 25 per cent but 51 per cent, then that is all right. That is an affiliated company. But if it is less than 50 per cent or 51 per cent, then they cannot get the exemption and therefore cannot dictate policy as an affiliate.

Senator Cook: You help me when you say "effective control," because I understood it to be legal control.

Mr. Lewis: Well, effective control of a public company usually means the votes at an annual meeting to elect the directors, in effect, because not all votes are present at the meeting.

Senator Walker: Mr. Chairman, who drafts these clauses, the House of Commons, their legal counsel or who? You drafted a lot of the stuff out of your head for us. But who have they over there? Where does this all come from?

The Chairman: I cannot tell you. They have not even started to work on it yet. All that happened the other night at the first sitting was that the minister tabled the proposed amendments and then he started in to read the comments. That was hopelessly confusing because the committee knew hardly anything about the bill, and so one of the members moved that they adjourn so that the members might have an opportunity to study the proposed amendments in relation to the bill. They adjourned and they have given the public until January 1 to file briefs, so I would say they are not going to have any sittings until after the Christmas recess.

While the departmental officers are tied up in that committee it may well be that they will decide that they are too busy to come here. If they decide that, then that is open to them, but we can carry on with the representations we have. We have had representations, on behalf of about 12 or 13 companies, from the Blake, Cassels firm, and they have submitted to us a series of draft amendments implementing the representations they have made. I note that they have dealt with the question of the principal and his agent and that that should be included in the affiliation provisions. So we already have that before us, and we will have it again tomorrow from the insurance brokers and agents. So what we will have to do is what we have done in other cases—to analyze the submissions, as we are doing, and use our own judgment. But I think we have shaken this one just about as far as we can take it.

The next one deals with pages 20 and 21 of the bill, section 31.5. This is just a correction to make it clear that the people who are likely to be affected by any order of the Commission are entitled to be heard before the Commission makes its order. From the way it was drafted in the bill that was not clear. So we can pass over that one pretty quickly and go on to the next one.

Mr. Cowling: The next one is exactly the same thing, Mr. Chairman, in relation to foreign judgments.

The Chairman: The reason for the amendment is simply to ensure that the person who may be affected has the opportunity to be heard before the commission makes a finding. That was really the intention originally, but the draft did not say so. That is on page 24 of the bill, subclause 14(3), dealing with section 32 of the act.

Mr. Cowling: That is right. There is a small change there. The words "other than a boycott" have been added to section 32(2)(*f*). The reason for it is quite short.

The Chairman: That is section 32(2)(*f*) of the act, is it not?

Mr. Cowling: That is right; and section 32 of the act, of course, is the one containing the main conspiracy offence. Section 32(2) of the act provides:

> Subject to subsection (3), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:
>
> (*a*) the exchange of statistics,
>
> (*b*) the defining of product standards,
>
> (*c*) the exchange of crédit information,
>
> (*d*) definition of trade terms,
>
> (*e*) cooperation in research and development,
>
> (*f*) restriction of advertising, or—

In other words, there is nothing wrong with a number of companies getting together and saying they will not advertise a product they all make, or that their advertising of that product will be limited in some manner. That is an agreement, but is is not an illegal agreement under the act. In this proposed amendment to paragraph (*f*), however, the words "other than a boycott" are added. The explanation given by the minister in his comments is that the proposed amendment was to allay the concern on the part of publishers that paragraph (*f*), as it now stands in the bill, would unintentionally permit a group of advertisers to boycott a particular publisher. I suppose what is meant there is that if a certain newspaper took an editorial stand which certain companies did not like and they got together and agreed amongst themselves that they would not advertise a certain product, in so far as that could be considered a boycott for the purpose of bringing the newspaper into editorial line it would constitute an offence under the act and an illegal conspiracy. It is a rather esoteric type of amendment.

Senator Walker: What can be done if it is a boycott? Is that clearly defined?

Mr. Cowling: That is just the point. I do not think it is, senator.

The Chairman: No, it is not defined.

Mr. Cowling: I do not know whether "boycott" has some kind of legal meaning or is a term of art.

The Chairman: It seems that every time we step into an amendment and another word is used the question arises as to its meaning and we are faced with the same situation here.

Mr. Cowling: I suppose a "boycott" denotes a situation in which something is done in order to bring someone into line and force them to do something, in this case applying to newspapers, whereas if an agreement were made on advertising in order to keep costs down, for example, and therefore keep the cost of the product down, that would not be anything to do with a "boycott".

Senator Cook: Why not? I am just being the devil's advocate for the moment.

The Chairman: The advertisement in question could be the type of advertisement that a newspaper or a group of newspapers might conclude is not in the public interest. However, if they refused to accept the advertisement I suppose it might still be said to be "boycotting" and, therefore, they would be guilty of an offence under section 32 in relation to trade, because this restriction of advertising occurs in the exemption section, 32(2), which provides as follows:

> Subject to subsection (3), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

Paragraph (f) of the "one or more of the following" in the bill is "the restriction of advertising or promotion". So if there is restriction of advertising or promotion, that would not enable the prosecution to succeed in a charge of an offence in relation to trade unless under the provisions of another subsection where it may be established that it has lessened, or is likely to lessen competition unduly.

In view of that I can understand what could be termed a justifiable boycott, as well as one which may have no good purpose, but this is just wide open, "a boycott", and we must consider it carefully.

The next amendment is section 32.2, relating to bid-rigging, at pages 26 and 27 of the bill.

Mr. Lewis: Mr. Chairman, in the first part of the amendment, in connection with section 32.2(1)(a), there is only one small change and that is the addition of the two words "or among". It is merely to clarify the meaning by improving the grammar. I hope we can skip that.

The Chairman: Yes.

Mr. Lewis: However, the second part, which is on the second page and is underlined, gives us a little concern. It is said there, in effect, that joint ventures now should be prohibited. Several briefs were submitted, including those presented before honourable senators, to the effect that joint ventures in many cases are a very important part of Canadian business. However, in endeavouring to amend this section, the wording gives us some concern, first as to the understanding of it and, secondly, as to whether it accomplishes the desired effect. One would think that if they wanted to exempt joint ventures, they would come out and say so. I think we all understand what joint ventures are. Their approach is that the joint venture should be permitted provided it is declared and open to the person calling the bids. I think this wording tries to indicate that this is what is meant by the drafters. However, I think there should be an easier way of drafting it. What do you think, Bob?

Mr. Cowling: I agree. Certainly I have difficulty with the words, "and accepted by the person calling for or requesting the bids." This would seem to indicate that if two or more people wish to make a joint bid, they would first have to go to the body that was calling for the tenders, whether it be a government, public body or private body, and say, "We are thinking of getting together and making a joint submission here. Will you agree with that?" They would not indicate to them at that point the terms of the joint submission. They would simply say, "We are going to get together on this. Do you accept that?"

If the party calling for the tenders says no, they could not do it. On the other hand, if they just got together and went ahead and made a joint submission in a sealed envelope, and when opened their bid was not accepted, it seems to me they might find themselves caught by the act at that point, because it might be interpreted then as an undertaking among themselves not to submit a bid, within the meaning of paragraph (a) of 32.2(1).

The Chairman: I think everyone in trade and business knows what is meant by a joint venture agreement. There are various ways of doing it. Perhaps several companies will get together and submit a joint bid, or perhaps a group of companies will get together and create a vehicle in which they will all have an interest for the purpose of making a bid. In the latter case, it might not appear that it was a joint bid.

Senator Cook: We have among our papers a suggested amendment.

The Chairman: Yes, and suggestions as to how it should be dealt with. I do not think we will pay much attention to this particular language. Now, on page 3—

Senator Cook: Tightening the screw.

The Chairman: Yes. Clause 15 deals with section 32.3 relating to prefessional and amateur sport. I think we can handle that very quickly. They propose taking out amateur sport from this section, and to write a definition of amateur sport. Where is that?

Mr. Cowling: They put it in the very beginning of the act. It would be new section 4.2. It is on about the tenth or twelfth page of the package.

Senator Cook: It is clause 2, page 4.

The Chairman: If you will recall, they were defining amateur sport. It was amateur sport when no remuneration was paid or received. We know that in hockey, for instance, and possibly in other amateur sport recognized as such in Canada and internationally, even though the players may receive remuneration, apparently if the league is recognized as playing amateur hockey, for instance, they can compete internationally. Under international rules, the other amateurs who are not paid do not lose their amateur standing because they are playing against professionals.

It seems to us that all amateur sport should be excluded, that you cannot draw this line. I explained what the situation is in Ontario, and honourable senators will recall that we had approximately 35 representatives of amateur sport appear before us. There are a tremendous number of people who devote their time to it. We are going to expose them to a form of regulation or supervision where the director or six people can get together and file a complaint that there is a violation under the trade provisions of the act, and they go through a procedure of investigation and everything else. So while the amendment recognizes that amateur sport should be excluded, they write a definition of amateur sport which really undoes the exclusion or exemption, and does it very materially.

Senator Walker: It should be redrafted.

Senator Laird: Have we given any thought to whether or not all reference to sport, professional and amateur, should be in this act?

The Chairman: Yes, and we shall hear from Mr. Eagleson tomorrow.

Senator Walker: It will be not entirely objective.

The Chairman: Well, you show rare insight, Senator Walker.

Senator Walker: Not rare. Anyone knows that.

The Chairman: You mean it is well known.

Mr. Cowling: It would appear that he agrees with Senator Laird's suggestion. He is suggesting that some form of regulation is necessary, as I understand it. He does agree with this bill—

The Chairman: That professional and amateur sport should not be in a bill of this kind. That agrees with what the amateurs have said, and with what Mr. Campbell has said here. He has gone through 40 pages to tell us what the evils are, but not to tell us how they can be corrected. If they can appoint an ombudsman, or someone like that, to supervise . . .

Senator Walker: Perhaps he is looking for the job.

The Chairman: Perhaps he is.

Senator Laird: Anyway, my solution is the simplest—to eliminate all sport from the act.

The Chairman: Yes. We have recorded that, Senator Laird. Now, section 34 on price discrimination.

Mr. Cowling: This section in the act is the one that would prevent you selling to different groups of purchasers at different prices, if I can summarize it that way. The only way it had been changed by Bill C-2 was to substitute the word "products" for the word "articles". As you know, the word "products" means articles and services under Bill C-2. In the proposed amendments they would go back simply to the word "articles". The proposal in this instance is to go back to the wording as it is in the present act. There is quite a lengthy explanation in this connection. Basically, the reason is that it was thought to be too difficult to compare the quality of services. "Like quality" is a factor in the application of this section. Whereas you can compare the quality of articles, perhaps, it becomes more difficult to compare the quality of services. As I understand it, it was felt to be just too difficult to have that section apply to services and, for that reason, it should be left as it is under the present act.

Senator Cook: If that were the test, they would scrap the whole act.

The Chairman: You will notice the comment goes for a couple of pages, at the end of which a change is proposed in section 34 by dropping subsection (4), which relates to the exemption in respect of newspapers, broadcasting and money lending. This appears on page 29 of the bill.

Mr. Cowling: Subsection (4) of section 34 would have been added by Bill C-2. It is now proposed that it be taken out altogether. For that reason, I did not familiarize myself with it to any great extent.

The Chairman: The provisions in the original act will simply remain.

Mr. Cowling: I do not believe there was anything on that specific point in the original act, Mr. Chairman.

The Chairman: If I am not mistaken, I saw a brief from Southam Press in which they were asking to have the original provisions remain in the act.

Mr. Lewis: That is right, Mr. Chairman. Subsection (4) of section 34, which they are now eliminating, was not in the original act. It was proposed in both Bill C-7 and Bill C-2, and now they are simply taking it out altogether.

The Chairman: You can imagine the submissions that would have been made in that respect. If you will turn to

page 29 of the bill, you will see the exceptions set out under subsection (4) of section 34, paragraph (a) dealing with newspapers and broadcasting, and paragraph (b) dealing with persons engaged in the business of lending money. Now it is propoded that that come out altogether.

Mr. Cowling: Yes, and that is in line with putting the whole section back so that it deals only with articles. Publishing a newspaper, operating a broadcasting undertaking or the business of money lending all involve elements of service and, since it has been decided they cannot deal with services in this section, it follows that the proposed subsection (4) would have to be deleted.

The Chairman: It could be that once the offence section is limited to articles, then the exemptions relating to broadcasting, newspapers and money lenders, because it is a service, are not covered by the bill.

Mr. Cowling: It is no longer necessary to have that subsection.

The Chairman: Next, we deal with section 34(3).

Mr. Cowling: The proposed amendment in this instance would replace that by adding. "association, credit union, caisse populaire or cooperative credit society". This has been done, according to the comment, to make perfectly clear that this provision does not apply to co-operatives which return net profits to members in proportion to their sales or to purchases from co-operatives.

The Chairman: But that is not intended to be covered by the bill. This particular amendment is needed to make that clear. Is that right?

Mr. Cowling: That is correct.

The Chairman: Next, section 36, misleading advertising. This is dealt with on pages 30 and 31 of the bill.

Mr. Lewis: Mr. Chairman, in this instance they are merely putting in the words which are underlined, "at which the product has been sold". The words in the act, I believe, were "previously charged". To make it more difinite, they have inserted the words "has been sold". This is a very minor amendment.

The Chairman: The words they use are, ". . . concerning the price at which a product or like products have been, are or will be ordinarily sold; . . ." It is not a substantial amendment.

Mr. Lewis: It is to cover a very small possibility, that being an indiscreet trade practice whereby someone could get around the act. They are simply trying to plug that loophole.

Senator Walker: And you think it is all right?

Mr. Lewis: Yes, senator.

The Chairman: Next, we turn to page 31 of the bill, which also deals with misleading advertising and what shall be deemed representation to public. Perhaps you can deal with this, Mr. Lewis.

Mr. Lewis: Mr. Chairman, I believe this is to tie the liability down to the actual person who is responsible and not to impose strict liability on someone who is only indirectly connected with the sale where there is misleading advertising. They have added the words, "to a person as ultimate user." It is more editing than anything else.

Mr. Cowling: Well, I think it goes a little further than that. It is a tightening of the bill rather than a relaxing. As the minister said when he tabled his amendments, some of them were to strengthen the bill and others were to relax certain provisions. This provision, I think, is designed to tighten the bill a little bit. If you had the words "to persons as ultimate users," then it would imply that the representations would have had to have been made to more than one person. Because it is singular, they can now take action even if the representation is made to just one person.

Senator Laird: Could this not give rise to some awkward situations with a clerk, for example, who is not aware of certain facts and, therefore, makes representations in error?

Mr. Cowling: Well, this goes back to the representations we had respecting "due diligence" being required in order to make an offence stick under this particular section. There are quite a number of proposed amendments to the misleading advertising section, and as we go along you will see that the minister has turned down the defence of "due diligence".

The Chairman: As honourale senators will recall, "due diligence" was the defence presented by Mr. MacIntosh of the law firm of Blake, Cassels, and in that connection we referred to the working papers of the Law Reform Commission dealing with strict liability. The minister, I think, through this amendment, is trying to get away from any possible application of "due dilligence." Of course, the only way you could have due diligence as a defence would be if you put it in the section.

Senator Laird: That is right.

The Chairman: Without it it is a strict liability. If you do what they prohibit you have no defence, there is no opportunity to defend yourself even though you may not have been directly responsible.

Mr. Cowling: Further on on that same page, you will see that some words have been added, the words "only," "so expressed" and "or contained." The purpose of these proposed amendments, as I understand them, is to exonerate a merchant where the material in question had been provided by somebody higher up in the chain.

The Chairman: I think we must have a good look at it. There was the reported case where Tamblyn's were prosecuted for misleading advertising. The judge in the first instance acquitted them. The case had to do with offering a roll of film if the customer brought in a roll of film to be processed. Apparently, on two different occasions investigators went in. The first investigator presented a roll of film, paid so much money, $7.30, and was given another roll. The second investigator went in later, presented a roll, was offered an extra unused roll, but said he did not need it, he did not want it, asked what he had to pay, and was told by the clerk $6. The obvious conclusion from that was that there was some element of cost in what was supposed to be given free. The judge in the first instance acquitted, but the Court of Appeal said it was a strict liability offence, "You did it. You are guilty."

However, they did look at the explanation by way of mitigation in deciding the amount of the fine. That is why we have been dealing with the question of these strict liability offences. There should be the element of due diligence available by way of defence. As it turned out, the

explanation offered in that case was that the clerk made this assumption on his own, but the Court of Appeal said he was the agent for the company.

Senator Laird: You may recall that Mr. MacIntosh indicated that the insertion of the words "due diligence" would solve a multitude of their problems which he raised.

The Chairman: That is right. We have the benefit in draft form of his suggestion in relation to these pertinent sections that create strict liability. He submitted that there should be a defence of due diligence open in a proper case.

The next one is on page 32, section 36, relating to misleading warranty or guarantee.

Mr. Cowling: You will recall that there were quite a number of representations to the effect that this subsection would cause a lot of confusion because it involved provincial law on warranty. Those representations have been responded to 100 per cent, because subsection (4) has been dropped altogether by virtue of the proposed amendements.

The Chairman: We do not need to spend much time on that.

We then go to section 36.1, relating to tests and testimonials.

Mr. Cowling: I think this is a very technical change, and I do not know that we need to spend any time on it at all. They have just substituted the words "to the product" for the word "thereto."

The Chairman: It is just to clarify the situation.

Mr. Cowling: That is right.

The Chairman: It does not change anything.

Mr. Cowling: I do not think so.

The Chairman: We go to pages 33 and 34, section 36.2. This relates to double-ticketing.

Mr. Cowling: That is coming right out.

The Chairman: They delete subparagraph 36.2(1)(d). That is the paragraph at the bottom of page 33.

Mr. Lewis: This is merely to take out the reference to catalogues. Companies from time to time, from month to month, make price changes. Before, this appeared to be double-ticketing in the catalogue, if you had one price, crossed it out and submitted another price the next month.

The Chairman: They have eliminated that.

Mr. Lewis: It is eliminated completely.

Mr. Cowling: I think that probably responds to a point made by Senator Buckwold. I mention that for the record so that he will perhaps pick it up and see if it is the same one I am thinking of.

The Chairman: Then we move to section 36.3 on page 35 of the bill. This does recognize the existence of some regulation in the province on pyramid selling.

Mr. Cowling: It is certainly true that more and more provinces, usually in their consumer protection acts, are developing regulations of this kind of distribution practice. I do not know that we had any representations on it, but there it is.

The Chairman: We have not had any on pyramid selling.

Mr. Lewis: There was a speech by the Honourable Mr. Welch in Ontario in May or April, when Bill C-7 was produced, to the effect that this should be left to the province because they already had this legislation under way.

The Chairman: They still keep their prohibition in the bill, but they provide:

> This section does not apply in respect of a scheme of pyramid selling that is licensed or otherwise prohibited by or pursuant to an Act of the legislature of a province.

They have recognized anything that could be called a submission that has been made to us.

Mr. Cowling: That is right. It is the same thing for referral selling.

The Chairman: Section 36.4 relates to referral selling, also on page 35. They have done the same thing; they have recognized provincial legislation. Where that exists, the section is not effective. Section 37.1, on pages 36 and 37 of the bill, deals with sales above the advertised price.

Mr. Lewis: This is section 37.1. These are additions, two new subsections, but they cover a number of items which were not in the previous bill and they all seem to be on different subjects. The first one, which is subsection (3), the underlined part, deals with advertisements that appear "in a catalogue in which it is prominently stated that the prices contained therein are subject to error if the person establishes that the price advertised is in error". This gives the department store owner an opportunity to retract the price by publishing a notice or advertisement in his window that the price has been changed—which is a logical thing.

Mr. Cowling: I do not think that it meets the point. The catalogue may be prepared quite a long time in advance, and to be of any use the catalogue has to have prices in it. In the days of inflation, prices might go up by the time somebody had placed an order and the issuer of the catalogue would be caught, would he not, because it would not be a question of an error then?

The Chairman: The object is to remove the strict liability of that provision, because you do have an opportunity to repent and correct. Is that right?

Mr. Cowling: I think the point that was made regarding catalogues was that unless you could provide that the catalogue stated that prices were subject to increase, then the issuer of the catalogue would be inclined to put in a much higher price than was necessary, in anticipation of prices rising during the currency of the catalogue.

Senator Laird: That would cut down the sales.

Senator Macnaughton: And the opposite is happening today.

Senator Walker: What are they doing today?

Senator Macnaughton: Lowering. The sales are off.

Mr. Cowling: Inflation is over!

Senator Macnaughton: I did not say that, sir.

The Chairman: The section does not apply to the type of case we are talking about, so at least there is some reduction in the strict liability provision.

Mr. Cowling: That is what the comment says. It says:

> Representations have been received to the effect that in the case of sales above advertised prices, the Bill should be amended to eliminate the strict liability imposed by the provision as drafted, and to accept an honest-error defence. It is not possible to accede to these representations because experience shows that it would rule out enforcement in most cases.

That is quite an admission. It continues:

> However these amendments are being proposed in order partially to accommodate the representations by going as far as possible in the direction of incorporating an honest-error defence.

The Chairman: I think the Investment Dealers' Association made submissions on this.

Mr. Cowling: There is something on securities there in (c).

Senator Cook: Yes, in (c).

Mr. Lewis: This is covered in (c) which says:

> (c) in respect of the sale of a security obtained on the open market during a period when the prospectus relating to that security is still current.

One question, or course, is what is meant by the words "is still current." When is a prospectus current? I would think it generally would mean until the whole issue has been sold to the public, which might be a month or two or three years.

The Chairman: May it not be that a prospectus is current until such time as you have such facts that it is necessary to file an amending prospectus?

Mr. Lewis: That is possible, sir.

The Chairman: Yes.

Mr. Lewis: I think we could go on to subsection (4). Now we are back in advertising again, as opposed to the security market. This is giving the retailer or the seller the opportunity to limit the market within the advertisement.

The Chairman: Yes.

Mr. Lewis: It says:

> . unless the advertisement defines the market more narrowly by reference to a geographical area, store, department of a store, sale by catalogue or otherwise.

The Chairman: So there is some measure of limitation there.

Mr. Lewis: He might have one price in one area and another price in a different geographical area or even in a different store or a department.

The Chairman: We come now to section 37, relating to bait-and-switch selling. You are proposing to change subsection (2) by dropping the words "or cannot". Does that sound like a serious change?

Mr. Lewis: No. They are merely trying to plug the loophole of an unscrupulous dealer advertising an article at that price when he actually does not have any in stock. He could claim that he could go across the street to his competitor and buy some. It is really to plug that loophole.

Senator Walker: That is a good addition, is it not?

Mr. Lewis: I think it is.

The Chairman: All right. We will move along to the next one which is in regard to subsection (3) of section 37, dealt with on page 36. This deals with the defence that is available.

Mr. Cowling: I think the intent again here is to take some of the sting out of the statutory offence.

The Chairman: Yes, it enlarges the area of defence, does it not?

Mr. Cowling: That is right.

The Chairman: I think at this time that is all right. Later we may wonder whether it goes far enough or not, after we have heard all the submissions.

Mr. Cowling: Yes.

The Chairman: The next one is section 37.2, dealing with promotional contests.

Mr. Lewis: I think this is to permit the promoter of the promotional contest to limit his area of responsibility for estimating the chances of winning. Previously it indicated that the promoter more or less had to tell the investor in the scheme or the buyer of the promotional ticket what his odds or chances were of winning. This can be very difficult, if not impossible.

The Chairman: Is there anything else in it?

Mr. Lewis: No, sir.

The Chairman: We turn to section 38, relating to price maintenance. There are a lot of words there, but the change is a small one but it might be important. It is the insertion of the word "low."

Senator Walker: That is at the end of subsection (1) of paragraph (b)?

The Chairman: That is really loss leaders, isn't it?

Mr. Cowling: No, that is where they are describing the offence, I think, senator, in refusing to supply someone because he is not selling at a price which the manufacturer or supplier considers high enough.

Senator Cook: Somebody who is discounting, for example.

Mr. Cowling: That is right. In order to clarify that, they have put in the word "low" in relation to pricing policy.

In subsection (2) they have added something to paragraph (b). This is the subsection that provides that the offence does not apply where there is a question of affiliated companies and so on, and they have added the principal and agent.

The Chairman: They include principal and agent as being within the affiliation.

Mr. Cowling: That is right. Subject to what we discussed before on consignment selling, I suppose. I think another small one but perhaps important again, Mr. Chairman, is in subparagraph (3), where it says:

> (3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of any proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion . . .

Up until now the courts have held that it is all right to suggest a resale price provided you do not do too much about enforcing your suggestion. Bill C-2, by the addition of subsection (3), would now provide that, although you can still suggest, you have to make it clear at the same time that he is not in any way bound. However, the wording that they used was pretty strong. They said, "any evidence", and they have replaced that with "any proof", for the obvious reason that "any evidence" might have meant any scintilla of evidence, no matter how unsatisfactory.

Senator Laird: That is a good amendment.

Mr. Cowling: That is a good amendment, yes.

Senator Walker: The question remains what "proof" means.

Mr. Cowling: That is right.

The Chairman: The subsection at the bottom of the page, subsection (6), has to do with the offence. That is the refusal to sell or to supply.

Mr. Lewis: They are merely adding the word "low" to make it "the low-pricing policy", in order to emphasize the low-pricing policy.

Mr. Cowling: And again that is consistent with the earlier proposed amendment.

The Chairman: Down at the bottom of that page you have 7.1.

Mr. Cowling: That is exactly the same also, Mr. Chairman, as the one we discussed earlier. It is a further definition of control.

The Chairman: Oh, yes.

Mr. Cowling: And I think it is in exactly the same words as the other one.

The Chairman: That goes in the same category as the other one we were talking about. And the next one is section 44?

Mr. Cowling: That is right.

The Chairman: That is on page 40.

Mr. Cowling: This is an important amendment. The Criminal Code provides that summary conviction proceedings must be instituted within six months, whereas for proceedings by way of indictment there is really no time limit. So there was the situation that if the Combines Investigation people only discovered something, say, seven months after the of fence had been committed, they were then limited to proceeding by way of indictment. The important point there is that the act provides in some cases that where the proceedings are on an indictment the penalty is mandatory imprisonment, whereas if it had been by way of summary conviction the judge would have had the option of giving a fine or imprisonment.

It seemed kind of absurd that this could be related merely to the question of time. In other words, simply by not catching it in time the prosecutor would have had to proceed by way of indictment and the accused would have had to be imprisoned if convicted.

Senator Laird: That makes sense.

Mr. Cowling: So they have changed that from six months to twelve months.

The Chairman: They are now allowing a year instead of six months.

Mr. Cowling: I think an important point in the comment here is that it says that cases

> . . . under the combines Investigation Act are very often exceptional in that the time required to receive the complaint and investigate the case is longer than six months. The proposed sub-section 44(5) would extend the time limit to one year. This is quite reasonable in the circumstances and it would not be unique.

The Chairman: But it quite often takes longer than one year.

Mr. Cowling: Well, one suggestion I heard was that if the Combines people felt that one year was sufficient, then there should be a time limit put on the indictable offence as well as on the summary conviction route of one year for both.

The Chairman: It does not interfere with their choice if you put year's limit on each one.

Senator Walker: Isn't there a year now for an indictable offence?

Mr. Cowling: I think it is more than that, senator, but I will check that point and have the answer for you.

Senator Walker: Surely a year should be sufficient to find out, shouldn't it?

Mr. Cowling: Well, as we know, some combines investigations have dragged out for almost ten years. Am I not right on that, Mr. Chairman?

The Chairman: Well, from the number that I am familiar with, after seizures, inquiries and getting down to the indictment, it could well be a year and a half to two years later.

Senator Walker: You could not described in great enough detail the indictment, could you, then? You would not have the necessary information, if it was a big investigation.

The Chairman: We are not trying to interfere with the efforts of the department to gather the information they think is necessary, but it really gets bogged down in the course of the inquiry. They seize documents and then they are required under the statute to deliver the documents seized within a period of time. I do not know whether it is 30 or 60 days. Then, in the meantime, they make Xerox copies which are given the same status as the originals. Then they study them and have an inquiry and that takes a long time, especially if they seize documents going back, as they have in a lot of cases, as far as 20 and 30 years. They go back 20 and 30 years and put their finger on you and say, "Well, you were a bad boy 30 years ago, and you did not pay any price for it, so maybe now you should pay the price and be indicted." The year is better than the six

months. I think the perfect situation would be if you could have a time limitation on both the summary conviction proceedings and on the proceedings by way of indictment. I would think in those cases you would have to talk about more than a year, though.

Mr. Cowling: I would think so.

The Chairman: We just have one more item. Section 45.3 on page 43 of the bill. This deals with the relating of the cross-examination and the statistical evidence. You remember we discussed that quite thoroughly.

Mr. Cowling: I think the objection has been met by these amendments.

The Chairman: Yes. They have met the objection, so we cannot complain about that.

Mr. Cowling: In other words, cross-examination of the statistician is now no longer within the discretion of the court; it is a matter of right.

The Chairman: Yes. Well, I want to thank you very much for your appearance and your patience. We will now be better able to deal with the situation tomorrow. Do not forget that in the afternoon we are hearing the Chamber of Commerce in connection with the income tax amendments, and in the morning we have three delegations on the Combines bill. I hope we find time to deal with all these matters. I have been cleaving to the idea that before the Christmas recess we should make a progress report. That would not discuss anything, but would simply recite what we have done—that is, heard so many delegations, considered so many briefs, found that there were some people who did not ask to appear, some who have asked to be heard whom we will not be able to hear before the Christmas recess, and so on.

Senator Macnaughton: I think we should make that report, if it is possible, and just get it on the record.

The Chairman: I was hoping to be able to present it, say, next Tuesday or Wednesday. We will therefore prepare a draft in the meantime and confer with you. It will be a recital of all the steps that we have taken and the things that we have done. It will not pretend to discuss the merits of the bill. I think it might be presumptuous to do that at the moment.

Senator Macnaughton: Mr. Chairman, perhaps this is the time to thank our advisers and experts. They have put in a lot of work.

The Chairman: Well, this is part of the report. We will acknowledge their services in the report.

Senator Macnaughton: They may never see that report, whereas they see and hear us now.

The Chairman: I told Mr. Cowling we would be sure to see to it that that got into the report.

Senator Walker: They will be here later on, will they not?

Mr. Cowling: If you want us, senator. Thank you very much.

The Chairman: We will adjourn until tomorrow morning.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 14

WEDNESDAY, DECEMBER 11, 1974

Eighth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

28506—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, December 11, 1974
(17)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to further consider the following:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*), Blois, Buckwold, Connolly, Cook, Desruisseaux, Flynn, Haig, Laird, Macnaughton, Sullivan and Walker. (12)

Present, not of Committee: The Honourable Senators Graham and Petten. (2)

In Attendance: Messrs. R. J. Cowling and John F. Lewis, C.A., Advisors.

Witnesses:

Institute of Canadian Advertising

Mr. L. S. McMahon, President;

Mr. G. S. L. Anderson, First Vice-President;

Mr. K. W. McCracken, Legal Counsel; and

Mr. J. N. Milne, Managing Director.

Canadian Federation of Insurance Agents and Brokers Association

Mr. J. S. Kirby, President;

Mr. G. D. Butler, Vice-President;

Mr. Wayne McCracken, Counsel; and

Mr. Fred G. Funston, General Manager.

National Hockey League Players' Association

Mr. R. Alan Eagleson, Executive Director;

Mr. Michael L. Cannon, Director of Operations; and

Mr. Howard Ungerman.

At 12:50 p.m. the Committee adjourned until 2:30 p.m. this day.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, December 11, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have three groups here this morning, and we are going to hear them in the order in which the briefs were presented. The first is the Institute of Canadian Advertising; the second, the Canadian Federation of Insurance Agents and Brokers Association; and the third, the National Hockey League Players' Association.

Of the first group, the Institute of Canadian Advertising, Mr. L. S. McMahon is the President. Mr. McMahon, would you come forward, I believe you are going to make the opening presentation. With you you have Mr. Anderson, First Vice-President, Mr. McCracken, Legal Counsel, and Mr. J. N. Milne, Managing Director.

Mr. L. S. McMahon, President, Institute of Canadian Advertising: Mr. Chairman, honourable senators, before getting down to the concerns that we have with Bill C-2 perhaps I should introduce my colleagues so that you will know who is who. On my immediate right is Mr. K. W. McCracken, Legal Counsel, then Mr. J. N. Milne, Managing Director, and then Mr. G. S. L. Anderson, First Vice-President of the Institute of Canadian Advertising and he is also President of Ronalds-Reynolds & Company Limited. My role is President of the Institute of Canadian Advertising and I am also President of D'Arcy-MacManus & Masius Ltd.

Mr. Chairman and honourable senators, thank you for providing the Institute of Canadian Advertising with the opportunity to appear before you and to outline some of our concerns with Bill C-2. As you all know, we made an intervention in February, 1974, and we recently supplied copies of it in both English and French to your committee.

If it meets with your approval, we would like to describe just briefly our concerns with Bill C-2. As we indicated in the intervention we have filed with you, our organization represents advertising agencies operating in Canada; we do not represent advertisers. The function of the advertising agency is to plan, create and place paid advertising in the mass communications media on behalf of clients who include manufacturing and business firms of all types and sizes, institutions, associations, political parties and governments. You will see in our intervention that we were concerned in two respects with the price discrimination provision in the bill. We believe that the amendments to that section which have been released by the minister successfully answer our problems so far as that section is concerned.

The Chairman: You are referring to the amendment which changes "products" to "article" and thus eliminates "services" from the scope of that provision?

Mr. McMahon: Yes, sir. We continue to be extremely concerned with the fact that the misleading advertising provisions of the bill impose strict liability on an accused. We feel that this places an advertising agency in an impossible position. No matter what steps an agency may take to ensure that the material it produces is accurate, and within the law, if an error occurs, for whatever reason, it has no defence.

In our intervention we have reproduced two alternative sections which we put forward as a solution to this problem. One is based on due diligence, and the other is based on the exercise of reasonable care. Our suggested defences are drawn from existing statutes, and in this connection I refer you to pages 4 and 5 of our intervention. Some of the case law in the area of misleading advertising has used the standard of the credulous man, but we feel that the applicable standard should be a reasonable one that would permit people preparing advertising material to be able to determine within clear limits what is and what is not permitted by law.

The Chairman: If I may interrupt you for a moment, this strict liability provision that you have been talking about is covered quite extensively in the working papers of the Law Reform Commission. Their recommendation for consideration by the government et cetera was that in strict liability provisions there should be the defence of what they call "due diligence". If there was a qualification of that kind so that it would be open to the person being proceeded against to show that all due diligence was exercised and therefore there was no negligence on the part of that person if error crept into the advertising, then that would meet your position?

Mr. McMahon: Yes, and I think that would be extremely helpful to us.

The Chairman: Is there anything short of that that would meet your difficulty? I realize that another way of dealing with it would be to eliminate the entire section, in which case you would not have any trouble at all. But let us forget that for a moment. Is there anything short of due diligence as a method of defence to any such order that you have to suggest?

Mr. McMahon: Let me turn to the brief, if I may, on that point. I am referring now to the bottom of page 4 and the top of page 5 of our brief. Perhaps I should ask my colleague, our barrister and solictor, Mr. Wayne McCracken to answer that question.

The Chairman: That provision you have in your brief on page 4 and on part of page 5 really embraces the doctrine of due diligence, so it seems that if you are to get relief from

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the strict liability provision you must get it via due diligence.

Mr. McMahon: I would think so, sir.

The Chairman: We have had quite a number of discussions on that, as you will see if you look at our *Proceedings*, and we have also considered a number of cases where a decision has been made on the basis of strict liability and where the facts were such that if a defence of due diligence were open there would not have been a conviction. So we are fully aware of those factors and of their importance.

Mr. McMahon: Well, I think, sir, that if due diligence were provided for as part of the act we would be quite happy with that. We are trying to take a reasonable posture on this.

The second area of concern, then, to get back to our opening remarks, is with misleading advertising, and we have five points in total. We could take them one at a time and answer them individually or I could run through them. However, if you would like to deal with them one at a time that might be easier.

In the area of misleading advertising some of the case law has used the standard of the credulous man. We feel that the applicable standards should be reasonable and should permit people preparing advertising material to be able to determine within clear limits what is and what is not permitted by the law. We submit that the credulous man's standard makes it virtually impossible to prepare an advertisement which will comply with the law. In our intervention we suggest that if a significant majority of the target audience—that is, the segment of the public to whom the representation is directed—is not misled by the representation, a court should hold that no offence has been committed. A proposed draft section reflecting that suggestion is set out in our intervention. Our point is not that a significant majority is the only test. In fact, it could be a significant minority, or it could be a test of any reasonable number of people. I guess the point is really that some test should be used to determine whether or not people have been misled.

Before going on to the next point, if you wish we could have questions or discussion, or we could proceed with the other points.

The Chairman: Maybe we are anticipating a bit, because in effect what you are suggesting is a defence available even in relation to the misleading advertising.

Mr. McMahon: I do not think so, sir. What we are saying here is that if an advertisement is placed in a newspaper, on radio, TV or any of the other mass media, there is no way that advertisement can be properly understood by the total readers or viewers of that media. Some will read it casually, some at a glance, and even to those who read it thoroughly, that which a person intending to communicate is not always what perhaps is read by the individual. What we are suggesting is that a target audience within any media to which the advertisement is directed should really be the test or the basis on which a judgment is made.

The Chairman: What you are saying is that if the segment of the public to which the advertising is directed is a sophisticated segment, then the measure of whether it is misleading or not should be in terms of that sophistication.

Mr. McMahon: Yes, sir.

Senator Laird: Is that not a pretty subjective test?

Mr. McMahon: I do not think so, sir. In all advertising, usually there is on paper for the advertiser, by the advertiser or by the agency in conjunction with the advertiser, material that sets out who the target audience is, what the objectives are and what strategy will be employed to meet those objectives. That evidence would always be available, and it does spell it out should there be a case of what appears to be misleading advertising. I think if that were done, if we had a target and that was the base, it would be a reasonable test, and I think it would serve the purpose which the committee is attempting to achieve.

Mr. K. W. McCracken, Legal Counsel, Institute of Canadian Advertising: This kind of approach would not really be a precedent. In the area of children's advertising presently in Quebec, as you are probably aware, there are various prohibitions relating to advertising directed to children, and some administrator or court must reach a decision, on looking at an ad, whether it is directed at children. Of course, the same kind of criterion is set up by CRTC in relation to children's advertising. It is not unprecedented to require a determination as to the targets of advertising. I refer to children's advertising in Quebec.

Senator Laird: That is comparable to censorship, is it not?

Mr. McCracken: I prefer not to comment on the position of the Quebec government.

Senator Cook: In the fine analysis, does it not really come down to what the judge thinks, no matter whether you call it credulous, sophisticated or anything else?

Mr. McCracken: No question about it. The problem we are raising is that some judges appear to be using a fictional standard, just as the reasonable man, as we all recognize, is a fictional standard. The standard they are using is that of the credulous man. Again, they are unfortunately applying that, not to adversiting aimed at the world, but also to advertising which is selling a more sophisticated product perhaps, and certainly is not trying to reach the least understanding, the least educated person in the community.

Senator Cook: I agree, but is it not fair to say, on the other hand, that some advertisers are inclined to let their hair down and be a little extravagant?

Mr. McCracken: Yes, and I certainly would not suggest any kind of standard that would permit that kind of advertiser to escape responsibility.

Senator Cook: I agree it is a difficult point.

Senator Walker: With all your computerized standards, percentages and so on, the way you work out advertising, have you figured out what percentage of the population is the credulous man? I include women, of course.

Senator Cook: If we do away with the test of the credulous man, what is going to happen to the ballot box?

Senator Walker: What will happen to advertising?

Mr. McMahon: Certainly, all segments of the consumer market are important to advertisers, but it varies according to their particular need. I think this area we are suggesting could be the basis of a test. Very few advertisers run an ad to the total population. A manufacturer who is selling ladies' garments, for example, is not going to use

language which will be suitable to men. I think the same could be true of a highly technical product that might well find it place in the pages of, say, a paper like the Montreal *Gazette* or the Toronto *Globe and Mail* business reports, yet a great section of that audience would not really take any interest in that product, and they might well misunderstand what is being said to that target audience.

Senator Cook: The ones who misunderstood the ad would scarcely be consumers of the product, would they?

Mr. McMahon: A consumer is a person who has need and uses that product.

Senator Cook: In that case you would expect him to understand the ad, would you not? If he was an actual consumer and user of that product, you would expect him reasonably to understand the ad.

Mr. McMahon: Yes, we would.

The Chairman: What you are suggesting is that there should be a provision in the bill on this point that would say that the commission, in considering any application presented by the director to the commission, should in reaching a conclusion have regard to the segment of the area, or the people in the segment, to whom the advertising is directed, and that they should determine whether that segment is sufficiently sophisticated not to be misled. Is that the only suggestion you have to make on that point?

Mr. McMahon: On that point, yes, sir.

The Chairman: How would the commission determine the segment to which the advertising was being directed? Would there be something in the form of an address of the advertiser, such as "Attention So-and-So"? How would you go about it?

Mr. McMahon: For example, in the self regulation of the industry currently, through the Canadian Advertising Advisory Board and its arm, the Advertising Standards Council, there are complaints arising from the consumers and/or competitors of a product which are processed through that body. That body is made up of very able representatives from the Canadian Association of Consumers, of members of the business community, and of people from the advertiser and agency section. Those complaints are dealt with in a very objective and, I think, fine way, so that any complaint that has a part in it that is misleading is understood by that group, and I would think, sir, that the judge would have available expert advice from many sectors of the community, including representatives from the Canadian Association of Consumers. If, on the other hand, it was a highly technical product, I would think there would be much help available from other witnesses who could be picked from the business section of the market. I think it would be one that could be handled quite readily by a court, just as is currently being done, and I think very well done, by the Advertising Standards Council.

The Chairman: Yes. All right. Any questions on that? If not, proceed, Mr. McMahon.

Mr. McMahon: Thank you, sir, the third area of concern within ICA is that we have misgivings with respect to the provisions contained in subsection 36(5) of the bill directing a court to have regard to the general impression of an advertisement, as well as the literal truth of that advertisement. In our intervention I draw your attention to page 4, paragraph (c). We do not believe that the government has lost any cases because a court acquitted an accused on the grounds that an advertisement was literally true, although the general impression of the advertisement was misleading. In other words, we do not feel that the experience in the courts shows that the subsection is necessary. However, if it is included in the bill, and advertising agency, in preparing an advertisement, must in some manner ascertain what the general impression of the advertisement would be, say, to a casual reader, or to someone who only glanced at the advertisement.

We suggest, sir, that there is no reason to cloud the analysis of legality of advertisements by including this provision.

The Chairman: Well, the only comment I would make there is that if, to date, the courts have had no difficulty in determining the nature and scope of the advertising in order to decide whether it is misleading or not, they have not encountered any difficulty in distinguishing the literal meaning from the general impression that may be conveyed, apart from that literal meaning. If the courts, therefore, have not encountered any difficulty, in your experience, in the application of this section, all this subsection (5) on page 32 is doing is affirming, really, what the law has already recognized as the approach that should be made to a determination of whether the advertising is misleading. In other words, they look at the over-all picture. You are not suggesting that it should be limited to just the liberal meaning?

Mr. McMahon: Mr. McGracken, what do you think of that?

Mr. McCracken: Our concern, Mr. Chairman, is the direction to the court. You have stated yourself, and repeated, our assertion that the courts have not had any difficulty to date. I am concerned, as a lawyer who works in the advertising area, with this express direction to a court. I feel that certain courts, in certain cases, may, because of this direction, adopt a different approach to advertising cases from the one they have adopted in the past. In the past, having viewed the general impresssion—and I am talking psychology here, in part—a court may well have used the general impression as a basis for whatever determination they may have formulated. However, with a statutory direction that they shall take in account the general impression, the general impression itself may become the subject matter of extensive evidence. In my judgment this is a section which can cloud the analysis of the impact of an advertisement, and is not necessary.

The Chairman: I am sure the art of advertising has reached a stage where, so far as the statements made in the advertising are concerned, the literal meaning is not misleading; but in looking at it in the over-all, you might be able to say, "Yes, that is true. That is the literal meaning, but there is a general over-all impression that is likely to be made that may be misleading." Should that be in issue?

Mr. McCracken: No question about that.

Senator Cook: After all, you could have an advertisement only a part of which would be words, and a large part would be pictures, which would in themselves make up the general impression, aside from the literal meaning.

Senator Walker: I would think this could help you on occasion, because there may be a lot of matters on which the court is in some doubt, when the over-all picture is that it has not been false or misleading in a material respect. It

has not done you any harm so far, and it is in fact a yard stick for you to follow. You have not had any cases against you involving this sub-section. I think this would be a help for you if it were left just the way it is. Do you not agree?

Mr. McCracken: I am afraid of the section. I do not think that our submission in this regard is as critical as the former submissions we made, but I am very concerned. I repeat that part of my concern is due to the fact that I, like other lawyers, have to examine advertisements ahead of time, and I do see myself confronted with this section, putting the following question to myself and to my clients: "My general impression of this advertisement is such and such. I do not think it is misleading. That is a personal view. However, a certain judge might think that the general impression is such and such."

In other words, a general impression, obviously, can be very subjective, and I am therefore concerned, as I said, with the express direction to every judge in every advertising case to direct his mind expressly to this aspect. However, I agree that in certain cases it may be helpful. That is in answer to your specific question, senator.

Senator Walker: That is why they have lawyers. That is why you come in handy. This is so simple. They ask you for your opinion on it, and I think it is important that you should be able to give your opinion, because after all, that is the be-all and end-all of all these strictures. It has done you no harm so far, in fact, it has done a lot of good because it has been a yard stick to follow in advising your clients.

Mr. McCracken: That is right.

Senator Walker: I would suggest that it should stay the way it is. That is my opinion, of course.

The Chairman: Well, I do not want to decide what recommendation we are going to make at this moment. We will take this under consideration. However, the assumption seems to be, so far, that the direction is going to be misleading, and that is why they are afraid of leaving the conception of "impression" as an element.

My own view, for what it is worth, would be that any court looking at the advertising would look at it over all, and I think that is the way they should look at it.

Mr. McCracken: Yes, sir.

Senator Walker: It can be a protection to them in that respect, can it not?

The Chairman: It could be a protection to the advertiser as well as to the public.

Mr. McMahon: I might add to that, Mr. Chairman, that in the Advertising Standards Council, of which I have been a member, and on which I have served, I have seen hundreds of cases processed. Generally speaking the complaints deal with some area of an advertisement in particular, and not the general impression. Where the Advertising Standards Council directs its thinking to seeing whether or not a single part, or a picture that may be involved, or some other aspect, or a combination thereof, are misleading, this is where they are able to cope with it in quite a specific way. Where we hit the general impression part of it in our discussions—and these are with quite expert people—they have trouble.

Another observation along that same line is that many advertisers today are pre-testing advertising, both in the broadcast field and in print. The total advertising section is not that sophisticated; in fact, costs would not permit it, and costs would run as high as $2,000 per advertisement. For many advertisers this would not be practical. When they do this testing the advertisements are tested by means of a panel, and the various parts of the message are looked at to find out what that particular ad is telling them in general; but where it gets into specifics we find that the message offers less in the way of confusion than considerations concerning the general impression, where we find there is more of a variable. I guess it is a question of just what the reader chooses to take out of it, and so it is harder to find uniform opinion on general impression than it is on a specific element. This is why we are suggesting that this would perhaps cloud the ability of the court to make a clear decision if it were left in. We do not think it would help the courts, and that is what we are for, sir.

The Chairman: All right. Now, the next item.

Mr. McMahon: Yes. The fourth of our five concerns deals with retail sale price maintenance, and here I would direct your attention to the bottom of page 5 in our intervention. Our general comments in regard to that section are these: That in the area of retail sale price maintenance, the ICA feels that sub-section 38.4 is impractical and undesirable. Price information, in our opinion, unless that information is misleading, is a most important piece of information for a consumer in making purchasing decisions. The ICA therefore suggests that ticketing commodities with suggested retail prices and advertising suggested retail prices should be permitted. As our submission indicates, this is particularly important in situations where individual retailers do not normally advertise prices, probably because of cost factors, and, therefore, price information is usually communicated by manufacturers. The ICA feels that the phrase "suggested retail price" makes it clear that the retail price is only suggested, and we do not know how that fact can be stated any more clearly. We also do not know how the direction in clause 38(4) of the bill, that "the price is so expressed as to make it clear to any person to whose attention the advertisement comes," can be complied with. We do not think it is possible to guarantee that any person will clearly understand that a price is merely a suggested price.

For example, if a person was looking for a Mercedes car, he might not generally be aware that the price is in the twenty thousands. Today the Ford Motor Company has introduced a new car—I think it is called the Granada—and in its advertisement it makes profiles showing the Mercedes and other fine cars being almost identical to the Ford car. Yet the price factor on the new Ford car is in the $6,000 bracket. I think it is important that the reader, when he is presented with the information in the advertisement about a new product such as that, is aware of the fact that the price is in the $6,000 bracket and not in the $26,000 bracket.

The same thing could be said of almost any product. For example, Timex. Part of the great attractiveness of that product to the market is the fact that they are able to say to people that they can get a dependable timepiece at a very low price, and they have suggested retail prices. That in no way commits the retailer to sell at that price. In fact, I think it encourages the consumer to look for a price something lower than whatever is suggested.

The Chairman: Did I understand you to say, Mr. McMahon, that in the advertising of a product, the advertisement

which the members of your organization may prepare and cause to be published would not contain any price references?

Mr. McMahon: No, Mr. Chairman. What we are suggesting is that advertisements be permitted to say, "Suggested retail price," and whatever the dollars are according to the particular product being advertised. We think this is helpful information to the consumer in making his purchase.

Mr. J. N. Milne, Managing Director, Institute of Canadian Advertising: We should explain here, Mr. Chairman, that we are talking specifically of national advertising, advertising which appears nationally on television programs or in magazines which have national coverage. We are not referring to the retail advertising by the store, which is obviously price advertising. When we state the price here our concern is on a much broader public range.

The Chairman: The language of subsection (4) of section 38 on page 39 of the bill provides an "unless" there. It says:

> ... unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

Say the advertising specifically says, "This is a suggested price for the resale and it is not a price which must necessarily be followed"?

Mr. McMahon: Mr. Chairman, you have added a phrase to the "suggested retail price," which is currently in popular use, namely, "must not necessarily be followed." I think for the credulous man that would be helpful. For the average reader it would not be necessary, because usage has made the shorter statement understandable. In any case, I would think that so long as there was something like that provided for, it would be of help to consumers.

The Chairman: The connotation of "suggested" is surely that it is not more than that.

Senator Walker: It is pretty broad, isn't it?

The Chairman: Yes, it is. The "suggested price" does not indicate that that is the price at which the article is sold.

Mr. McCracken: I agree with your statement completely, Mr. Chairman. My understanding, from discussions with the administrators of this act, is that they do not agree. They feel it is not enough to say "suggested retail price" or "suggested list price." This provision, of course, appears in the resale price maintenance section of this act, and, without purporting to be a spokesman for the department, my understanding is that they are concerned that this word "suggested" over the years has taken on a connotation of being the price. That has led them to insert this subsection.

Our submissions are really twofold. First, we disagree with that position. We feel that the use of the word "suggested" is within the limits which are implicit in advertising in terms of physical space, if nothing else, or the length of time in a commercial. To require an extensive explanation of what the word "suggested" means is not practical. That is one submission. The other submission relates to the statement that the explanation must make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

Senator Cook: What is the evil the act is trying to prevent?

Mr. McCracken: Resale price maintenance, sir. The department, as I said, believes that the phrase "suggested list price" has taken on a connotation in the minds of retailers of commodities which has in effect led them to sell at that price. If I can paraphase it, the department fears that the phrase "suggested list price" over the years has become a signal that that is the price, and has influenced merchants to retail at that price and not to cut prices. Of course, we disagree with that. Timex watches, in our judgment, is a perfect example. Their prices are cut all over the place. I believe that is the evil they are attempting to aim at, senator.

Senator Cook: One could see that the consumer would not bargain very much over the price of a watch, but he would certainly bargain over the price of a car, and the suggested retail price might be helpful to him in that case.

The Chairman: In subsection (4) on page 39 there would seem to be room for the advertising agencies to avoid any of the connotations that they think have become attached by the public to the word "suggested". There is language they can use, surely, without destroying the effectiveness of the advertising, to bring themselves within the "unless" provision in the subsection.

Mr. McCracken: I have two observations in that regard. First, the section states that whatever method one uses to try to comply with the section, he must succeed in making it clear to any person to whose attention the advertisement comes that the product must be sold. It has certain overtones of the credulous man problem.

The Chairman: Just on that problem, do you not think the court would apply the doctrine of the reasonable man?

Mr. McCracken: I would hope that the court would. The statute uses the word "any," and that is the point which concerns us.

The Chairman: It would be fantastic, it appears to me, to assume that the view of Joe Doakes, who belongs in a category of retarded mentality, would be the view that the court would take.

Mr. McCracken: I would hope that the courts would adopt a reasonable interpretation of the word "any".

The Chairman: They would be looking for the reasonable man.

Mr. McCracken: I would hope so. I would hope that the courts would adopt a reasonable interpretation of the word "any".

The Chairman: Like looking for a "reasonable" man.

Mr. McCracken: I would hope they would.

Mr. Milne: Mr. Chairman, may I quibble with something you said? It is difficult for a creative writer or an advertiser to work out for themselves what the act is telling us we should do. They could say "This is a suggested price, Mr. Consumer, but you might be able to buy at a lower price."

The Chairman: You do not have to say that. You could say this is a suggested price but it is not necessarily the price at which the retailer may offer the product for sale.

Mr. Milne: But as a writer of the advertisement, I do not think you would say that.

Senator Cook: That might be the case when you are looking at it from the retailer's price, but when you are looking at it from the point of view of national advertising, whatever you might say otherwise, as to the suggested price, I do not think you could hold out and say that you can get it for less if you try, as the retailer would have to supply it.

Mr. Milne: You are thinking of the regular market?

The Chairman: What I was calling your attention to was that you simply indicate that this is a suggested price and is not a price dictated to the retailer. Now, how would that interfere with the ability to sell the product?

Mr. R. J. Cowling, Special Counsel, to the Committee: You would probably have a little asterisk beside the price, or a footnote, as you often see in connection with options on automobiles. This is just a standard phrase that would appear.

Senator Beaubien: You could say: "This is the suggested price but it is not dictated."

The Chairman: Honourable senators, I think we have discussed this pretty well. Perhaps we could move on to the next point.

Senator Desruisseaux: Before we leave it, Mr. Chairman, I am worried about the advertising in Canada, if you come to analyze it in the perspective of the American advertising that overflows into Canada. My impression would be that if the suggested points are given positive consideration, what, if any, differences would there be with the American code and the American way of handling their advertising that overlaps into Canada?

Mr. McMahon: I think that is a very good point to consider, because there is a considerable overlap from the media, particularly television, but also in the magazine media. We have many copies of all sorts of publications coming in and they are permitted and do use a suggested retail price. Often we will hear on a station from Buffalo or from Seattle a price in the United States. I think this confuses and misleads the public, unless the Canadian advertiser of the same product is able to say that there is a suggested retail price in Canada which is X. Here is the point where we are suggesting a use of a suggested retail price which I think is tried and true and working well for the consumer, because they can understand this idea. I believe this has served a useful purpose, and this is why we are suggesting it be retained. We find this a very useful piece of information for the consumer, yet it seems to be prohibited under the bill.

Mr. G. S. L. Anderson, First Vice President, Institute of Canadian Advertising: Mr. Chairman, if I may introduce a point here. Mr. McMahon referred to useful information to the consumer—which is quite true. But it is useful also to the dealer who ultimately sells to the consumer. I think the word "suggested" does connote latitude in the decision with respect to pricing he has given to the dealer that will ultimately come off by giving some other benefit.

Mr. McMahon: It also helps prevent the retailer from increasing the price because the consumer will have a guide by which to go shopping. We think it helps to protect the consumer again, in all areas. We think it is very valuable assistance and information for the consumer in providing for what is considered a proper purpose.

The Chairman: The whole question turns on the interpretation of the words, unless the price is so expressed as to make it clear. If the art of advertising has not reached the stage of perfection at this time where you can devise language that will keep you within the benefit of this subsection, I would think that the advertising profession may have fallen from the very high position I thought it was in. I thought they were very skilled in advertising where it is a matter of protection.

Mr. McMahon: Sir, I think we are skilled. I do not think it is a craft; it is an art. If the position remains, I believe that through time there will be statements or phrases developed, much broader and longer than this current one, which will be used and will be more cumbersome than the current one, but it will be done, and some standard will be arrived at.

Mr. McCracken: The paradox in that is that as soon as that happens, perhaps the department's problem with the current language, "suggested list price," would reappear with this new phrasing.

Senator Cook: I cannot hear you.

Mr. McCracken: I say that assuming that this position stays and assuming that the advertising industry does work out a longer statement which, when it is first used, satisfies the department, as soon as it comes to be generally used in advertising we may well run into exactly the same problem which prompted the department to insert this in the first instance, namely, language which has become standard, the present problem being "suggested list price." Once the language becomes standard, using perhaps an additional 20 words, it takes on the taint, or the overtones, rather, of resale price maintenance. This is again one of our concerns that the standard language, whether by way of asterisks or whatever, does not help, because once it does become standard the department would probably be of the same view as they are now with respect to the present language, namely that that language has become accepted by merchants as inducing a resale at that price.

The Chairman: Well, Mr. McCracken, we have a big enough job studying this bill and the amendments to the bill, and what we are talking about is a way in which you can live within this subsection by protecting yourself in the form in which this section affords you protection. What the department view may be a year or two years from now, I would not even attempt to speculate.

Senator Cook: Or he view of the courts.

The Chairman: Or the view of the courts. But I am sure that, whatever it may be, the advertisers will be just as resourceful and just as quick to act as the department is to take a position. Let us deal with the present situation.

Senator Laird: In other words, you should win the battle of semantics.

Mr. McCracken: All other things being equal.

Mr. Milne: Mr. Chairman, I have a few points. One is that the council's suggestion in regard to the asterisk might work very well in print, but it would be a little different when you come to radio and television. I do not know where you would put the asterisk on the radio.

The Chairman: The inflection of the voice.

Mr. Milne: This is also the senator's concern when he talked about overflow advertising. This is of concern to us even if it does not come into our intervention at all. In attempting to control what happens in advertising, both by self regulation and by government regulation, we have little or no control over what flows over the border in publications, television and radio. We are damned for what is done down there, in the eyes of the Canadian consumer, by things over which we have no control.

The Chairman: If on the radio or television they fall into error or into difficulties, that is their problem.

Mr. Milne: That is true, but we get the blame for it.

The Chairman: You have broad shoulders!

Mr. McMahon: I should like to close with one short comment, and then we could move on to the next point. I hope senators will appreciate that our concern is not really one on the part of advertising agencies in this particular instance, because we can write it either way. Our concern is for the public.

The Chairman: Yes.

Mr. McMahon: Our last and fifth item is in regard to promotional contests.

The Chairman: That is on page 4 of your brief.

Mr. McMahon: Yes, we are back to page 4. The general comment we would like to make today in that regard is that in the area of promotional contests the ICA would like to see clarified the meaning of the phrase "adequate and fair disclosure" which appears in paragraph 37.2(1)(*a*). We are uncertain whether those words require every document and window banner and all other literature and advertisers' announcements advertising the contest, to contain the disclosures required by the section. We would suggest that the meaning of that phrase be described more clearly, in order that we can assess its impact. We are suggesting that if a window banner, which is generally half a dozen words or more, must also carry all of the rules and regulations, it will appear in 8-point type, or type which is hard for the average person to read. Even if it were included in as large characters as possible on the poster, in my opinion it would serve no purpose. We believe that as long as any contest required that the rules, regulations or conditions of that contest were carried in some physical part of the total promotional material, such as a leaflet or a newspaper advertisement somewhere within the program, it would serve that purpose. Other pieces within the promotional program could carry a line directing the reader or viewer to see so-and-so for complete rules.

The Chairman: Yes, Mr. McMahon. You know that the minister has proposed an amendment to section 37.2(1)(*a*), which reads:

> . . . unless
>
> (*a*) there is adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that affects materially the chances of winning.

What have you to say in connection with that?

Mr. McMahon: Our concern is with the definition of the words "adequate and fair", which is still somewhat obscure.

The Chairman: I am sure you use the word "adequate" quite often in your advertising. What have you meant when you have used it?

Senator Cook: It is a question of fact every time.

Mr. McCracken: As an example, if the window banner states that details of the contest are available inside from the dealer, is that adequate and fair disclosure? This is our problem, as we do not know.

The Chairman: In my opinion it is, but as chairman I am not expressing any legal opinion. However, one would think that if you refer to where the terms and conditions could be found and they were readily available, if the person who was reading did not choose to turn a page, that would be his problem.

Senator Cook: Except that if it was directed to school children they would not be expected to go and ask the manager to see the conditions of the contest. Again, it is a question of fact, to whom it is directed.

The Chairman: We have appreciated the points you have raised.

Mr. McMahon: As a suggestion I might add, sir, that we might make the law even tighter. The words of the section now read: " . . . unless (*a*) there is adequate and fair disclosure of the number and approximate value of the prizes,". If the words "adequate and fair" were simply deleted leaving disclosure, the point would be covered.

The Chairman: I can understand that from the point of view of the department they wish to limit the meaning of the word "disclosure" and define the type of disclosure. That is why the words "adequate and fair" were included. Surely they must be interpreted in that context?

Mr. McMahon: I certainly subscribe to the idea of "adequate and fair" if some means could be found that did not require it to appear on every piece of material, which in my opinion it would serve no purpose for anyone. The inclusion of total or adequate and fair disclosure in certain pieces of promotional material would serve no purpose as long as the public is protected and it is readily available. In the case of this type of thing in my opinion it is very important. I believe, however, for an act to call for total disclosure, or adequate and fair disclosure on all pieces is a little unrealistic.

The Chairman: I do not believe you can attribute the word "total" to the words "adequate and fair".

Mr. McMahon: I agree.

Senator Walker: This is an advantage to you, because it limits the amount of disclosure.

The Chairman: That is right. Are there any other points, Mr. McMahon?

Mr. McMahon: No, Mr. Chairman. We really appreciate the opportunity of being heard and thank you for your very courteous consideration.

The Chairman: We appreciate your attendance and the submissions you have made. Although the points have been raised previously before us, they will emphasize our consideration.

Honourable senators, the next delegation represents the Canadian Federation of Insurance Agents and Brokers Associations.

Present are Mr. Kirby, who is the President, Mr. Butler, the Vice-President, Mr. McCracken again, who is counsel for this organization and Mr. Funston, who is the General Manager.

Mr. G. D. Butler, Vice-President, Canadian Federation of Insurance Agents and Brokers Associations: Mr. Chairman, honourable senators, the Canadian Federation of Insurance Agents and Brokers Associations is very pleased to have this opportunity to appear before you and briefly discuss some of our concerns in relation to Bill C-2. As was indicated in the submission we have filed with you, our organization is a federation of provincial associations of independent insurance agents and brokers. An independent insurance agent or broker is an independent businessman who represents several insurers, dealing in forms of insurance other than life insurance, including, for example, fire insurance, automobile insurance, casualty insurance and so on.

Our membership consists of 11 associations, one from each province of Canada. In the case of Ontario we have two member associations. Our members are listed for your information on the first page of our submission to you. We represent the small one-man agency in rural Canada, all the way up to the giant brokers in the large cities.

The bill concerns us in the areas of misleading advertising, the relationship between the bill and provincial insurance regulations, the impact of price discrimination provisions of the bill upon the sale of insurance, the standardization of licensing requirements for insurance agents throughout Canada and the limited rights of appeal implicit in the bill.

We indicate concern in our submission with the failure of the bill to permit in the area of price maintenance the normal direction as to price given by a principal to his agent. The amendments to the bill which the minister has recently tabled would appear to solve our problems in that particular area.

The Chairman: That point included the principal-agent relationship as being within the definition of affiliation, or affiliates.

Mr. Butler: Yes.

The Chairman: So that point is dealt with.

Mr. Butler: Yes. I would now like to deal with the problem of misleading advertising. This section of our brief commences at the bottom of page 4 and continues to pages 5 and 6. A contract of insurance, as you know, is an extremely complex legal document at the present time. Insurance agents provide insurance coverage to Canadians very efficiently. They take reasonable care to be certain that their clients understand what is and what is not covered. Many policies contain similar clauses and common features, of which the purchaser usually has some knowledge. It would therefore be time-consuming and could significantly affect the cost of insurance if all the clauses were explained in detail. As our submission indicates, we feel that the extension of the so-called misleading advertising provision to all representations, when combined with the introduction of civil right of action, if no effective defence is available to our members, could create havoc in our business. In that regard we feel our position is somewhat unique in that we receive a relatively minor commission for the sale of thousands of dollars worth of insurance coverage. An example of that in Edmonton would be that if we were to sell a $25,000 home-owner's policy, there would be total coverage available to the policy-holder of about $42,500, and for that we would receive a commission of approximately $10. Now, in our opinion, if a menswear store sells a sweater at a price of $22, it might receive a $10 markup. Now they might say that the sweater was all wool and it could turn out that it was only 80 per cent wool and in that case they simply get the sweater back and return the $22 to the customer. But in our case, for a $10 commission, we might be liable to pay out $42,500 in an action if we fail to disclose an exclusion of policy.

Senator Walker: What would be the premium on that?

Mr. Butler: It would be $40.

The Chairman: So you get 25 per cent?

Mr. Butler: On that particular policy.

Senator Flynn: Do you not think that you would be liable even if the present bill did not include that?

Mr. Butler: Not for innocent misrepresentation.

Senator Flynn: Well, I am not too sure about that, but under provincial legislation there is a liability on your part for errors and omissions.

Mr. F. G. Funston, General Manager, Canadian Federation of Insurance Agents and Brokers Association: If I might just interject here, under those circumstances the agent would probably be carrying liability insurance, but even then he would be covered only by the simple liability aspect rather than for the strict liability which is provided for here.

Senator Flynn: It is a question of nuance.

Senator Cook: But under what circumstances would he be liable for the $42,500? You say that the insured person has a policy and the total benefits could be $42,500. Now this was sold by an agent on behalf of a company. In what way could the agent be liable for the $42,500?

Mr. Butler: If a loss occurred that was prohibited under the policy by an exclusion which has not been verbally pointed out to the client when handing him his policy of insurance or when selling him the policy of insurance.

Mr. Cowling: Does the act say "omits to make a representation", or does it say "to make a representation"?

Mr. K. W. McCracken; Counsel, Canadian Federation of Insurance Agents and Brokers Association: The Act says "makes a representation." If there is a representation such as "This is an all-risk; there are certain exclusions; they rarely occur" it could be considered to be misleading.

Senator Flynn: To have an all-risk policy with a lot of exclusions could be interpreted as a misrepresentation of the coverage of the policy. I would say that technically and theoretically your example could be valid, but I am not too sure that it makes any difference under the provisions of this law or under actual provisions in the common law or in civil law.

Mr. Funston: Mr. Chairman, if I may interject again, I would like to point out that we are not asking that we be absolved of all responsibility for misrepresentation, but

only that we be given an opportunity to put up a due diligence defence against that.

Senator Flynn: My view is that there should be no provision in this legislation concerning civil liability because that is something that should be settled by the province.

The Chairman: Yes, I think that is a point that should be developed now. Mr. Butler has referred to provincial regulations and statutes related to the operation of their business. Can you tell us the extent to which they go?

Mr. Butler: You mean where this bill might be in conflict?

The Chairman: Yes, or where this bill might be unnecessary; in other words, where the provincial authorities may have already covered the field.

Senator Cook: Is there duplication? Take this example of the policy for $42,000. If this bill did not come into effect, what would be your position under the provincial legislation? Let us say that your insured lost his $42,000.

Mr. Funston: Under present circumstances there would be a civil action against the agent and if he is liable he would have to pay, no matter what province this was in, unless, as Mr. McCracken has said, it was an innocent instance of misrepresentation. So if were liable the insurance agent would have to pay, but under the proposed bill he would become strictly liable.

The Chairman: The bill creates strict liability, but you are talking about an innocent misrepresentation. Is that provided for in provincial law?

Mr. Funston: Not that I know.

Senator Flynn: I think as long as it is false it would generate liability even if it is innocent.

Senator Cook: But what is the representation? What is said to the fellow that has the policy and suffers the damage? He has the policy.

Senator Walker: What obligation is there on the agent to explain all that small print?

Mr. Butler: If we sell a policy which is our parlance we call an all-risk policy, we feel that this bill says to us that we have to explain in detail every single exclusion under that policy so that when that man walks out our door he knows exactly what is in it.

The Chairman: Well, why not?

Senator Cook: Why do you sell an all-risk policy if it is not going to be an all-risk policy?

Mr. Butler: I can visualize seven pages of small print that might take, say, three hours to go over with an individual home owner.

Senator Cook: Well, if there are seven pages of exclusions, then he has been sucked in, has he not?

Senator Laird: On the form of the policy do you have on the front page any form of exhortation in bold type to read the fine print on the other pages?

Mr. J. S. Kirby, President, Canadian Federation of Insurance Agents and Brokers Association: Yes, we do. It is stamped on the policy. In addition there is stamped on the policy the words "This policy may contain a limitation of loss clause" in red print.

Senator Flynn: I think furthermore that provincial insurance departments see all these forms, and you require approval, do you not?

Mr. Funston: Just for automobile insurance.

Senator Flynn: Just automobile insurance? No fire insurance?

Mr. Cowling: But would the policy be regarded as an advertisement? We are talking here about misleading advertising.

Mr. Butler: About misleading misrepresentations.

Senator Flynn: But it would be on the face of the all-risk policy while inside there was a number of exclusions.

Mr. Cowling: Sometimes you get from the agent a summary of the policy and a covering letter, and that is, I suppose, a representation.

Mr. Funston: We are not trying to absolve ourselves of any responsibility in explaining the seven pages. All we are trying to avoid is strict liability. We are quite prepared to accept responsibility under the current liability situation.

The Chairman: I would think that if policy is described as an all-risk policy and there are in fact exclusions, the exclusions should be brought to the attention of the man who is proposing to buy that insurance.

Senator Cook: Or it should be labelled "limited risk policy." It should not be an all-risk policy if there is an exclusion. There should be a limited risk policy.

The Chairman: It might say "all risks subject to" stated exclusions.

Senator Flynn: This type of policy is the result of the combination of, let us say, fire and liability insurance. I would say there could be quite normal exclusions, but for the public they may not appear normal.

Senator Cook: For example, one exclusion is that of theft, that you will not pay if sums of money are stolen over a certain amount.

Mr. Butler: An all-risk property form would generally exclude flood and earthquake. If you live in an area where there is no river running through it or any body of water whatsoever, you certainly would not bother to tell a man, "This policy will exclude flood".

The Chairman: Except that water pipes and sewer pipes might break and you might have a flood, or you might have an unprecedented rainstorm and have flooding.

Senator Walker: Is it relevant that under the bill we are considering we should wrestle with this problem?

The Chairman: My own view, as chairman, is that I am more concerned about the extent to which there is provincial regulation and government of these companies. If that happens, the question is what right the federal authority has to intrude on that field, where the job is being done by the provinces and they have jurisdiction to do it.

Senator Flynn: And they do not need it. It is ancillary legislation, because they do not need it to achieve the purpose they have in mind. There are already penalties provided in the act, and this is really criminal legislation. For the enforcement of criminal legislation you do not need to lay down the rule of civil liability. I think really the solution is to exclude this thing from federal legislation.

Senator Walker: You would be satisfied with that, gentlemen, would you?

The Chairman: That is the direction in which I was going.

Mr. Funston: I happen to have with me the Unfair and Deceptive Acts and Practices in the Business of Insurance part of the Ontario Insurance Act, if you would like to refer to that.

The Chairman: In British Columbia, for instance, they have the fair practice legislation.

Mr. Funston: This is written right in the act rather than being separate legislation.

The Chairman: Is it lengthy?

Mr. Funston: It is not too lengthy. I could touch on the things it covers.

The Chairman: Would you do that?

Mr. Funston: It says:

> (b) "unfair or deceptive acts or practices in the business of insurance" includes,
>
> (i) the commission of any act prohibited under this Act or the regulations;
>
> (ii) any unfair discrimination between individuals of the same class and of the same expectation of life, . . .
>
> (iii) any unfair discrimination in any rate or schedule of rates between risks in Ontario: of essentially the same physical hazards in the same territorial classification,
>
> (iv) any illustration, circular, memorandum or statement that misrepresents, or by omission is so incomplete that it misrepresents, the terms, benefits or advantages of any policy or contract of insurance issued or to be issued,
>
> (v) any false or misleading statement as to the terms, benefits or advantages of any contract or policy of insurance issued or to be issued,
>
> (vi) any incomplete comparison of any policy or contract of insurance with that of any other insurer for the purpose of inducing, or intending to induce, an insured to lapse, forfeit or surrender a policy or contract,
>
> (vii) any payment, allowance or gift, or any offer to pay, allow or give, directly or indirectly, any money or thing of value as an inducement to any prospective insured to insure,
>
> (viii) any charge by a person for a premium allowance or fee other than as stipulated in a contract of insurance upon which a sales commission is payable to such person, or
>
> (ix) any consistent practice or conduct that results in unreasonable delay or resistance to the fair adjustment and settlement of claims.

Senator Connolly: Would the witness say what he is reading from?

Mr. Funston: I am reading from Part XVIII of the Ontario Insurance Act, section 388.

The Chairman: It would appear that, having regard to the provisions of the provincial statute, there is no need or requirement to have this provision included in this bill.

Senator Walker: I agree, Mr. Chairman. Also, this is a fine group, these insurance agents, they have a good reputation, they have strict supervision, as I know, in Ontario, and I think in most other provinces. This seems to superimpose something that is unnecessary.

Senator Desruisseaux: I should like to try to clarify whether the all-risk form is a non-statutory form. Is it uniform for Canada? Would it be the same for all provinces?

Mr. Butler: It would be reasonably similar in the common law provinces. It is not statutory, except where the peril of fire is in there; that part should be statutory.

Mr. Funston: Let me try to illustrate something. First of all, it is not standard. One insurance company might insure a contractor, but might not insure him while blasting; a company might not insure someone while using equipment on a vessel, because they would want to know more about the vessel. Other companies might say, "We don't understand this type of work", and will exclude it. The term "all-risk" is not statutory. It is an insurance term that means different things to different people. It is all risks except what they say they will not cover.

The Chairman: Is there anything more? I do not suppose there could be much more. We have said that we do not think there is any place in this bill for dealing in this fashion with any insurance broker. You know the philosophy of the merchant as to good salemanship is that when you have sold something you wrap it up. Are there any other things you want to add?

Senator Walker: You should quit when you are up.

Mr. Butler: The application of the price discrimination provisions of the Combines Act to the field of insurance would produce very questionable results in the absence of some appropriate provision. In our view, an insurance policy is personal property, and therefore is an article within the meaning of the bill. Presently, identical insurance coverage may be sold at different premiums from competitors representing different risks or having different loss experience. It seems to be unquestioned that in many cases the premiums charged for identical policies will differ by reason of the difference in risks or the difference in loss experience. However, our reading of section 34 indicates that to charge a different premium for identical coverage to competitors, although the risk or the loss experience is different, would constitute a criminal offence. We submit that there must be some specific provision or exemption introduced into section 34 to permit the different charges in those circumstances.

Mr. Cowling: You are not satisfied with the proposed amendments which would take the word "products" out and leave the word "articles"?

Mr. McCracken: No. "Article" is defined as "real and personal property of all kinds including" and then there is a specific list. I am concerned that a contract of insurance is personal property.

The Chairman: It does not include services, does it? What do you do? You render a service, do you?

Mr. McCracken: And sell; we sell contracts of insurance to insurers, as agents for insurers.

The Chairman: Is that not a service?

Mr. McCracken: It may in part be the provision of a service, but it is the sale of a contract of insurance, however. To that extent I am concerned that "article" would include this.

Mr. Cowling: But you would always have a contract where there was the provision of a service, would you not?

Mr. McCracken: Yes, in part the contract relates to services and in part to the payment of moneys; if a loss occurs so much will be paid.

The Chairman: Yes. But there is a contract to provide services, and the services include, if there is a loss which is included in the coverage provided, having to receive money.

Mr. McCracken: Well, Mr. Chairman, if I am inaccurate in saying that the contract of insurance is personal property, then our point is invalid. If, however, I am accurate, in saying that the contract of insurance is personal property, then this unusual result would follow.

The Chairman: I see there is quite a broad definition of "article."

> 1. (1) The definition "article" in section 2 of the *Combines Investigation Act* is repealed and the following substituted therefor:
>
> ""article" means real and personal property of every description including
>
> (*a*) money,
>
> (*b*) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a company or in any assets of a company,
>
> (*c*) deeds and instruments giving a right to recover or receive property,
>
> (*d*) tickets or like evidence of right to be in attendance at a particular place at a particular time or times, and
>
> (*e*) energy, however generated;"

It seems to me that deeds and instruments giving a right to recover or receive property are within the definition of the word "article".

Mr. McCracken: Yes.

The Chairman: And therefore it would appear that everything that you do, since you have said there are two things, provide service and assure the repayment of moneys in the insurance that you sell, may confer a right to receive money in certain circumstances.

Mr. McCracken: Yes, sir.

The Chairman: And therefore "article" is a broad enough word to cover your position.

Mr. McCracken: That is our concern, sir.

The Chairman: Well, would you be satisfied with that state of affairs, and would you therefore not require any further limitation?

Mr. McCracken: Well, if what we do in part involves the sale of articles, then in selling the identical article to competitors, unless it is a one-shot sale in which case it would not be a practice, the same price, that is, the premium, in an insurance context, would have to be charged, regardless, as Mr. Butler said, of the loss experienced, for example whether a person had a good driving record or a bad driving record, or regardless of whether a building was sprinklered or not sprinklered.

The Chairman: If some person was refused insurance and complained to the director, and the commission proceeded to hold a hearing, do you suggest that if there is going to be any qualification it should be with regard to the things that have to be established before the commission has any authority to act?

Mr. McCracken: We are talking about the discrimination provision, which does not involve the commission.

The Chairman: Oh. That is the trade offence.

Mr. McCracken: Yes. This is one of the criminal provisions, and requires, as I read it, the sale of articles of like quality and quantity to competitors, where a practice is involved, at the same prices, if the sales occur at roughly the same time.

The Chairman: Each transaction may be entirely different.

Mr. McCracken: That may or may not be the case. In any event, if two transactions occur—if, for example, I sell to you and I sell to your competitor at roughly the same time—

Senator Flynn: This is already covered by the provincial legislation in Ontario, that was read before.

Mr. McCracken: That is quite true, which expressly permits taking into account different loss experience. You may recall that when Mr. Funston read it, one of the qualifications on discrimination was the same risks.

Senator Flynn: There is a danger of conflict here.

The Chairman: So if we eliminate the section, we eliminate your problem in that regard. You have to wrestle with the provincial authority.

Mr. McCracken: If the application of this bill was not extended to provincially authorized or regulation or statutorily governed activities of insurance agents in this case, then that would, or might well, remove our problem. That is correct.

The Chairman: Anything further?

Mr. Butler: No. Thank you very much, Mr. Chairman.

The Chairman: I want to be sure, now, that you feel you have got your points across, because while we are trying to get into the core of the thing, we do not want to miss any point that you may feel seriously affects you. What our view appears to be at the moment is that you are well regulated by provincial legislation, and this bill would only provide some duplicate regulation.

Mr. McCracken: And in our view, uncertainty.

The Chairman: And some uncertainty.

Mr. McCracken: Yes.

The Chairman: Now, is that what you wanted to convey to us? Is that correct?

Mr. McCracken: Yes.

The Chairman: There is nothing further?

Mr. McCracken: No, sir.

The Chairman: Well, thank you very much.

Now, honourable senators, we have the third delegation, the National Hockey League Players' Association. Mr. Alan Eagleson is here. He is the Executive Director. Are all the members whose names I have here today? Will you please come forward, Mr. Eagleson? I take it you are going to make the opening statement.

Mr. R. Alan Eagleson, Executive Director, National Hockey League Players' Association: Yes, if I may.

The Chairman: Will you introduce your panel?

Mr. Eagleson: Yes, sir. Mr. Chairman and honourable senators, may I first thank you for giving me the opportunity to appear before this committee today. Secondly, I would like to apologize for the non-appearance of a player that we had anticipated would be able to join us. The player in question is Mr. Rod Seiling, who is one of our player representatives and Vice-President of the Players' Association. Mr. Seiling, I suppose fortunately for the Maple Leafs, and perhaps unfortunately for us, is back skating as of yesterday, and Mr. Gregory, the General Manager of the club, felt that he might be better spending his time on the ice at the club this morning, with all due respect.

The Chairman: It would appear, from the performance record of the club, that his services may be needed.

Mr. Eagleson: I do not think there is any doubt about that.

The gentlemen with me are Mr. Michael Cannon, who is the Director of Operations of the Players' Association, and, on the far right, Mr. Ungerman, who is a law student of mine and who has been doing a lot of work in the last few days. He is going to have to point to things that I may perhaps miss in the presentation.

I have provided Mr. Jackson, the clerk of the committee, with copies of this rather lengthy and voluminous brief, and with your permission, Mr. Chairman, and with the permission of the members of your committee, I would prefer just to touch on certain points that are in the brief rather than read verbatim the contents thereof.

Senator Beaubien: Before Mr. Eagleson starts, I would like to ask a question. Mr. Eagleson, for those of us who are not too enlightened, could you give us an idea of how many clubs the National Hockey League Players' Association represents?

Mr. Eagleson: In the National Hockey League there are 18 teams as of the commencement of the 1974/75 hockey season. For the past four years, and including this year, our membership has been 100 per cent of all the players in the league.

Senator Beaubien: All 18 teams?

Mr. Eagleson: Yes.

Senator Beaubien: So you have how many players?

Mr. Eagleson: Between 350 and 400. The reason for that variation is that each club carried between 20 and 25 or 26 players, some of whom, at different points in time during the season are sent to a minor league club for, not discipline exactly, but for . . .

The Chairman: Exercise?

Mr. Eagleson: . . . exercise, or for health reasons, to remind them of the difference.

Senator Flynn: How well put.

Mr. Eagleson: But once they are with the club for a 6-game period they are eligible for membership in the association, and because of the benefits connected with the association they are anxious to remain members, even though they are sent to the minor leagues.

They share to the extent that it is a non-profit organization and the receipts are converted into benefits along the sames lines as a union would do, in that the Players' Association, as an example, funds the dental plan for all players and the members of their families. They are funded only by the players and not in co-operation with the owners.

Senator Beaubien: That is the $400 you are talking about now, is it?

Mr. Eagleson: Whatever our revenue is is converted into benefits, subject to the operating expenses of the association. My annual fee to the association is $20,000. Mr. Cannon is a full-time employee and is paid $15,000 a year. Our overhead involves a very small office, and I would think our total expenses are between about $50,000 and $70,000 a year.

The Chairman: How is the association maintained? Where does its financing come from?

Mr. Eagleson: It comes from two sources, Mr. Chairman. Primarily it does have the members' contributions, which this year are $400 per man. In addition, we have licensing revenue under an agreement whereby the NHL association has a committee which approves the endorsing of products. Earlier this morning I was listening to a gentleman from the advertising business talking about certain products in the market-place and some of those products in the market-place are endorsed by the Players' Association committee, subject to certain standards being reached, and that revenue varies from $40,000 to $50,000 a year, depending upon the sales of those products, because we work on a royalty basis.

The Chairman: Does the money go to the Players' Association or to the players who provide the endorsements share in that money?

Senator Beaubien: That would give you about $70,000 left over.

Mr. Eagleson: Considerably more than that would be left over, sir. I would guess it would be $100,000, and that is converted into such things as the dental plan, additional payments to a medical plan to cover members of the family and, even though they do not pay dues, it would cover the

trainers in the National Hockey League, in that we feel they are an important part of the team. So, even though the owners do not make any contribution on their behalf to a medical plan, we provide them with that service through the Players' Association.

Senator Beaubien: Do you represent individual players also in this?

Mr. Eagleson: Yes, I do.

Senator Beaubien: How does that work?

Mr. Eagleson: That works on the basis that if a player decides he wants me or somebody else to negotiate his contract, or help him in the negotiation thereof, he comes to me or to one of several other people who are involved. That is then done on a fee basis, in some cases. In my case I am a lawyer, not an agent, and I work on a fee basis related to time.

Senator Connolly: Mr. Eagleson, you do not have to disclose the arrangements of your contract here. Don't do that.

Mr. Eagleson: Some others work on a percentage basis. But that is how it works.

Senator Flynn: Do the clubs contribute to the funds of the association?

Mr. Eagleson: No.

Senator Beaubien: The owners do not?

Mr. Eagleson: No.

Senator Connolly: Mr. Eagleson, you say that there are 350 to 400 people in the NHL who are members of this association. As I understand it, the owners also have minor league teams, farm teams, where their players are trained and developed. Are those players involved in this?

Mr. Eagleson: They are not members of the National Hockey League Players' Association. We attempted about four years ago to include them with us for bargaining purposes on benefits, but the owners indicated they felt that the players in those leagues should form their own associations and use their own bargaining weapons. They have since done that so that there is an American Hockey League Players' Association, a Central Hockey League Players' Association, and, in addition now at the senior level of professional hockey, the WHA Players' Association. So each unit has its own association. I think it makes sense, senator, in that the differences in bargaining which exist between an owner in the WHA and an owner in the NHL and an owner in a minor league are completely different from their financial positions.

Senator Connolly: Thank you.

Senator Laird: Mr. Eagleson, you did say, did you not, that there was a method by which a player could retain membership in your association even though he was sent to the minor leagues?

Mr. Eagleson: Yes, that is correct.

Senator Laird: How long does he retain that membership?

Mr. Eagleson: He can continue it until the conclusion of that season; but we have one additional advantage, and that is that the player, when he retires from hockey, can continue on as an associate member of the Players' Association. In that way he can keep, as one particular benefit, the life insurance policy which we have in group form on every player to the extent of $50,000. For example, Elmer Vasko, who retired about six or seven years ago, still stays on as an associate member and has that benefit. The obvious benefit is, of course, that he is permitted to participate in a group plan at a much lower rate than would be possible on the basis of an individual purchasing insurance.

Senator Laird: Are there any other fringe benefits which he can obtain, such as dental benefits?

Mr. Eagleson: He can retain the dental benefit if he pays the additional premium. He is permitted to stay in our group, but he has to make his own financial arrangements with the insurance broker.

The Chairman: Mr. Eagleson, you have referred to a provision by which, although a player retires, he may still remain an associate member of the association and therefore enjoy, particularly, the group insurance benefit. As I understand it, and as I have seen it work, group insurance plans usually extend to include retired employees as well as those who are actively engaged in work. That is not an unusual feature of a group insurance policy, therefore.

Mr. Eagleson: I think the unusual feature of this is that he stays on and can say that he is an associate member of the Players' Association, which gives him such additional benefits as entrées to certain arenas in North America. So it has that advantage as well.

The chairman: I was thinking only in terms of the money entitlement, which is still a rather important consideration.

Mr. Eagleson: Yes.

The Chairman: Mr. Eagleson, I know you prepared an opening statement. At this stage would you prefer to go ahead with that opening statement or would you prefer to deal with particular questions?

Mr. Eagleson: I am quite happy, Mr. Chairman, not to involve myself in the opening statement, but simply to answer questions, if that is the wish of your committee. If you feel you can achieve more in that way, I am satisfied.

The Chairman: Well, we can see as things develop. I have read your brief and I have noted your views in relation to the NHL and its operations and its relationship with players and so on. I also read the conclusion in your brief, and it seems to me that one effect of the conclusion is that you do not think that professional and amateur sports belong in a bill of this kind.

Mr. Eagleson: I think I should expand on that conclusion. I am suggesting that, unless and until we are assured by government that there is going to be a specific place for sport, we should be included. I am indicating my preference as to the type of administrative tribunal or ombudsman related to sport, to avoid the indictable offences aspect of it, because many things happen in the movement of players, both in amateur and in professional hockey, which require some opportunity to have things brought to someone's attention quickly without going through the courts to the extent that is described in the bill at present.

The Chairman: I was just considering what you say on page 43 of your brief, where you say:

> I just do not believe that this legislation is most appropriate or the best solution. Such legislation will not solve the problems and may only create greater ones.

What conclusion do I take from that? On the basis of what I have read, it would appear that you are putting yourself against the bill in present form.

Mr. Eagleson: I think, Mr. Chairman, that your interpretation is correct, but perhaps it is the wording that has not made our position clear.

Our position is that we require the advantage of the bill if nothing else is available. At the present time nothing else is available. What I am suggesting from the Players' Association's point of view is that before getting to the step of putting this in the bill, perhaps we should consider an alternative.

The Chairman: You know that the amendments proposed in the committee of the House include the elimination of amateur sport from this particular section of the bill?

Mr. Eagleson: Yes. I touch on that in the brief.

The Chairman: So all that is left for your reservation and qualification of what you have said in your brief is the matter or professional sport.

Mr. Eagleson: I would anticipate having the opportunity, Mr. Chairman, of appearing before the Commons committee with respect to the proposed exclusion of amateur sport, unless they explain or define the word "professional"; because if "professional" is going to be deemed in accordance with what one in the normal course of business defines as "professional," I would be quite agreeable to removing amateur sport.

I suggest to you and the members of the committee that the definition that prevails in hockey today between "professional" and "amateur" is not that which is defined by an ordinary businessman.

The Chairman: You are aware that the amendment proposed in the Commons committee defines an amateur. It is a most peculiar definition in the light of today's operation of amateur hockey. It defines an amateur as a person who performs his services without remuneration.

Mr. Eagleson: That is correct; and yet the definition of an amateur varies depending on which circle in hockey you are talking to. Carl Brewer was an amateur for a short time in 1967. He played in an international league in Muskeogon for a salary well in excess of $20,000, yet we still considered him an amateur. So I agree that this is not the place to debate that point on the basis of the suggested amendment. I suppose I will have to get to the definition section with the Commons committee.

The Chairman: That is right. Well, you can try it on us, if you like.

Mr. Eagleson: To me, it would seem that amateur hockey should be defined in a similar fashion to amateurs as they exist in other areas of sport. We know that Jim Elder, to retain his amateur status, cannot be paid a substantial amount of money and can scarcely be paid an amount that will sustain a young equestrian and his horses. We know that Paul Henderson, one of Canada's top sailors, is required to dig into his own pocket or depend on the support of friends to retain his amateur status.

We know that top tennis players, such as Jane O'Hara, have difficulty in keeping up with the expenses that one incurs in trying to achieve a high level of competence in the sport of tennis without income from some source.

It is quite different in hockey. In the Quebec Junior Hockey League, for example, I am sure most of you will recall that it was more beneficial to Jean Belliveau to stay and play with the Quebec Citadels than with the Montreal Canadiens, because it was learned later that he was making between $15,000 and $20,000 a year playing "amateur hockey".

At the present time there are junior hockey players, playing in the Quebec Junior League, who are making substantially more per week than some semi-professionals. In two instances last year there were two players playing amateur hockey who had already signed one-million-dollar contracts with professional clubs.

My concern, then, trying to look at it from the sports position and for the protection of sport itself, is to make certain that some restrictions, restraints or legislation exist to extend the definition of professional sport to what I think is a reasonable interpretation, and which would include junior hockey in Canada.

The Chairman: A very simple definition would be that professional sport has the customary meaning attached to it by the public, and that amateur sport have the same kind of definition, without regard to whether there is remuneration, the amount of it, or anything else.

Mr. Eagleson: I would think that would be a fair comment, but it may make too much common sense to be acceptable—except before this committee!

Senator Flynn: As far as hockey players are concerned, it could be much easier to say those who play for professional leagues and those who do not.

Mr. Eagleson: That is right, absolutely.

Senator Desruisseaux: I wonder if Mr. Eagleson could accept the Russian definition.

Mr. Eagleson: To me the Russian and Czech hockey players are as professional as any player in the National Hockey League and the WHA. Having come to know Mr. Omnedomansky quite well, since he decided to remain in Canada this year, he was making, I would say, the equivalent of $15,000 to $20,000 last year playing "amateur hockey" for the Czechoslovak National Team, which Bunny Ahearne says satisfies his definition of "amateur" because someone in the Czech federation sent a letter saying "These are our players".

Senator Flynn: It is a career in those countries. It is not even a profession.

Mr. Eagleson: It varies from country to country, particularly, of course, behind the Iron Curtain. In Sweden there are players making substantial amounts of money out of hockey, and ice hockey playing ability, and yet they are still defined as amateur. Regarding Mr. Ahearne's and the International Ice Hockey Federation's definition of "amateur", we took advantage of that definition and had Carl Brewer reinstated as an amateur. In December 1966 he was permitted to rejoin the Canadian Amateur Hockey Association as an amateur, and three or four months later he became a professional again.

The Chairman: It points to the fact that we have to stay away from talking about money.

Mr. Eagleson: It is difficult.

The Chairman: Money can be whatever it is, and whatever flows to them is fine; but if we want to get a workable definition of "professional" and "amateur" we have to consider it in relation to what is—"any person who is engaged in a sport which is described as professional."

Senator Cook: Different standards apply to different sports, do they not?

Mr. Eagleson: That is correct. In figure skating it was impossible for Karen Magnussen to even appear on the same ice surface with professionals without a written agreement from the International Figure Skating Association, without risking her amateur standing.

The Chairman: I think perhaps we can cut through that by the definitions that we are thinking about.

Senator Laird: Mr. Chairman, to bring matters to a head, can I point out to Mr. Eagleson that, as I recall, Mr. Clarence Campbell said sports, professional and amateur, had no place in this act, because the idea that the public has in mind is to protect the individual. Have you given any thought to that aspect of the problem, and whether or not suitable legislation could be drawn outside this act?

Mr. Eagleson: We get into problems, because we are dealing with international leagues, between the United States and Canada,—the National Hockey League and the WHA. If a vehicle could be structured, whether in the form of a tribunal or anything like that, then I would say fine, we can leave it out of this act; but, believe me, without such protection in this act, in the absence of that type of tribunal or of any legislation, the hockey players' lot will not be a happy one. I would certainly prefer this section. To have Mr. Campbell suggest that sport is any different from any other business is something that I find impossible to agree with. Professional sport is big business; it is monstrous business. In Canada, just relating it to hockey alone, let alone any other sports, the Vancouver Canucks in 1970 were purchased for $6 million by an American group, Medcor Inc. We all know the problems which came up between that original purchase and the purchase of that franchise by Western Broadcasting earlier this year at a price tag about double that of the original franchise purchase price in 1970.

The Molson family sold the Montreal Canadiens on December 24, 1971, just before the capital gains tax came into effect, at a price of some $15 million. When Conn Smythe sold the Maple Leaf Gardens to Harold Ballard, John Bassett, Jr., and Stafford Smythe, within five years of that purchase John Bassett walked away from Maple Leaf Gardens, having been bought out by his two partners, with a profit of $5 million. Mr. Ballard now indicates that he wants $40 a share for Maple Leaf Gardens stock, which would mean that the value has now gone to about $35 million.

Senator Walker: Not the way they are playing now.

Mr. Eagleson: There might not be a long line-up of buyers.

In answer to your point, Senator Laird, as far as I am concerned, the business aspects of professional sport can be well acquainted with the business aspects of other major industries in Canada.

Senator Connolly: It is a major industry.

Mr. Eagleson: Yes. I apologize, Mr. Chairman, for perhaps not making it clear in my conclusion, but the protection set forth in the proposed section 32(3) is the best thing that can happen to a professional hockey player. What I am saying is that if this committee should determine that there is a difference between hockey and business, I can agree to that as long as there is some protection somewhere.

As is the case in the United States with baseball being exempt from the anti-trust legislation, a ball player, really, has very limited rights. Football, basketball and hockey are not exempt. As a result, the WHA was able to set up a league to provide competition for the National Hockey League. The NHL fought the establishment of that league tooth and nail until February, 1974, when it was determined, by agreement, that there must be something in violation of the anti-trust, because they settled it very nicely without even bothering to consult the hockey players. In the judgment it was indicated that part of the agreement before the court was that the leagues would continue to pursue the possibility of indirect merging. Such a course, as far as I am concerned, would put the hockey player back to where he was pre-1967.

Senator Laird: But as a lawyer, do you feel that this has a place in this legislation?

Mr. Eagleson: As a lawyer, and knowing what I know about the operation of the National Hockey League owners, and other hockey league owners, I cannot differentiate between professional hockey and any other major industry.

Senator Laird: Yes, but you are talking in terms of protecting the individual, as I understand you submission.

Mr. Eagleson: That is right.

Senator Laird: Should there not be some other type of legislation, other than providing for it under this act, which would effect that purpose more satisfactorily?

Mr. Eagleson: It would certainly be more expedient, Senator Laird. If a professional hockey player is going to be involved in moving under a conspiracy action, by the time he gets that action to the courts his career, because it is very short to begin with, may well be over, with the result that his damages might be very difficult to prove. Even if the owner is convicted of an indictable offence, that is not going to help the hockey player.

The Chairman: As I understand your position, Mr. Eagleson, unless there is an alternative way to deal with this, then you are prepared to support the provisions in this bill, notwithstanding that they would not be in the bests interests of the players.

Mr. Eagleson: That is correct. I apologize for having that as clouded as it appears in my conclusion.

Mr. Cowling: Mr. Eagleson, to what extent have hockey players in Canada, amateur or professional, had recourse to the ordinary courts in respect of any problems under the common law restraint of trade?

Mr. Eagleson: The best example I can give is the Carl Brewer case. We sought everywhere for a solution and

found that the only solution was public opinion. Had we operated through the courts in order to obtain a declaratory judgment, as we were advised by Mr. Sedgewick and Mr. Robinette, by the time we obtained a declaratory judgment, the January 1967 series with the Russians would have been behind us.

Senator Flynn: And the same thing would apply to this legislation?

Mr. Eagleson: That is correct.

Senator Flynn: So, it does not solve that problem.

Senator Laird: There must be another solution.

Mr. Eagleson: The players are certainly flexible in this respect. The Players' Association, on behalf of the players, is not taking the position, "We want this and nothing else." We need protection. The players are satisfied—based on the protection afforded them through the association which, to all intents and purposes, is a very strong union—that they have sufficient protection for themselves. On the other hand, there are certain things that the owners are inclined to do. For example, if a merger is ever achieved between the WHA and the NHL, unless the players had something to fight it, I cannot imagine the players having the same degree of benefits which they now enjoy. That is not to say that all the benefits presently enjoyed are realistic. I think we are looking for a slide downward in salaries. However, the opportunity to sell his product to more than one source gives the player a right in the marketplace.

The Chairman: Mr. Eagleson, I am going to say again what I said to one of the other delegations, and that is that our job at this stage is to deal with this bill, not to speculate into the future as to whether there is a possibility of there being one gigantic league. The players' positions may be different in that event. That may be the dream of a lot of people; it may even be your dream.

Mr. Eagleson: My nightmare.

The Chairman: I would describe it preferentially, because as long as you have the two leagues, you certainly have competition in the bidding for players, which is to their advantage. Whether that will be beneficial in the long run or not, I do not know. I may have some reservations in that respect.

Do you not think it is a selfish viewpoint to put forward, on behalf of the players, the position that, "If we cannot get something better, even though this section could hurt us and is not good for us, we want it"?

Mr. Eagleson: If that is your interpretation of my position, Mr. Chairman, it is perhaps the result of my poor terminology. That is not what I am saying. What I am saying, and what I meant to say, is that we are happy that the Government of Canada is considering including professional sport in this sphere; but, before you throw it out, as Mr. Campbell has suggested, I should like the committee to consider an alternative from the players' point of view. My position, as Executive Director of the National Hockey League Players' Association, is that I am for section 32.3(1), (2) and (3).

Senator Walker: In other words, it is better than nothing.

Mr. Eagleson: Absolutely.

Mr. Cowling: Mr. Eagleson, are you aware of how many decided cases there are in Canada where a player has instituted an action against a league or a club in the ordinary courts?

Mr. Eagleson: I would say less than a dozen. The most recent case has become the most frightful, and that was the case where a 15-year-old was drafted by a junior team for which he did not wish to play, because it was 30 or 40 miles away from his home. He took the matter to court for decision and was told, "We are sorry. We felt that hockey had to have these rules at the Junior A level to survive." The unfortunate victim in many cases is the player. The best example is that of a young man who is now in the National Hockey League, David Gardiner, who was an A student at St. Michael's College in Toronto and who was drafted when he was in Grade 13 by the Peterborough Hockey Club. They told him that if he wanted to play junior hockey—it didn't matter to them that he and his family were living in Toronto—he would have to play in Peterborough. They could not consummate a trade with the Marlboros. There was a boy who was forced to play Junior B hockey because Peterborough would not release him. Finally, after a year or so, he was permitted to play junior hockey after a trade with Marlboros and won the scoring championship. But it deprived him of an opportunity to play at a higher level.

The Chairman: You will agree that discipline in professional or amateur sport is necessary— discipline of the teams, discipline of the owners, and discipline of the players.

Mr. Eagleson: Absolutely.

The Chairman: And that part of that whole setup is—and the concept is in this blue book that the department put out, "Proposals for a New Competition Policy for Canada"—the idea is, and they recognize it, that a balance must be maintained amongst various teams in a league, or the whole operation is not going to be profitable. Otherwise, if the players are free to go wherever their choice takes them, without being subject to any contract or any discipline in their movement, then the wealthy teams will get the better players and you will always have the poorer teams going nowhere. This policy statement says that this is recognized as being necessary to have the teams operate profitably in the various leagues and for the benefit of the players, whether amateur or professional.

Mr. Eagleson: I trust that whoever wrote that comment will read the case histories that are recited in this brief, because if anyone who is reasonably knowledgeable on the hockey scene today, the National Hockey League, can tell me that balance of competition is the aim of the owner, I must heartily disagree with that, because the statistical evidence is obvious. You have three teams right now that, barring a miracle or a freeing up of some players—Kansas City, Washington and California—are not going to win 25 games among the three of them; and the Buffalo Sabres, possibly on the basis of their record, will win 50 out of 80.

The Chairman: So, what is the conclusion?

Mr. Eagleson: The conclusion, as far as I am concerned, is that if someone magically says that we must have balance in sport, unless someone is a watchdog over the regulations and the manipulations, the players' lot, the balance will not result. As I indicated, the Montreal

Canadiens had five first round draft picks last year and I think they had four or six this year I could not tell, because one general manager would not tell me whether he finalized the deal or not, for next year. Conversely to the proposal that it is going to result in a balance, the rich are getting richer, the strong are getting stronger, and the weak are getting weaker.

The Chairman: Is that true? You take the Canadiens, who were at the top of the flagpole for some years. This year they seem to be struggling to keep above water.

Mr. Eagleson: They are in first place in their division, sir.

The Chairman: They may be, but in the standings, and the representation between wins and losses, it may be only because some other teams have lost more games.

Mr. Eagleson: I would think that if you wanted to make some easy money you could possibly bet on the Montreal Canadiens to win the Stanley Cup.

The Chairman: That will be noted in the record.

Mr. Eagleson: We have to keep the Stanley Cup Canadian, we are trying and it is tough when you have 15 to 3.

Senator Blois: Is that better odds than the Olympic Lottery?

Mr. Eagleson: Yes.

Senator Blois: I am glad to hear that.

Senator Walker: Would you prefer, Mr. Eagleson, that the reference to amateur sports in this bill should be left in an amended form, or do you agree with many members of the committee that it should be entirely eliminated?

Mr. Eagleson: That gets back, Senator Walker, to the definition aspect. To me, if you leave out the junior hockey program as it presently exists across Canada, if you define them as amateurs, and if they are determined to be amateurs, then the wording is taken out of this bill, we are looking for chaos in junior hockey—as it exists already.

The Chairman: Haven't you got chaos now, or are you going to have a gap in good, junior amateur players, because of their early joining of the ranks of the professionals?

Mr. Eagleson: The problem is a dual one, in that our government has decided in its wisdom that the age of majority shall be reduced from 21 to 18. On that basis, if a player can make a contract for anything else, it would be difficult, I think, for a court to determine that he is not entitled to turn professional. I think it is a mistake, but again it is a mistake by those who are the owners, The Players' Association was on record as holding off on junior drafts, and they ignored this. The Player's Association is on record as reducing the protected list from 18 to 10, so that we could get better balance, and the owners said "This is our vested interest, and we are not going to have players tell us how to run our business." But the one who suffers in the end is the hockey fan. There are two difficult things In Montreal, as far as I am concerned, and it is a question of which is the more difficult. One is to get tickets when the Boston Bruins are in town, and the second is to give away tickets when the Kansas City Scouts are in town.

The Chairman: You are always going to have to face that.

Senator Cook: Can we cover that in legislation?

Mr. Eagleson: But we should not, sir, if balance is the idea. There is no question, that you cannot bring in an amendment which will legislate against stupidity of general managers, but if every second year or every year there is a drafting procedure that permits a balancing, then the players are certainly not disinclined to balance, because the players—from the opinions of the players representatives and the players themselves—would rather be the victims of a trade and a move than be mired with a last place club for years and years.

The Chairman: Somebody has to be there.

Mr. Eagleson: But the same club does not always have to be last.

The Chairman: No. I suppose Buffalo is a good example.

Mr. Eagleson: Yes, that is correct. Vancouver is another. They have come from last to first, but for one reason, they did not trade any draft choices.

Senator Walker: To bring to a conclusion your answer on the amateur clauses, you would prefer some clause in there concerning the amateurs, some section, but you would want it greatly changed?

Mr. Eagleson: I think, Senator Walker, it should be softened, but again, rather than a complete removal, I would rather see it in and then let someone determine whether it constitutes a cartel.

The only other item that I am concerned about is Canadian relations to international hockey. Mr. Campbell appeared before this committee some time ago. Thereafter he was quoted. It is an addendum to the brief, giving his views. It disturbs me, as a Canadian, and I know it disburbs members of the Players' Association. The article by Mr. Iaboni, quoted Mr. Campbell as saying:

> The NHL will never lend a player to any other organization . . . never! The NHL is under no government institution to provide a representation for it . . .
>
> The attitude of the NHL is we'll play anybody on an individual team basis, not an All-Star collection.

I want to make sure that the senators on this committee are aware that that is not the position of our Players' Association, that no matter what the contract says we have taken the position with the National Hockey League that if, as and when the player is given an opportunity to play for his country, that right should be available to him; and for the president of the National Hockey League to suggest otherwise is flying in the face of what will be fact.

The Chairman: I am sure, Mr. Eagleson, that there may have been times in the course of your participation in hockey when you may have made over-emphatic statements.

Mr. Eagleson: There is no question about that.

The Chairman: Let us assume that Mr. Campbell was making a pronouncement as president on behalf of the league. It may be effective only so long as the board is prepared to go along with his statement, so long as the owners are prepared to go along with it, and so long as he remains president.

Senator Walker: And so long as the players decide to go along with it.

The Chairman: If the players do not go along with it, two things will happen: one is that there will be no professional hockey; and the other is that there will be no income.

Senator Walker: They would find a way around that one, though, would they not, Mr. Chairman?

Mr. Eagleson: The point I am making with respect to the international hockey scene is that the 1972 and 1974 series were beneficial to Canada. It is the opinion of the Players' Association that if Hockey Canada or any other group negotiates an opportunity for world cup hockey and we face that, as a Canadian team, without the best playing team available, we will not be acting in the best interests of our country. We went through it in 1972 when, because of litigation, the NHL refused to permit players to go on the ice with WHA players, so that Hockey Canada had to take the lesser of two evils. In 1974 a deal was negotiated which involved only the WHA. Hopefully, the next time we would not ask, "Is this the WHA?" or, "Is this the NHL?" We will ask, I hope, "Can Canada send its best hockey players to play for Canada?"

Senator Walker: That is a high note on which to close.

The Chairman: Yes. We have wandered a little further than would appear to be necessary for consideration of this particular clause of the bill, as to whether professionals and amateurs should or should not be included. I wonder if we could return to that basis for a moment? Could we have a very succinct statement? Is there more that you have to add than simply you will take this section if you cannot get something better?

Mr. Eagleson: We will stress it even more than that, Mr. Chairman. We will be very happy to take this section, because we have nothing else at the moment.

Senator Desruisseaux: Mr. Chairman, I wish to observe that the views expressed this morning by Mr. Eagleson are quite different from those expressed by the representatives of the amateur clubs who appeared before us, such as soccer, baseball and lacrosse.

The Chairman: Swimming.

Senator Desruisseaux: And the large number of players they stated they represent in the amateur field.

The Chairman: Yes, it was 605,000 participants.

Senator Desruisseaux: Which appears to be contrary.

Mr. Eagleson: There are that many in hockey alone.

The Chairman: Yes, that is what was said, but your presentation is on behalf of the NHL Players' Association. You have a membership in that of how many?

Mr. Eagleson: 400.

The Chairman: If we are to deal in numbers we must certainly pay some attention to the views of the amateurs. You have been yourself more involved in the professional aspect.

Mr. Eagleson: I have simply tried to say, Mr. Chairman, that as far as the Players' Association is concerned, keep professional hockey under the watchful eye of the Competition Act. I am attempting to tip you off, to use the vernacular, that the phrase "professional hockey" may well extend into what is presently deemed to be amateur hockey.

The Chairman: We are aware of that and share your dissatisfaction with that definition.

Mr. Eagleson: I feel much better after hearing those comments.

Senator Cook: Is it true to say, Mr. Chairman, that a representative of amateur sport said that a definition that fits one sport does not necessarily fit another sport?

The Chairman: Yes.

Senator Cook: So there could be a difference between hockey and the other sports.

The Chairman: Are there any other questions? I repeat what I said to the earlier delegations: Is there anything on which, in the course of questioning, we have cut short discussion?

Mr. Eagleson: Nothing whatsoever.

The Chairman: Is there anything further that you would like to develop?

Mr. Eagleson: No, that is all.

Senator Walker: What about Mr. Cannon?

Mr. Michael L. Cannon (National Hockey League Players' Association): No, Mr. Chairman.

Mr. Eagleson: Let me say, Mr. Chairman, how thankful we are for your attention and questions. I hope the lightning will fly through this lengthy document.

The Chairman: At any rate, we gave the whole subject a good work-out this morning.

Mr. Eagleson: Thank you, Mr. Chairman; thank you, senators. I appreciate the hearing.

The Chairman: The meeting will adjourn until 2.15 this afternoon, when we will revert to the income tax amendments. We will hear the Canadian Chamber of Commerce. Our staff, which was here the last day when we had, what shall I call it, a seminar for the whole day on the various resolutions proposing amendments to the Income Tax Act, will be present. They have considered the briefs of the Chamber of Commerce, and we will be ready to do business starting at 2.15.

The committee will meet again tomorrow morning, when we will consider a public bill, the Indian royalties legislation at 9.30. In addition to that, we face a great deal of work next week if we receive such legislation as the Federal Business Development Bank bill and the Territorial Lands bill. We hope that the Customs Tariff and the excise tax amendments contained in the budget will also be received by us during next week. However, I hope that those who move these bills along will remember that I do not believe Christmas closure will work as far as this committee is concerned.

Senator Beaubien: What do you mean by that, Mr. Chairman? Are we to sit all the way through?

The Chairman: "Christmas closure" simply means that we would be pressed against a recess date in the hope that the pressure would be such that it would foreclose our consideration. Maybe, no matter when the legislation is

received, we should insist on a proper amount of time for its consideration.

Hon. Senators: Hear, hear!

The Chairman: However, I would not expect that we would sit here and our confrères in the House of Commons, who would have caused the situation to develop, possibly, would be able to go away on a holiday, which just would not make sense.

Senator Walker: Mr. Chairman, will we meet again on Tuesday evening?

The Chairman: As I understand it, it is not yet settled. We meet tomorrow and on Friday morning. There will be royal assent, I understand. It is under consideration to possibly adjourn until Monday evening, so as to move the heavy pressure to the early part of the week. If we meet on Monday evening, I have suggested that our committee sit then to deal with any bills then before us. After, next Wednesday we have a full slate of three delegations, with good briefs on the competition bill. We have not accepted any further briefs in connection with the Income Tax amendments and have indicated to others who wish to come forward on the competition bill that they may only be heard after the Christmas recess. So it looks as though we have heavy commitments. From my point of view in getting the work done, I would hope we could deal with some of it on Monday evening, and Tuesday and Wednesday. Then our obligations in committee will be at an end.

Have you any suggestions, Senator Walker?

Senator Walker: I think that sounds fine.

The Chairman: Mr. Jackson informs me that the Canadian Chamber of Commerce and the Canadian Petroleum Association will appear this afternoon. They asked to appear, but have not presented a brief. It will therefore probably be just ad lib, but we know how to deal with these situations and keep them on the point.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 15

WEDNESDAY, DECEMBER 11, 1974

Second Proceedings on:

"The advance study of the Budget Resolutions respecting income tax and any bill or other matter relating thereto."

(Witnesses: See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, November 21, 1974.

"The Honourable Senator Everett for the Honourable Senator Hayden moved, seconded by the Honourable Senator Inman:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and consider any bill based on the Budget Resolutions relating to income tax in advance of any such bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, December 11, 1974
(18)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 2:30 p.m. to further consider the following:

"The advance study of the Budget Resolutions respecting income tax and any bill or other matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Blois, Connolly, Cook, Desruisseaux, Laird, Macnaughton and Sullivan. (9)

Present, not of the Committee: The Honourable Senators McNamara, Manning and Prowse. (3)

In Attendance: Messrs. A. Peter F. Cumyn, and C. A. Poissant, C.A., Consultants.

Witnesses:

The Canadian Chamber of Commerce

Mr. G. W. Riehl, Chairman, Public Finance and Taxation Committee (Ontario Section), and a member of the Executive Council (partner, Deloitte, Haskins & Sells, Toronto);

Committee Members:

Mr. R. W. Cochrane, (Treasurer and Director of Taxation, Gulf Oil Canada Ltd., Toronto);

Mr. R. R. Easton, Q.C., Windsor;

Mr. A. D. Laing (Assistant to the Executive Vice-President—Financial, Dominion Foundries and Steel, Ltd., Hamilton);

Mr. E. D. K. Martin (Assistant Manager—Tax Department, Imperial Oil Limited);

Mr. D. I. Matheson (McMillan, Binch, Toronto);

Mr. H. A. Sherman (Director, Taxation, Massey- Ferguson Limited, Toronto);

Secretariat:

Mr. D. J. Gibson, Ontario Manager, and Secretary, Public Finance and Taxation Committee (Ontario Section).

Canadian Petroleum Association

Mr. John S. Poyen, President;

Mr. William Oostenbrink (Chairman) Economics Committee;

Mr. Lindsay Milne, Member of Economics Committee;

Mr. Percy Baker, Member of Economics Committee.

At 5 p.m. the Committee adjourned until 9:30 a.m. Thursday, December 12, 1974.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, December 11, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 2.15 p.m. to examine and consider the advance study of the Budget Resolutions respecting income tax or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: The first group to appear before us represents the Canadian Chamber of Commerce. Mr. Riehl, the Chairman of the Public Finance and Taxation Committee, Ontario Section, and a member of the Executive Council, is going to make the opening statement. The first thing I would ask you to do, Mr. Riehl, is to introduce the panel.

Mr. G. W. Riehl, Chairman, Public Finance and Taxation Committee, Ontario Section, and Member, Executive Council, the Canadian Chamber of Commerce: Thank you, Mr. Chairman. Our panel is made up of myself—I will give our firm affiliations—with the firm of Deloitte, Haskins and Sells. We have with us Bob Cochrane, who is Treasurer and Director of Taxation, Gulf Oil Canada; Bob Easton, who is a lawyer from Windsor; Alan Laing, Assistant to the Executive Vice-President, Financial, Dominion Foundries and Steel; Doug Martin, Assistant Manager, Tax Department, Imperial Oil; Dave Matheson, lawyer, and partner in McMillan, Binch; and hon. Sherman, Director of Taxation, Massey-Ferguson.

Senator Laird: Are yon trying to overwhelm us with numbers?

Mr. Riehl: The Canadian Chamber is pleased to have the opportunity to accede to your request to appear before you today to provide you with our views, as best we can, on various aspects of the Resolutions emanating from the present federal Budget.

As you are aware, sir, the chamber has made two pre-Budget submissions to the Ministers of Finance and National Revenue this year—one in March and one in October. I understand that the committee has received copies of our October submission in advance of this hearing.

I should like to point out that the chamber's Public Finance and Taxation Committee is composed of two sections, one resident in Montreal, dealing with fiscal and monetary policy matters, and the other is in Toronto relating to technical tax matters. It is the Toronto section of the committee which is appearing today.

As you can understand, our committee is made up of tax practitioners from both professional firms and industry. We have placed some emphasis on the resource industries, because we have two gentlemen who are in that particular field. We had anticipated that you might have more detailed questioning in that area than in some of the other areas.

We are now prepared to answer questions.

The Chairman: You realize, Mr. Riehl, that this is the first hearing we have had on the Budget Proposals amending the Income Tax Act. We have done our homework, we think. We had a seminar for the whole day, with questions being exchanged, under the instruction of our staff, whom we feel are excellent.

We had expected that you might give us more in the way of comment in relation to the Budget Resolutions. The Resolutions can be divided into two parts, one dealing with the resource industries and the other with the more general aspect of income tax law. You may be specially equipped, judging from those who are included in your panel, to make some submissions in relation to the treatment of the resource industries, keeping in mind that there are two elements in that—one is the matter of policy, and the other is the framework of the Resolutions themselves.

As a starting point, let us proceed from there to hear your submissions. If we think they are getting off base, we will tell you.

Mr. Riehl: I shall call on Doug Martin and Bob Cochrane to make a presentation on the oil and gas industries in particular, although we are prepared to discuss mining also. That is the area that we think is critical at this time.

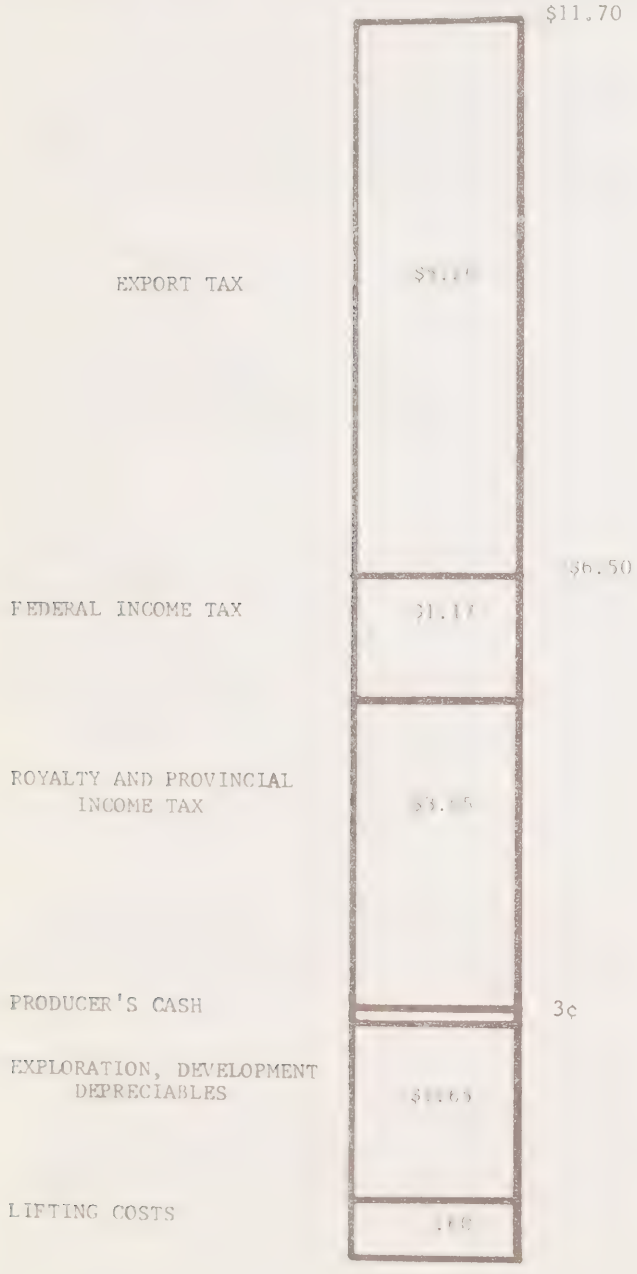
Mr. E. D. K. Martin, Committee Member, Public Finance and Taxation Committee, Ontario Section, the Canadian Chamber of Commerce: Thank you very much, sir, and gentlemen. The heart of the Chamber's submission is really, when we are dealing with energy resources, that the current difficulties have placed the extractive industries in an untenable position. I have a few things to show you as to why we are in an untenable position. If I may, I would very much like to put a transparency on the screen. I have copies of prints for the reporters and for distribution.

DIVISION OF PRODUCTION INCOME

FROM A BARREL OF OLD ALBERTA OIL

"MATURE TAX SYSTEM"

(FROM MR. TURNER'S JUNE 21, 1974 CALGARY SPEECH)



The Chairman: Go ahead.

Mr. Martin: There are masses of numbers and percentages that are quoted around. I find it very confusing, and perhaps you too will find it confusing, because everyone has a different figure. I felt that as a starting point I would pick out some numbers which are perhaps neutral. On June 21, the Minister of Finance spoke to a luncheon put on by the Chamber of Commerce in Calgary. At the end of that prepared speech he had a table showing the division of the revenue from the sale of a barrel of old oil in Alberta under a mature system.

The table is very long. I have reproduced it. It is for distribution, sir. I took the final column, which is the chief one here, and I would like to put it on the screen and run over it with you to illustrate principles rather than particulars of a penny here or a penny there.

When the Minister of Finance was speaking in Calgary, he pointed out that a barrel of conventional sweet crude in Alberta was selling at the wellhead for $6.50. He pointed out very correctly that if the industry sepnt $1.50 on drilling and exploration costs and 15 cents on depreciables, the royalties and provincial income tax would amount to $3.05, the federal income tax would amount to $1.17, the lifting costs to 60 cents, and the producers net cash surplus, three cents.

We are not completely satisfied with those numbers, but they are a good place to start. On this slide you will see that the federal share of $1.17 is not a very big portion. The provincial royalty and income tax is much the bigger portion. Then there is the $1.65 spent in drilling, exploration and depreciables. This is a very large and important portion. For some reason Mr. Turner has included it in our share. I will show you this numerically in a moment. On the public presentation he is saying, "This is the federal share; this is the provincial share; and this is the industry's share."

The Chairman: Mr. Martin, when you say "this" it does not mean anything in terms of the record.

Mr. Martin: Thank you, Mr. Chairman. There is another side to the picture, a very important side, and that is the export tax. This same barrel of crude which is sold in Edmonton at $6.50 has a value of $11.70 in Edmonton. The price in Chicago is $12.20, but there is a 50 cents transportation charge which brings it back to $11.70. The export tax collected by the federal government amounts to $5.20 on every exported barrel, and that export tax goes into the revenues of Ottawa.

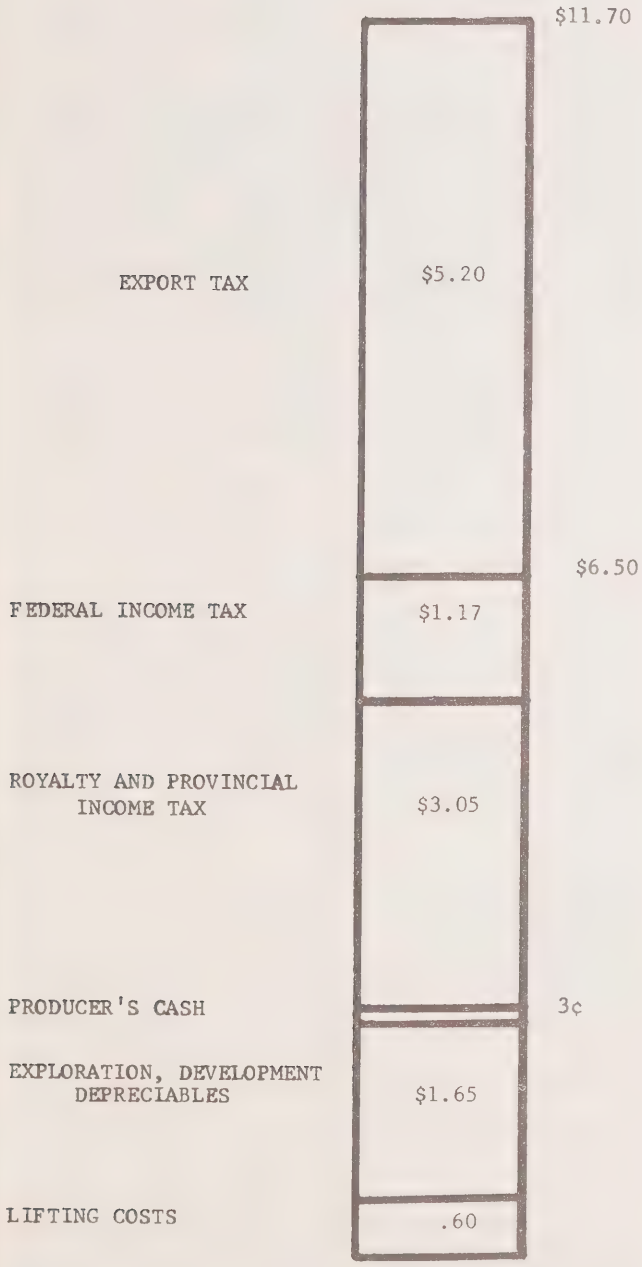
The Chairman: Is it proper, then, to describe the price of this oil at Edmonton as being $11.70? Should that description not be "in the export market"?

Mr. Martin: At Chicago, Mr. Chairman, it is $12.20.

The Chairman: But you said it was $11.70 in Edmonton. I am wondering whether that is a proper description.

Mr. Martin: I stand corrected, Mr. Chairman. That is not a proper description of the price, because the exporter has to pay $5.20. While the fair value, without the export tax, would be $11.70, because of the export tax and because of the price controls, it is $6.50. I might say, all the oil moving to Canadian refineries goes at $6.50. In other words, domestic barrels move at $6.50.

DIVISION OF PRODUCTION INCOME
FROM A BARREL OF OLD ALBERTA OIL
"MATURE TAX SYSTEM"



Mr. Martin: How one looks at this depends entirely on which side of the fence you are on. From the point of view of someone in Ottawa, the provincial share is 52 per cent, and the federal share is 20 per cent; from the point of view of someone in Edmonton, it is rather different: the federal share is 57 per cent and the provincial share is 27 per cent. It is for this reason that we see such very different assessments of the situation, depending on whether you are listening to someone from Ottawa, or to someone from Edmonton.

The Canadian Chamber of Commerce has not formed any opinion as to which level of government is right. All we know is the total. This 3 cents at the bottom is the industry's net cash flow.

The Chairman: I do not want to break into your presentation, Mr. Martin, but, as I understand it, the export tax is really a transfer payment which subsidizes the world price of oil going into the Maritimes and parts of Ontario and Quebec. So that when you refer to the federal share, I think there should be some qualification, should there not?

Mr. Martin: You are absolutely right, Mr. Chairman, when you look at it from the federal government's point of view. I make no judgment as to which side of the chart you should look at, but if you are looking at it from the Edmonton side, it is different. I form no judgment as to how the export tax should be taken into account. From the point of view of one province, it is a very important factor. I do not know how to weigh it.

The Chairman: But it does not enrich the federal Treasury where it is a transfer payment?

Mr. Martin: That may be. I have no mandate to express what even appears to be a political opinion, Mr. Chairman. The answer to your question might appear to be the expression of a political opinion. That point of view is argued most strenuously by the Minister of Finance, and half the time I agree with him. The opposite point of view, however, is argued by the province of Alberta. I would prefer to stay neutral on that question, if I may.

Senator Cook: Is all of the $5.20 so used?

Mr. Martin: The minister has said that most of the $5.20 is used to lower the price of crude oil and refined products going into the market east of the Ottawa Valley line. There will be, he believes, a small surplus.

I should add one other thing, and that is that when we saw him last October he described it as a self-liquidating measure, one which will disappear in the not too distant future as Canadian oil moves up to the world price level or, conceivably, as the world price level comes down.

From the point of view of the Canadian Chamber of Commerce, there is a much more important aspect to be considered, that being that we feel a great deal of emphasis should be put on the development of new supplies. If you look at this chart you will see that there is only this small amount of $1.65 going to the development of new supply in order to heat us and keep us mobile. In Mr. Turner's speech in Calgary, this was described as "expenditure on depreciables, exploration and development." It is only $1.65 which is being spent to replace these barrels of oil which are being produced. The producer's reward for doing that is merely 3 cents.

These figures, I might say, are Mr. Turner's. We do not necessarily agree with them, and I think the Canadian Petroleum Association, from whom the committee will hear later, will have some differing figures. Whether it is 3 cents or 2 cents, we are agreed on the principle that it is not enough, nor is the amount of $1.65 enough for the development of new supply.

The Chairman: What you mean is the net earnings available to the producers, after all taxes are accounted for, whether they be federal, provincial or export, is 3 cents?

Mr. Martin: That is right, Mr. Chairman. The amount of money which is being spent on the development of new supply for the future is $1.65. The portion being devoted to other purposes is everything from this point of the chart up, being $3.05, $1.17 and $5.20, amounting to approximately $9. In other words, the export tax, being $5.20 is being devoted to good social purposes; the federal income tax, being $1.17, is being used for good social purposes; and the royalty and provincial income tax, being $3.05, is being used for good social purposes. There is no question about that. The question is whether the balance is correct. In other words, is this sum of roughly $9.47 too much for those good special purposes and is the sum of $1.65 too little to replace these barrels of oil?

Senator Walker: What about the 3 cents?

Mr. Martin: I think the shareholders will have views on that, senator.

The Chairman: Mr. Martin, is not the determination which results in the calculation of $1.65 a decision of the producers as to how much they will spend?

Mr. Martin: That is quite correct, Mr. Chairman. If the producer wants to go out of business and conduct no further exploration for oil, he will not spend a penny on exploration. However, I question whether that is wanted by anyone in this room.

The Chairman: I am not suggesting it is. I am simply asking whether the make-up of the $1.65 is the amount that the producers determine that they will spend on exploration and development, and on depreciables?

Mr. Martin: That is quite correct.

The Chairman: Is that based on the average which has been spent, say, in the last five years, or is it much more than that?

Mr. Martin: Mr. Turner did not tell us how he prepared those figures. As I said earlier, I am using Mr. Turner's figures. However, they are roughly in line with the estimates provided by the Canadian Petroleum Association.

When you multiply these by the number of barrels being produced, it comes to about $1 billion a year. Later on the committee will hear some opinions as to whether $1 billion a year is sufficient to replace our diminishing reserves. As honourable senators are aware, and as has been well documented, the reserves of conventional oil and gas in the ground have been diminishing over the last few years. Not enough has been spent successfully.

Mr. Riehl: It is my understanding that to explore further and find further oil, a good deal more money will have to be spent per barrel. In other words, we have already found the easiest oil. From this point on, it will be much more difficult to find oil and gas in the ground.

Senator Connolly: How can you tell whether you have found the easiest oil?

Mr. Riehl: Because they are looking for it now in the Arctic and the islands out in the Arctic Ocean, which they did not have to do previously.

Senator Connolly: It is because of the northern and offshore cost, I suppose, of that exploration and development work?

Mr. R. W. Cochrane, Committee Member, The Canadian Chamber of Commerce: Wells used to cost $100,000 to $150,000. Now we are talking of $2 million, in this order today to do the same thing. In the far Arctic and the Beaufort Sea it will be more expensive, with the special requirements of drilling islands even to go offshore. The offshore is a very significant and dangerous area in which to drill and all of this is costing a fantastic amount of money to drill. In Alberta and Saskatchewan and other sedimentary areas it will take a considerable period of time; there will be more finds, but not of any magnitude.

Senator Connolly: That was perhaps the question I should have asked. In other words, do you think there are no more conventional sources to be tapped on the mainland in Saskatchewan, in the provinces?

Mr. Cochrane: There is some more but it is not of the magnitude that is required.

Senator Connolly: Do you know that?

Mr. Cochrane: This is generally the opinion of every geologist and of every group that I have listened to. In addition to that, most of that oil that will be recovered will be secondary and tertiary recovery subject to water flooding and different things, in trying to get more oil out of that pool. There has been a lot of work over the past 20 years in Alberta and Saskatchewan looking these over. There are hopes of major finds there but they are very unlikely. Therefore, industry has necessarily had to go north, to the delta and to the Arctic Islands and to the east and west coast, to try to find oil.

Senator Beaubien: If oil were found in the islands, you would not have to pay the provinces.

The Chairman: This is exactly what I was going to ask Mr. Martin. If the exploration is in the north and also in the far north and also in the Arctic circle range, then that is in the Territories and is not in either of the provinces.

Mr. Martin: That is right.

The Chairman: And therefore the provincial royalties would not apply to that production.

Mr. Martin: That is correct. It would not apply. There are two things to be talked about. In the first place, there is the financing of the ongoing exploration and there is this increase in the tax, proposed to be made and now reaffirmed in the November budget, causing a very great cash squeeze. I might mention one case. In five months, our earnings were cut by $37 million. On a year, that is about

$90 million. That has forced us to cut back capital projects right across the country from Halifax to Vancouver. We have had to get the money from somewhere and it was a real squeeze. I saw it happen and I think you can get the same picture from Mr. Cochrane. The same thing has happened in a great many places.

The Chairman: Accepting the economic assessment that the results that you may achieve in the far north and the Arctic area will be more substantial and therefore should produce a greater return, I agree that the exploration and development in those areas will be much more costly.

Mr. Cochrane: Could I answer your question, in part? The law as it is now proposed under the budget resolutions, says that all royalties, whether federal or provincial, will be added back to income. Four years ago, in the Territories the federal Land Use Act was suspended, so we have no idea of what royalties are there. We are working in good faith that everything may be all right, but we do not know. So at this moment in time, the exclusion in the rules, in 7 and 7.1, and the resolutions, is that this will affect all federal lands except Indian lands. They have moved in Alberta on Indian lands and the royalties are higher than the provinces. So what comfort do we get that the federal will be that good in the Northwest Territories?

Senator Connolly: What are the numbers on that figure?

Mr. Cochrane: It is about 56 per cent, the average royalties. Mr. Martin, is that about right—on Indian lands?

Mr. Martin: That is about right.

Senator Connolly: And what is the provincial royalty?

Mr. Cochrane: It averages about 43 per cent in Alberta and 57 per cent in Saskatchewan.

Senator Connolly: Is the Indian land take a much bigger one? Is there a bigger production?

Mr. Cochrane: I do not know. Gulf Canada has about 2,000 barrels a day. I am not sure. Perhaps CPA could give figures on that. I am not sure. Could you give some figures, Mr. Martin?

Mr. Martin: I have not got a figure.

Mr. Cochrane: I do not think it is that large. All I am saying is that you can look into the pattern of what happened on the federal situation. It is a little difficult. Sure, we hope that the federal will not materialize. When you realize that the federal resolutions have said that lands are not exempt and not only will they assess a royalty on them for federal purposes but will make them add it back and pay more income tax on the same royalties going to the federal government. It seems to me that this is double taxation, in words of one syllable.

Senator Laird: Precisely what do you suggest we can do unilaterally here in Ottawa, having in mind the inter-relationship with provincial taxation?

Mr. Cochrane: I am not sure. I do know that we are getting squeezed to the point—the industry is being held as the ham in the sandwich—between two fell forces, neither of which we can control. There are larger and larger provincial royalties and what we call punitive taxation on the other side. They maintain it added back on the other side. What the industry has is one objective, that is, to do the job that needs to be done, to try to find new oil, to try to get ourselves back to the self-sufficiency basis. What we need to do that is to be left a reasonable amount of the revenues from the production, and this is where we are being squeezed. We have had to cut back on our programs for next year, as has been mentioned, for the simple reason we just do not have the money. The new taxation is so effective that it has drained off all the dollars that we hoped were there.

Senator Walker: Supposing you did have that money, what incentive is there for you to go ahead with exploration and development for three cents cash surplus per barrel?

Mr. Cochrane: There isn't any.

Senator Walker: I would not think so.

Mr. Cochrane: This is why we are saying there is no incentive, there is no advantage there.

Senator Cook: As you go to more remote areas, will it have any effect on your lifting costs?

Senator Connolly: They will up somewhat.

Mr. Cochrane: Transportation costs will be up. Once you have got there, there is the lifting cost, but it is not so big. The big cost is in developing the field, getting the transportation and that sort of thing. The actual lifting costs, once the well is down, should not be terribly different. They may be a bit higher.

Senator Connolly: Could I ask another question at this point? In the spring budget, as I recall it, the exploration and development charges were not allowed as a deduction.

Mr. Riehl: That is correct.

Senator Connolly: And in the fall budget that was changed and they are now to be allowed, and a good deal was said about this in the press. Was it a helpful move, and to what extent?

Mr. Cochrane: The exploration and development costs were allowed, but only on a 30 per cent basis rather than on the 100 per cent basis that they had been allowed. So, over time, they were both allowed. The problem is that the exploration expenses was a bread and butter cost. The major costs were in working and finding oil. To say that you disallow is just like a manufacturer being disallowed his wages. To us, it was just the normal way of doing business. We could have lived with this, perhaps. But once this was coupled with taking this very large take, 40 per cent of the gross-remember we are talking of revenues on royalties—and starting to add them back—in Alberta—and Saskatchewan even higher, even 70 or 80 per cent of the gross being added back—there was just no way we could make this up.

To get back to the exploration expenses, certainly it is very helpful. We can continue our exploration and development now. Now for the exploration it is 100 per cent in the November budget; it was not that in the older one. Both were proposed to be at the 30 per cent basis.

The situation is particularly bad where you have a lot of small producing companies which may be spending $5 million or $10 million, or whatever the finances are, and do nothing but develop a dry hole at the end of the year.

They would have had to pay taxes if they had any revenue, if the 30 per cent was not sufficient to wipe them out. Yet, at the same time they received nothing for all the work they had done. At the end of the year their net worth, if you want to call it that, was no better than it was when the work started and it was an anomalous situation, which was very difficult. If there ever was an operating expense that resulted in no assets after evaluation, it was a dry-hole drill.

The Chairman: Mr. Martin, I wish to ask you a question. You may feel you cannot answer it or that you should not answer it. My recollection is that royalties not allowed to be deducted for purposes of accounting for taxable income was so proposed because the royalties provincially had become so high that they were like income taxes. Now, let us assume that as a base. Therefore it might be interesting to know—this is, if you can do it—up to what level would you say that the deductibility of royalties would be a reasonable thing and could not be looked on as an income tax?

Mr. Martin: I will try to answer it, sir. Contracts were freely entered into by petroleum companies with the owner of the mineral resources. These owners were in many cases the provinces in right of the Crown. In many cases they were freeholders, such as the Hudson's Bay Company and the CPR. If an oil company had asked me for a lease of my property I would have agreed that they could have all the oil in it except 16-2/3 per cent. I believe that I would have parted with 83-1/3 per cent of my property and they would have to produce and deliver the oil, providing me with 16-2/3 per cent of the production profit, which I could dispose of as I saw fit. That is what the property owner does; and I could then say to the oil companies; "Your profit has gone up because the price has gone up, and I would like to increase the royalty from 16-2/3 per cent to 65 per cent". I believe the oil company would say, "No, mister, no way! You as a private individual have no way of doing it." In my opinion, up to the amounts specified in the leases there is no question that that is a property right.

The Chairman: Was the royalty to which you were subject prior to the substantial increase provincially a royalty base with which you could live and continue exploration and development?

Mr. Martin: Yes, sir.

The Chairman: Whether it is deductible as an expense or not?

Mr. Martin: From the point of view of our own company, that is true. For the industry as a whole sir, I would ask you to put the question to Mr. Poyen. However, for our company, I believe we could, sir.

Senator Cook: Mr. Chairman, I wonder if Mr. Martin could tell us what these three figures, royalty $2.62, provincial tax, 43 cents and federal tax $1.17 were like before the roof fell in.

Division of Production Income
From a Barrel of Old Oil in Alberta
"Mature Tax System"

	March 1974	Existing Law	May Budget	November Budget
	$	$	$	$
Net Production Income	3.20	5.90	5.90	5.90
Provincial Revenues	.92	2.74	3.05	3.04
Federal Tax	.17	.41	1.17	.96
Producer's Realization	2.11	2.75	1.68	1.90
E and D and Depreciables	1.65	1.65	1.65	1.65
Cash Surplus	.64	1.10	.03	.25
Share of Net Production Income	%	%	%	%
Federal Tax	5.3	7.0	19.8	16.3
Provincial Revenues	28.8	46.4	51.7	51.5
Producer's Realization	65.9	46.6	28.5	32.2
E and D and Depreciables	51.5	28.0	28.0	28.0
Producer's Cash Surplus	14.4	18.6	.5	4.2

Mr. Martin: Because there are so many figures on here, sir, I consensed it a little, but I will give you the breakdown. The first column is the March, 1974, when the price was $3.20 per barrel and the provincial royalties were roughly 16-2/3 per cent, plus income tax. The federal tax was 17 cents. The producer, in Mr. Turner's words, realized $2.11. Expenditure on exploration and development amounted to $1.50. 15 cents was spent on depreciables and we took 46 cents to the bank to pay our shreholders their dividends. When the price increased the royalties were increased and became as illustrated in the second column. You will see that the royalty and the federal tax has increased.

Mr. Cochrane: You had better give the figures.

Mr. Martin: The provincial revenue has increased to $2.74, the federal tax, 41 cents, the producer's realization, in Mr. Turner's terms, is $2.75. The expenditure to replace that oil is $1.65 and we have $1.10 to take to the bank.

That is why our profits for the first nine months of the year were originally reported as better than the year before, because our realization was $1.10, rather than 46 cents. However, in the May budget things got rather worse and we see the three cents. In the November budget, presuming that the 25 per cent net federal tax is introduced rather than 30 per cent, we would have 25 cents. These are based on Mr. Turner's figures, which are not bad figures and illustrate the point. They are not necessarily exact and the Canadian Petroleum Association may wish to vary them by 5 per cent or 10 per cent.

The Chairman: I take it they are based on estimated production in 1975?

Mr. Martin: No, sir. I took Mr. Turner's figures in the third column from his Calgary speech. Then, knowing the

breakdown of the figures, because they were given there, I computed the first and second columns, as well as the fourth column.

Senator Beaubien: If an oil producer makes a deal with CPR or the Hudson's Bay Company, do they have to pay a provincial tax if that land happens to be in the province?

Mr. Martin: Yes.

Senator Beaubien: The provincial tax must be paid if the land is in the province?

Mr. Martin: Yes. That is one of the new changes. When the royalties were increased, this is what happened. Originally, sir, the arrangement to which you refer would be between an oil producer and a freeholder, such as the Hudson's Bay Company, a farmer, or the CPR. We paid our royalty to him and the province did not exact any form of severance tax, royalty, or any levy. The province at that point in time was only collecting royalties from the lands of which they were the owner.

Senator Beaubien: When did that change?

Mr. Martin: The change took place in the middle of 1973, when the reserves tax was introduced in Alberta. It was introduced in the legislature in 1972 and the legislature of Alberta placed a reserve tax on all reserves in the province. Apparently they did not wish to levy what might be an indirect tax, so they levied a tax on reserves computed by reference to production. Every producer had to either pay that tax, or they could be excused from it if they requested the province to amend their leases to strike out the royalty limitation clause. They were given a choice of either paying the reserve tax, or having their leases amended to increase the royalty. At the same time, all leases which were in freehold just had the reserves tax applied to them without any alternative.

The Chairman: And no deduction.

Mr. Cochrane: Yes, they were allowed to be deducted at that time.

The Chairman: I mean, provincially.

Mr. Cochrane: Yes.

Senator Beaubien: They were an expense.

Mr. Cochrane: Yes. At that time, if you were paying 16 ⅔ per cent royalties to the CPR, you had to pay a reserve tax which worked out to about the difference between 16 ⅔ and 25, which was the new scale. You had to pay that to the province.

Senator Connolly: And that was deductible from federal income tax at that time?

Mr. Cochrane: Yes, sir. It was considered a section 66 expense under one of the rulings of DNR. As of January 1, all rules are off in Alberta. They cancelled all previous arrangements, and as of January 1, 1974 they were playing around with a number of these experiments which were guaranteed to last five years but lasted only six months. They changed it at the end of the year. As of the first of the year you pay crown royalties on all crown properties. On freehold properties royalties are paid to the owner, plus a mineral tax which is this reserve tax the government talks about, which is supposed to pick up and almost equate the difference between the freehold royalty and the amount of the crown royalty if it had been a crown property. So you have a substantial tax come in here. If you have freehold property, a substantial tax is involved starting January 1, 1974, which applies to freehold property, which almost puts an equation between crown and freehold so far as the province is concerned.

Senator Beaubien: Is all that not tax deductible now?

Mr. Cochrane: It was in May. They did not take it off. They only added back those provincial levies which were directly related to production. This was not. This was related to reserves in the ground. On November 18 they put in a new rule, and anything in connection with acquisition, development or ownership of resource property now has to be taxed. That takes in almost everything, including school taxes, but not quite. They have just eliminated by special resolution the school taxes. Lease rentals, conservation taxes, everything now has to be added back, and any payment that you make to the province.

Mr. Martin: I think the question was the amounts paid to the land owners—the Hudson's Bay Company. Those are still deductible.

Mr. Cochrane: Freehold royalty is still deductible.

Senator Laird: Are you prepared to offer to us any formula as to what should be deductible off this provincial tax uniformly?

Senator Cook: On that point, the provincial revenues in the November Budget are shown as $3.04, and the federal tax is shown as 96 cents. How much would the federal tax be if the $3.04 was allowed as deductible?

Mr. Martin: The federal tax would be reduced by perhaps 75 cents. The federal rate being 25 per cent, take 75 cents off the federal tax.

Senator Cook: If the $3.04 were deductible, the federal tax would be 21 cents?

Mr. Martin: That is right.

Senator Laird: I am anxious to get an answer in connection with that. Do not forget that we can only deal with the matter federally.

Mr. Martin: I know, sir. It is really a constitutional question. I am afraid I am not in a position to give a constitutional answer.

The Chairman: Mr. Martin, I do not think it is a constitutional question, with all due respect. All we are asking is, would you tell us in your opinion what would be the level of provincial royalties which would be deductible federally, with which you could live?

Senator Laird: Precisely.

Senator Cook: And which would give the federal something.

Senator Walker: In other words, what cash surplus must you have in order to get along?

Senator Connolly: I wonder whether we are being a little unfair. This presentation is being made on behalf of producing companies who are caught in a squeeze between

the upper and lower parts of the millstone. They have a problem within the petroleum industry. What is going on is a dispute regarding jurisdiction. I do not think we want to ask them questions that go to the jurisdictional side, and the question of how much a province should get, as against the federal, is perhaps a little unfair. I do not say that the members of the committee are trying to be unfair. I am wondering whether the trhust of these questions is putting the witnesses in an invidious position in respect of their own positions with reference to federal and provincial governments.

The Chairman: But, Senator Connolly, you could reorganize the question and simply say, can you estimate for us what amount of cash you want, or need to put in the bank, in order to carry on your exploration and development?

Senator Walker: I thought that is what he was asked.

Senator Laird: That is what I am trying to get at.

Mr. Martin: My own company is not representative. No one company is representative. I think that more companies are represented behind you. For my own company, we have said if we can have something similar to what we are now. That is what Mr. Armstrong said in his speech to the Canadian Tax Foundation a month ago.

The Chairman: You mean $1.10?

Mr. Martin: Yes. These numbers are terribly confusing. I would like to illustrate it with the first chart I projected.

Senator Walker: Before you leave that, it was my understanding originally that your cash surplus was now three cents, but according to a change in the November Budget your cash surplus has risen to 25 cents. You now have a cash surplus of 25 cents. Can we go on from there?

Mr. Cochrane: Could I interject at this point? This 25 cents is not necessarily true for all companies. Gulf Canada has about 40 per cent of its gas on freehold property and about 20 per cent of its oil is on freehold. The November Budget is 10 per cent more severe than the May Budget to Gulf Canada.

Senator Walker: Are you with Gulf Canada?

Mr. Cochrane: Yes, sir. I am Treasurer with Gulf Canada.

Senator Walker: Whose figures are those?

Mr. Martin: They are Mr. Turner's, taken from his speech on June 21. The figures in the third column are his.

Senator Walker: What about the fourth column?

Mr. Martin: I knew that the taxable income figure would show a reduced federal tax by some 21 cents. The provincial tax was reduced because I made an allowance for the fact that exploration costs would be dealt with immediately. I thought we would be better off by about 22 cents.

Senator Walker: Is that for the whole industry or is that Imperial Oil's figures? I know they are Mr. Turner's figures, but you said you made this deduction of 22 cents.

The Chairman: You said you could live with it.

Mr. Martin: I said that Mr. Armstrong, our president, said we should have a system whereby we were left with about what we were left with under the existing law, which is the second column —which in Mr. Turner's description is the second column.

The Chairman: It is $1.10.

Senator Connolly: The plain fact is that, so far as producers are concerned, it does not matter to you whether it comes out of the federal take of the provincial take. This is what you need to carry on a viable industry.

Mr. Martin: That is exactly it.

Mr. Cochrane: The $1.10 and depreciables can both be lumped as the producer's share. He has spent $1.65 . . .

Senator Connolly: But that is his expenditure.

Mr. Cochrane: It leaves $2.75, out of which he pays his $1.65 and is still left with $1.10.

Senator Cook: Am I right in thinking that the Budget will be less severe for you next year?

Mr. Martin: When I adjusted Mr. Turner's figures, I made full allowance for the reduction of the tax at the 1976 rates. Full allowance is made for that.

The Chairman: Is it not 1975?

Mr. Martin: No, 1976. In 1975 there will be a 12 per cent reduction to 28 per cent.

The Chairman: That is right.

Division of Production Income
From a Barrel of Old Oil in Alberta
"Mature Tax System"
(From Mr. Turner's June 21, 1974 Calgary Speech)

	$	
Price	6.50	
Lifting Costs	.60	
Net Production Income	5.90	
Royalty	2.62	
Provincial Tax -11%	.43	.65
Federal Tax -30%	1.17	1.77
Producer's Realization	1.68	
Expenditure on Depreciables	.15	
Exploration and Development	1.50	
Cash Surplus	.03	.86
Share of Net Production Income		
Federal Tax	19.8%	30%
Provincial Revenues	51.7%	55%
Producer's Realization	28.5%	15%
Exploration, Development and Depreciables	28.0%	
Producer's Cash Surplus	.5%	15%

December 5, 1974

Mr. Martin: One point I should like to illustrate about these percentages by using the June figures—and this is terribly confusing, even amazing—is that in the event that a producer did not spend any part of the $1.50 on drilling

and exploration, he could not put it in his pocket, because when Mr. Turner computed the tax figure he assumed the $1.50 and 15 cents had been spent. So, if it had not been spent, the provincial tax would go to 65 cents, and the federal tax to $1.77, and the producer's cash surplus to 86 cents. The shares also changed, in that the federal share would go from roughly 20 per cent to 30 per cent; the provincial share to 55 per cent, and the producer's share to 15 per cent.

Senator Cook: When you say "spent", you mean spent in that taxation year?

Mr. Martin: Yes, senator, spent in the taxation year. So, there is no way, as I see it, that the producer has $1.68 to put in the bank and pay dividends on, even if he does not spend a penny replacing his reserves. Even if he were on a liquidation course, he would be getting 86 cents, or 15 per cent of the take only.

When we see numbers quoted, unless we know how much drilling and exploration costs are behind those numbers, they cannot be understood. With great respect to the gentleman, I find it very difficult to understand the figures which were given in the supplementary information to the budget, because it gives percentages but not the underlying numbers. For instance, I think there is a vast difference between 28.5 per cent and 0.5 per cent. I think it is very arguable that the 28.5 per cent is money in our pockets, because 28 per cent has been spent on drilling and exploration.

The Chairman: The answer there, of course, is that, if you do not use up income which would otherwise be taxable income to pay for drilling and exploration, then it is taxable income.

Mr. Martin: That is right, Mr. Chairman.

The Chairman: So, you pay out part to the provincial authorities and part to the federal authorities.

Mr. Martin: That is right. Those are the points I wanted to make.

Senator Connolly: Mr. Chairman, perhaps we could see the chart which was displayed just prior to this one.

Mr. Martin: Yes, certainly. The third chart I projected shows the division of the barrel of oil at various points in time. Is that the one you had in mind, Senator Connolly?

Senator Connolly: Yes.

Mr. Martin: I also have an interesting one which you might want to see as to just how the $2.70 per barrel increase was divided. As honourable senators will recall, there was an increase in the barrel of oil on April 1, and the committee might be interested in seeing how that increase was divided between the various parties.

Senator Connolly: Before you leave this chart, the provincial revenue rose much more sharply than did the federal revenue, did it not?

Mr. Martin: That is quite true, senator.

Senator Connolly: I do not know what the percentage increase is.

Mr. Martin: That is shown below. I should point out that I am, perhaps, misleading you a little bit in that these do not take the export tax into consideration. From the point of view of someone in Edmonton, these percentages are not quite right. Someone in Edmonton would look at this situation and say, "Shucks, Ottawa is getting $6.37, not just $1.17."

Senator Connolly: But that is not staying in Ottawa; it is going out in order to subsidize the oil going into Eastern Canada.

Mr. Martin: Yes, senator, that is quite right.

The Chairman: I have described it as a transfer payment.

Senator Walker: It is out of the pockets of the oil companies, regardless of what is done with it.

Mr. Martin: To put it in as neutral terms as I can, would it not be fair to say that the $1.17 is being used by the federal government for good social purposes and the $3.05 is being used by the provinces for good social purposes? Who am I to judge whether one good social purpose is better than another?

Senator Connolly: We should not ask you to so judge. You are not here for that purpose.

The Chairman: Your operation is not affected by the $5.20, is it?

Mr. Martin: Well, we pay it, Mr. Chairman. We charge that to our customers.

The Chairman: But you get $6.50 on domestic production.

Senator Cook: But they would get $11.70.

Mr. Cochrane: If there was no export tax, we should get fair market value, which is $11.70.

The Chairman: That is the position of the industry, but there are other factors taken into consideration in the $5.20. These things may touch on jurisdictional problems as to whether Canada is one unit, and where one part of the country is badly hurt and is subject to the world price for oil, say, whether the resources of Canada in the export field should not, to some extent, be used to maintain the level of price all across Canada for domestic use. That is really the question, is it not?

Mr. Martin: That is exactly it, Mr. Chairman, and you have put it very well. I think the provinces, too, can put forth a good case, but somewhat differently than you have stated it.

Senator Laird: That is what we think, too.

Mr. Martin: There are two sides to it, and I hope neither side is forgotten.

The Chairman: I am not asking you to express your view on it.

Mr. Martin: Finally, members of the committee might be interested in a chart showing how the $2.70 was ultimately divided up.

The Division of the $2.70 per Barrel Alberta Old Oil

	March 1974 Prospect	Effect of Royalty Increase	Effect of May Budget	Effect of November Budget
	$	$	$	$
Royalty	.62*	1.75	1.75	1.75
Provincial Income Tax	.15	.07	.38	.37
Total Provincial Share	.77	1.82	2.13	2.12
Federal Income Tax	.53	.24	1.00	.79
Total Government	1.30	2.06	3.13	2.91
Producer's Share	1.40	.64	(.43)	(.21)
Total	2.70	2.70	2.70	2.70

Assuming Expenditures on Depreciables of $0.15c and on Exploration and Drilling of $1.50

Mr. Martin: This chart shows the division of the $2.70 per barrel increase in oil. Had the old rate stayed in effect, the total provincial share would have been 77 cents out of that $2.70 increase; the federal government's share would have been 53 cents, for a total government take fo $1.30, and the industry's share would have been $1.40. However, the royalty went up, so that Alberta took $1.82. The federal income tax, instead of it being 53 cents, was only 24 cents. I can quite sympathize with a man who was hoping to get 53 cents and suddenly found that, for reasons beyond his control, he is only getting 24 cents. I can quite sympathize with the man who thought he was going to get $1.40 instead of 64 cents, and would up 43 cents out of pocket.

Th Chairman: I can see the position of the man who is expecting certain provincial royalties and finds himself loaded with higher provincial royalties.

Mr. Martin: Yes.

Senator Walker: Or the great gold analyst who said gold should go down and, as a result of his advice, it did go down and then he jumped out the window the next day.

Mr. Cochrane: It is interesting to observe that this illustrates the situation in both Alberta and Saskatchewan with respect to the balance over the $3.80 when it went up to $6.50. With that increment, the Alberta government levied a 65 per cent gross royalty. These being added back under the November budget means that you pay 41 per cent on it, so that the increment is taxed between the two levels of government at a rate of 106 per cent. In other words, we cannot do anything but lose it. In Saskatchewan, it is 142 per cent of the increment that is taxed. Once you get into this kind of taxation, God forbid that we should ever get a price increase, because we would be forced out of business. Every time we get an increase in price, we lose more money.

The Chairman: Are there any other comments?

Mr. Martin: I do not believe so, Mr. Chairman.

Senator Cook: Is it possible tc have these tables form part of the record, Mr. Chairman?

The Chairman: They will be included in the record, yes.

Mr. Martin: I have copies which I will leave with Mr. Jackson.

The Chairman: Do any other members of the panel wish to make representations in addition to what Mr. Martin has already said on this subject?

Mr. Cochrane: It is a question of taking five minutes. I would show that we are getting Mr. Turner's figures and outline the three stages we have been through. I think it is interesting, because the problem is that we have these figures and every one is disagreeing with everyone else's figure. We would like to tell you how we see them coming through, that it adds up to not very much.

These are based on Canadian Petroleum statistics and we accept them as being illustrative figures. Let me give you the first.

Division of an Existing Domestic Barrel of Oil in Alberta

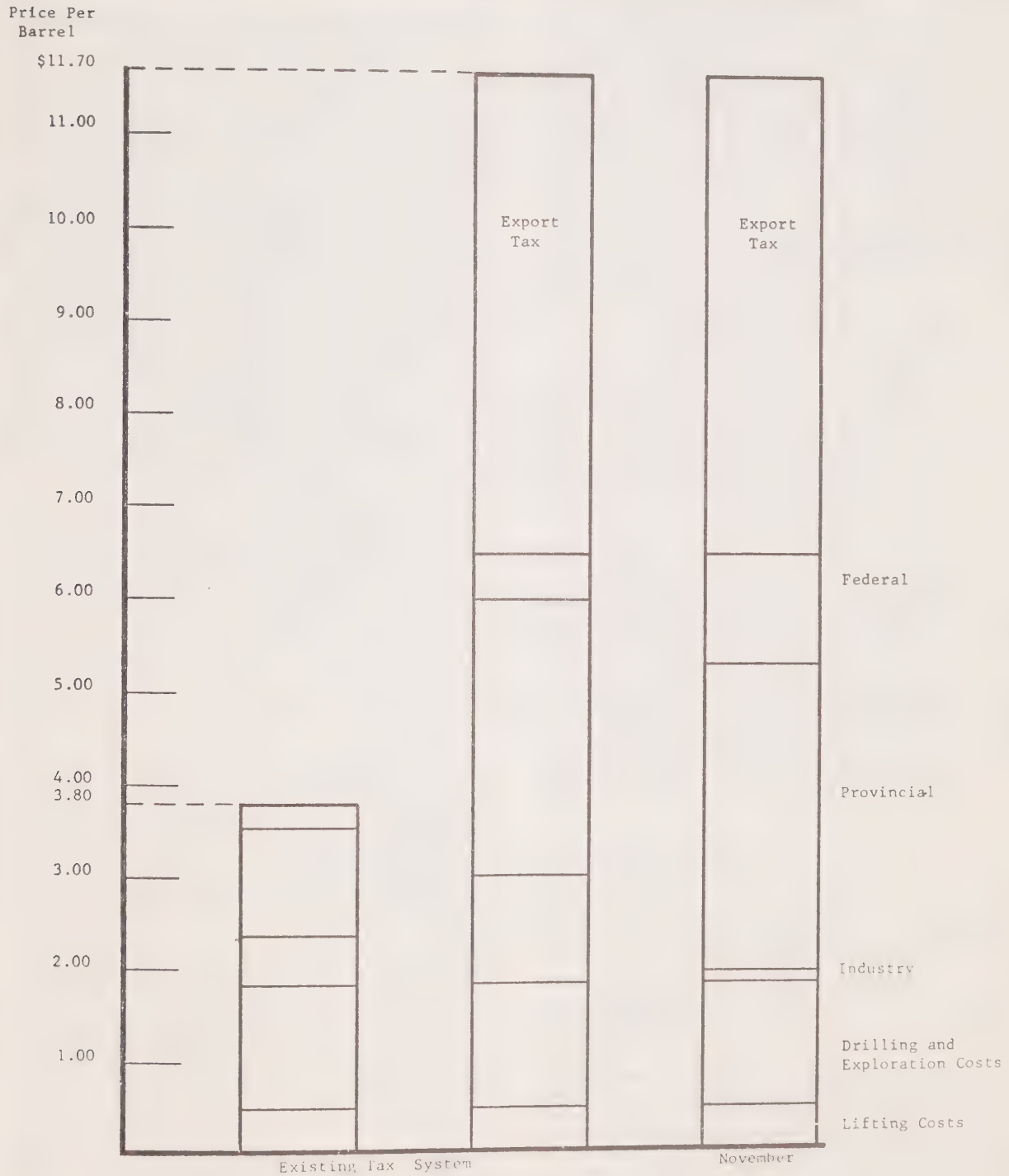
	Existing Tax System		November 18th Budget
	$	$	$
Gross Revenue	3.80	6.50	6.50
Lifting Costs	.50	.50	.50
Drilling & Exploration Costs	1.35	1.35	1.35
Net Revenue	1.95	4.65	4.65
Federal Take	.27	.51	1.18
Provincial Take	1.15	2.97	3.34
Industry Retention	.53	1.17	.13
Share of Net Revenue			
Federal	13.8%	11.0%	25.4%
Provincial	59.0%	63.9%	71.8%
Industry	27.2%	25.1%	2.8%

Mr. Cochrane: These are two sets of figures. We have simplified them as much as possible. They show the $3.80 before the price change on April 1st, and the $6.50 under the present tax system, what would happen to the $3.80 with lifting costs in the region of 50 cents a barrel, and the drilling and exploration costs of $1.35, and then there is 20 cents that is paid in bonuses and other things to the provinces, which is in the provincial take. This means that the net revenue, after our two charges, is $1.95 and then $4.65. The federal take is 27 cents and the provincial $1.15, then there is 51 cents and $2.97. In other words, the industry retention was 53 cents and $1.17, and that is not far from the $1.10 which was used before. Under the November 18 budget, which we based it on, we consider that this has come down to 13 cents. In other words, the share of the net revenue—and this is net revenue after deducting our direct costs—the amount of federal take is 25.4 per cent, the provincial take is 71.8 per cent and we get in industry 2.8 per cent. We cannot live with that kind of distribution and sharing of costs.

Senator Walker: Just to summarize, then, your figures show a net to you of half of what Mr. Turner's figures show. He shows 25 per cent and you show 13 per cent. Who is right?

Mr. Cochrane: We know what is in our figures. The trouble is we do not know what is in Mr. Turner's figures.

DIVISION OF AN EXISTING BARREL OF OIL IN ALBERTA



Mr. Cochrane: This chart is just a graphic way of showing you the same thing, but it is probably highlighted. At the top there is a price per barrel which you can ignore. From here down, in the column after the export tax, it shows that after export tax it represents $6.50, at the bottom of the export tax. On the $3.80 basis you can see the provincial share of the take going from that to a large share here (*indicating*). The federal figure is moving in red from a fairly small group to a little higher, to a major group here (*indicated*). These are just the same figures that we have looked at. It shows industry going from a relatively large proportion here of 53 cents, to $1.17, down to 13 cents. The exploration and drilling costs are left constant.

The big problem we have is the overall question of adding back this very large part of our total gross revenue which is in the form of royalties. From that, it is very difficult to go forward, to allow us to do the job. We are trying very hard to do that. We are trying to do the job and we are very enthusiastic about it, but we do not have the money to do it and it is difficult to carry on.

The Chairman: Thank you, Mr. Cochrane.

Now, Mr. Riehl. Having discussed the resources tax and that phase of the industry and its problems, we are at the stage where we have studied all the resolutions in the budget relating to amendments to the income tax. We have gathered certain information which suggests that the language of the resolution is too loose and will undoubtedly be tightened up when the bill is introduced.

In those circumstances, I would suggest this. If there are some particular instances in the special resolutions, other than the resources end of it, on which you have a comment to make, that touches your industry, we would like to hear it. But to base presentations on the wording or language of the resolutions, we may be wasting a lot of time.

We have noted in our study of it that there are many areas where it is just inconceivable that the bill will contain the language of the resolutions. It just has to be tightened up or, in some cases, expanded. So, rather than waste time on the language of the special resolutions, is there something in the special resolutions, other than the resolutions dealing with the resource industry, which you particularly want to comment on?

Mr. Riehl: If I may, I will call on certain members of our group. I would call now on Mr. Laing to comment on the excise tax.

Senator Cook: Mr. Chairman, are we not going to have any presentation from the mining people, or is mining in substantially the same position as oil?

Mr. Martin: It is in substantially the same position, sir. They are having their mineral tax disallowed, the figures are a bit different, but they have got substantially the same squeeze.

The Chairman: When you speak about excise taxes, you are referring to the resolutions that deal with the excise tax changes. Our reference from the Senate is in connection with the income tax resolutions. As to the excise tax bill, it is expected it may come to us, it may go through the House of Commons some time next week and come to us. But until that happens, we have no authority to deal with excise tax, by the terms of our reference. If you want to make a submission, you can make it in writing, and we will hold it until such time as the bill is before us.

Mr. Riehl: I think that our comments now would be fairly brief on that other subject. We did concentrate on the first a little heavily.

The Chairman: The only point is that we are going beyond our terms of reference.

Senator Connolly: It might help us on a later occasion, if we have this comment now.

Senator Walker: If it is only five minutes, it will show the real position and it will help us.—provided it is five minutes.

The Chairman: If that is the wish of the committee, to go outside the terms of reference. You understand that we may not retain our familiarity with the terms of reference of the bill if we take five minutes or so, and it will be part of our record that we will have. So you are going to talk about the excise tax on the basis of the amending resolutions, and you are going to tell us what is wrong with term as far as your end of the industry is concerned. You understand the terms on which you are giving it, that we will look at it and use it only when that bill is before us.

Mr. A. D. Laing, Committee Member, the Canadian Chamber of Commerce: Mr. Chairman, on the excise tax resolutions, first, one of the more important changes was in regard to construction materials. It is important from a revenue point of view, where the minister estimated that it will cost about $450 million in revenue reduction because of the reduction of the construction materials tax alone to 5 per cent from 12 per cent and 11 per cent rates previously. We naturally applied the rule that has been made. We had suggested that consideration be given to exempting them altogether. I can only guess that they had gone as far as they think they could go at the moment, for revenue reasons.

The Chairman: That does not leave you with any more revenue, does it?

Mr. Laing: The companies, you mean?

The Chairman: Yes.

Mr. Laing: To some extent. Some of these construction materials are used in repairs and to that extent they will affect revenue.

The Chairman: The reduction in excise taxes available from the government to some extent may leave you with some more cash in the till?

Mr. Laing: Exactly.

The Chairman: Can you estimate the percentage?

Mr. Laing: Based on one business, which is a steel mill, and because steel mills are on a pretty extensive capital expenditure program and expect to continue that, it would appear to be, possibly, one-half to one per cent of the capital expenditure.

The Chairman: Yes, that is a variable.

Mr. Laing: For some businesses it could be much higher than that.

The Chairman: I wondered whether it would relate to a percentage of the $450 million in reduction of revenue to the government by the reduction in the excise tax?

Mr. Laing: A large amount of construction materials is used in residential construction. This relates to the portion that remains with businesses.

The Chairman: I am referring only to your business.

Mr. Laing: I do not have an estimate of that.

The Chairman: There would be some, though.

Mr. Laing: Oh, yes. The next point which we believe should be considered in the method which is used in the proposed regulations and schedules to the act is that there have been difficulties in the past in deciding whether something which a business acquires is exempted tax or taxed at a low rate. The method of decision in that respect was that it was used in that manner, for those purposes. The resolutions here have attempted to provide an exemption for some construction equipment and transportation equipment and a reduced rate of tax on construction materials. In doing that, instead of sticking with the specific end use criteria, it was suggested that if something is designed for use primarily for construction, or transportation equipment and in the case of construction material which is used in construction. If it is that type of material it is automatically either exempt or subject to the low rate. You do not then have to go and prove exactly how it was used.

The Chairman: It is an end-use item on which the tax proceeds.

Mr. Laing: Yes, it has done. It has departed a little from that now and provides some administrative simplicity, which is a good move.

You have asked, though, not for just what is good about it but for any suggestions we have and there are a few on the basis I have already mentioned. That is, as soon as revenue considerations permit consideration should be given to the complete removal of the tax on construction materials. That tax is now five per cent. It helps business and it also helps in the prospective cost of residential construction.

The second administrative suggestion we have is with respect again to how the tax is collected on the construction materials which are now subject to tax at the low rate of five per cent rather than 12 per cent. There are certain categories of goods, pipes, valves, and electrical equipment. It has been the practice that the manufacturer who sells those must collect tax on all sales. When the person who buys and uses them in an exemptable manner, or a way in which the tax is lower, he requests a refund. We suggest that the government now give more consideration to allowing the manufacturer not to apply the tax at the time of sale.

One minor point, which might be an oversight, has to do with construction materials.

The Chairman: That is why I was going to wash them out, because I would suspect that the language problems would be recognized by the time the bill is drafted.

Mr. Laing: Another administrative point is that the list of construction materials contains a clause which provides that if other items are considered to qualify they can be added by regulation. One suggestion, by way of illustration, is floor tile, which is a construction material taxable at the lower rate. For some reason adhesives were left out. We would think that if floor tile qualifies for the lower rate, adhesive should also, but it was omitted.

The Chairman: We will consider that.

Mr. Laing: That is all I have to say with respect to the excise tax.

Senator Laird: Mr. Chairman, in Windsor over the weekend I was chatting with Mr. Easton, who is on the panel. He has the distinction of being a resident of Windsor. He indicated to me that there are certain omissions in the budget resolutions. I wonder if it would be helpful to the committee if he were to indicate them?

The Chairman: If there are certain omissions, maybe he could give us a list of them. We have noticed many ourselves.

Senator Laird: Have you made a list?

Mr. R. R. Easton, Q.C., Committee Member, The Canadian Chamber of Commerce: Senator Laird, I have four, which I thought would help the average taxpayer and I did prepare a memorandum on them. I can speak to them, or just pass the memo around.

The Chairman: We can file the memorandum and give copies to the members of the committee and avoid spending any amount of time on it now.

Text of document follows:

SUBMISSION TO THE SENATE STANDING COMMITTEE ON BANKING, TRADE AND COMMERCE ON OMMISSIONS FROM THE BUDGET OF NOVEMBER 18, 1974 OF NEEDED REFORMS FOR THE AVERAGE TAXPAYER

Among the reforms badly needed for the average taxpayer are those which can be classified as amendments to bring some balance and fairness into the rules by which taxpayers and tax bureaucracy deal with each other. The following are only four of such taxpayer reforms:—

(1) *ESTOPPEL AGAINST CROWN*

There is that old legal doctrine that the Crown is not bound by the acts or omissions of its servants. The continuance of this obsolete doctrine is surely unwarranted where tax matters are concerned since it means that taxpayers cannot now make valid and binding settlements of tax issues with D.N.R. officials. In many instances such settlements are now made but they are only binding on the taxpayer who, notwithstanding the bona fides and sincerity of intent of officials with whom they are made, can later be surprised to receive a Notice of Assessment which effectively repudiates such settlement. I have heard of it happening after the death of the settling Assessor and have seen it occur when the taxpayer has moved from the area of one District Taxation office to another where the new local officials on receiving and reviewing the taxpayer's file takes an entirely different view of the tax issue settled several years before.

There are also many cases where for various good reasons neither party desires to litigate and where the public

interest in both the administration of justice and the protection of the revenue is better served by a compromise settlement without formal reference to a Tax Court.

There are those who suggest this can be achieved by going through the motions of a tax appeal just to get the matter before such a Court which can then sign a consent jugment upon the settlement previously agreed upon. Recent judicial pronouncements have, however, cast doubt upon the legality and propriety of this practice.

RECOMMENDATION

It is therefore submitted that an amendment to the Income Tax Act be proposed to provide machinery with suitable safeguards to enable a binding settlement of tax issues between taxpayer and the Crown by giving certain tax officials power to conclude such out of Court settlements.

(2) *SEARCH AND SEIZURE*

Another tax reform needed by the taxpayer is quickly discovered by those who attempt to tangle with the tax bureaucracy. The taxpayer learns he has put himself in opposition to a relentless, tightly knit group which historically has shown itself not only ready and willing but able to commit the full legal, financial and other considerable resources of the Federal government against him without mercy or even reasonably adequate legal and political controls over the administrative practices it may follow.

A perfect illustration of the untrammeled use of this power is contained in the recitation of the conduct of Departmental officials set out in the decision of Mr. Justice Bouck of the British Columbia Supreme Court in the Granby Construction case. Mr. Justice McFarlane, writing the decision on the defendants' appeal to the B.C. Court of Appeal, has now added that Court's characterization of this conduct in the following terms:—

> "I cannot leave this appeal without stating my opinion that on the evidence before this Court the powers conferred by section 231 (4) have been exercised in a high-handed and oppressive manner which I feel sure was never contemplated by Parliament."

Another case of high-handed use of the power to search and seize under section 231 (4) recently reliably reported to me was one where the seizure yielded nothing to justify the concomitant invasion of privacy. Yet in this case the offending D.N.R. officials refused to return the taxpayer's seized records until they had received a signed release of all civil criminal action which might be brought against them.

RECOMMENDATION

That this section should be repealed or at the very least amended to restrict its use to those cases where the Department has first acted under the ample powers in sub-sections (1) and (3) of section 231 and then only when it has discovered hard evidence of criminal intent and not merely rank suspicion of tax evasion.

(3) *ADMINISTRATIVE ABUSE*

Another practice of questionable propriety that ought to be stopped is the habit of many Assessors, following a routine review of taxpayer returns as a result of which they turn up items in gray areas of the tax law, of bluntly or by clear implication threatening the taxpayer with a full dress field audit unless their interpretation of the taxability of such items is accepted. Experience shows that this not only happens all the time but has been going on for years in spite of complaints to senior officials of the D.N.R. One can only conclude that this is a tacit if not openly expressed policy of the Department. Instances of such practice represent at best improper taxpayer harassment and at worst unmitigated blackmail and extortion. If the facts warrant a field audit, then a field audit should be done without gratuitous threats.

RECOMMENDATION

Administrative directive having obviously failed to stop this abuse, it is recommended that a suitable prohibition with accompanying penalty be written into the Income Tax Act in a form similar to section 241 which protects the confidentiality of taxpayer information received by tax officials.

(4) *PAYMENT OF JUDGMENT BEFORE CASE IS TRIED*

Because of the D.N.R. power previously referred to and its demonstrated ability to induce the Department of Justice also to appeal any and all cases right through to the Supreme Court of Canada, few taxpayers have the temerity to start a fight in or out of the Tax Courts unless well heeled and determined to see justice done. This surely was never Parliament's intent when it provided the largely excellent appeal procedures in the Act. Further aggravating this imbalance in favour of the tax bureaucracy is the requirement of the Income Tax Act that no appeal from assessed tax can be conducted by a taxpayer unless he pays the tax assessed within 30 days of the date of the Notice of Assessment. To the taxpayer who honestly believes upon reasonable grounds that he has been wrongly and unjustly assessed, this legal impediment to judicial scrutiny of his legitimate objection to the assessment is not only unwarranted, it adds insult to injury. It is insult because this blanket requirement labels all such taxpayers whatever the facts as dishonest and absconding debtors. Injury, because it requires the taxpayer, the litigant in the impending trial least able to pay any judgment rendered, to prepay what the other litigant blandly alleges should be the judgment before the case is tried.

One of the more serious side effects of this requirement is the very substantial encouragement it provides for careless, if not frivolous, assessments. If the amount involved is less than the legal costs of contesting the assessment, the official making the assessment knows full well most taxpayers will pay and do nothing in spite of any injustice thay may be felt. With more than 8 million Canadians now paying income taxes, an unwarranted extra assessment of a mere $100.00 against each of them would yield 8 hundred million dollars. This potential for illegally balancing the Budget in the hands of a D.N.R. without adequate staff

controls is surely one which none of us desires to be possible however improbable.

Viewed from this point of view of the average taxpayer, it is hard to imagine a more iniquitous provision of the old law which escaped the reforming zeal of those who determined the nature and character, if not the details, of tax reform. It should also be noted that no other modern state which calls itself a free enterprise democracy requires prepayment of tax before trial in its tax law. Certainly, the Americans, from whose Internal Revenue Code much of our current capital gains and other tax law was taken, have no such requirement, offending as it does our long common law tradition of equal justice before the law. Neither does Japan nor West Germany, France nor other similarly situated members of the European Economic Community to mention only a few of those nations not having our common law tradition of equality before the law.

RECOMMENDATION

To remove this inequity it is also recommended that section 158 of the Income Tax Act be amended to provide that the payment required by this section does not, at the option of the taxpayer, need to be paid within the 30 days mentioned if within such period the taxpayer serves Notice of Objection on the Deputy Minister of National Revenue and the latter then fails to establish, upon the hearing of a motion made to the Tax Review Board within 10 days thereafter, that the taxpayer's objections are frivolous or that there is good reason to believe that the taxpayer is attempting to avoid payment of taxes with intent to defraud the Revenue. In fairness to the Revenue, another provision should reasonably be added to enable the Deputy Minister upon similar motion to the Board to secure revocation of the suspension of payment elected by a taxpayer if he should abandon or fail to prosecute his appeal with all due despatch.

———

Mr. Easton: It is not complicated and deals with the following subjects: Estoppel against the crown and the search and seizure section, which is a terrible section so far as the average taxpayer is concerned. It also deals with incidents of administrative abuse which in my opinion ought to be corrected. Finally there is the question of payment of judgment before a case is tried, which irritated me most as a common law lawyer, having to pay the judgment before the case is tried. As you all know, you must pay within 30 days of receipt of the notice of assessment, to which this is directed. You might say that this is my own submission, as it has not been discussed by the committee.

The Chairman: You may be back here again when the bill is received.

Senator Walker: Has it passed your company, Gulf?

Mr. Easton: It has passed me, yes. These are only four of the type of items which I consider should have been done when the tax reform was introduced at the end of 1974. They are for the average taxpayer, who was forgotten in the shuffle.

The Chairman: We have a copy of it now and it will be included in our record of proceedings.

Mr. Riehl: Mr. Easton is a lawyer practising in the city of Windsor.

The Chairman: The moment Windsor was mentioned by Senator Laird, knowing his great love of the city of Windsor, certainly we had to deal with that situation.

Is there anything else?

Mr. Riehl: We wanted to return to Mr. Laing in connection with the manufacturing and processing capital cost allowance.

The Chairman: These are the special income tax provisions.

Mr. Riehl: Yes.

Mr. Laing: With regard to manufacturing and processing, we are pleased that the minister decided that the tax reductions on manufacturing profits should remain. Unless there is any specific change, they are expected to stay there. The same philosophy was adopted with respect to the fast write-off for capital expenditures on manufacturing and precessing equipment, which is now proposed to be included in the regulations, without a termination date. It had a termination date of December, 1974.

The Chairman: In a sense that is relieving, then.

Mr. Laing: Yes. It was rather difficult from a planning point of view to know what your cash flow might be if it were done on a time-to-time basis. We are very happy to see that particular change in the proposal for cost accounting regulations.

The other one has to do with facilities for environment control. That has been extended, unfortunately again with a time limitation applied.

The Chairman: Well, who knows? It may work out in the same manner at some date on the environmental provision as it is now working out on the provision where there is now no limit on the fast write-off as to time.

Mr. Laing: We hope so. Those are all my points.

The Chairman: If everyone keeps talking and making representations, well, sooner or later they appear to get heard. Is there anything else?

Mr. Laing: Nothing on that part.

Mr. Riehl: I believe resolution 74 is the longest, and we have Mr. Sherman, who I do not believe is unhappy with any of the provisions, but may wish to make a comment on the resolution.

The Chairman: If he is satisfied with it.

Mr. Sherman: Yes. It is not necessary.

The Chairman: That is all we need to know. We will remember that when we are studying the bill.

Mr. Sherman: It must be very gratifying to your committee, sir, to know that your report, which was made after the hearings on Bill C-259, has now finally been accepted by the government and much of it is embodied in the ways and means resolutions.

The Chairman: It is another indication that there is a lot of good thinking and law in the reports we have made. They have finally caught up with practically all the points we made.

Mr. Sherman: It is a shame that it took three years.

The Chairman: Sooner or later we seen to get there.

Senator Macnaughton: Mr. Chairman, is Mr. Easton's name and address on his memo?

Mr. Easton: I can give you my business card.

The Chairman: The reporter can note, in connection with the memorandum which has been handed to the reporter, that the memorandum was presented by R. Robert Easton, Q.C. of Windsor.

Senator Macnaughton: Mr. Chairman, we used to follow the practice of having the addresses of the different witnesses. I think it is rather important, when we are estimating the quality of the statements they make, to know their position in the company and their background. It helps us to judge.

The Chairman: In the list of representatives we have the addresses—at least, for Toronto. Mr. Cochrane is the Treasurer and Director of Taxation for Gulf Oil Canada. Gulf Oil is so well known in Toronto that I am sure a letter addressed in that fashion would reach him.

Senator Macnaughton: I was referring to our procedure sheet.

The Chairman: I have a representation list which includes the addresses. I will give them to the reporter.

Mr. Riehl: In my introduction, I tried to give them. Mr. Sherman is the Director of Taxation at Massey-Ferguson. That is one Canadian company which probably has larger overseas operations than almost any other. I believe that About 10 per cent of their operations are domestic and the rest apply to overseas. So their foreign taxation is international taxation.

The Chairman: Certainly when Massey-Ferguson appeared before us when we were considering the White Paper and Bill C-259, they made a very worthwhile contribution in that area. Is there anything else that you wish to say?

Mr. Riehl: We emphasized today the resource industries.

The Chairman: The Canadian Petroleum people are waiting to make a presentation. Possibly they may deal with the other matters.

Mr. Riehl: Mr. Matheson, do you have any comment?

Mr. D. I. Matheson, Committee Member, Public Finance and Taxation Committee, Ontario Section, the Canadian Chamber of Commerce: Yes. In a word, in the area of personal income, corporate reorganization and acquisitions in the amendments, the Chamber feels that the amendments contain a very positive thrust overall. We have only a couple of small points to make. There are a couple of omissions, in connection with which we have made suggestions over the years. We do not see that. Among other things, the individual who employs his wife has to include her salary in the income. We still think that is improper. Regarding employee expenses, where we have a limit of $150, the Carter Commission, the Bar submission and the Institute of Chartered Accountants' submission have continuously recommended that it be altered to a percentage of salary compensation, to a higher limit. If something is incurred for reasonable purposes, attributable to earning income, it should be deductible.

On the indexing side, a very possible thrust in the Budget, there should also be consideration, in the chamber's view, to indexing the limits on contributions to plans such as registered retirement saving plans, following through the same principle, where people are making contributions and getting limits of $2,500.

On the amendments dealing with registered retirement savings plans, a positive introduction allowing plans to be set up for wives, we indicate in our submission that we think this area could be subject to some abuse, where an individual makes a contribution, gets a deduction for his wife, opens a registered retirement savings plan, and a couple of years or even weeks later his wife winds up the plan and takes the income out of it. That income is not attributable to the husband who went through this particular approach. We think there should be some clarification on that.

I should like to say a word about the corporate reorganization provisions. We are finally getting a number of good common business sense provisions which make sense when you get conglomerate companies and you want to move your assets around. There are still a number of short-falls. We hope that the thrust currently being taken will continue too grow and improve. Things like transfers between sister companies should be clearly opened up, and the winding up of companies, where you get a tax-free roll-over. Sometimes a company does not own 100 per cent but only 95 per cent of shares. Those sort of things should also be eligible for roll-overs. We think that in the area of groups of companies there should be eventually consolidated reporting, where there is always the problem of shifting the losses of one operation over to another company or being able to apply losses of one company over to another company, and so on.

The Chairman: That is one thing we recommended in 1971. They have not caught up with that one yet.

Mr. Matheson: It is just good common business sense. Industry has many problems. Let us get these others out of the way and go for the big problems rather than the technical ones.

The Chairman: Thank you very much.

Mr. Riehl: Mr. Chairman, I have a few words to say, but I think I will let them go. I wanted to mention Resolution 59, which seems to require a listing of all depreciable property where there is a roll-over to Canadian corporations. That might be sensible where only part of the class of depreciable property is being rolled over. But if you have a corporation of any magnitude, there seems to be a ridiculous amount of work involved where you are rolling over all the assets of a class. There is no purpose to it.

The Chairman: We will have a look at that.

Mr. Riehl: We have taken up a good deal of time. We emphasized today the extractive industries. We thank you for the time you have allowed us.

The Chairman: Thank you very much.

Honourable senators, we now have before us representatives of the Canadian Petroleum Association. Mr. Poyen is going to give the opening statement. Will you introduce your panel, Mr. Poyen?

Mr. John S. Poyen, President, Canadian Petroleum Association: Mr. Chairman and honourable senators, may

I on behalf of the Canadian Petroleum Association express our appreciation for the opportunity of appearing before you in the matter of the federal Budget tabled November 18?

If I may, I should like to introduce myself and my associates. My name is John Poyen. I am President of the Canadian Petroleum Association. On my right is Mr. Lindsay Milne, Chairman of an ad hoc committee of the Canadian Petroleum Association to develop economic models regarding exploration and production and future investments, in Canada. The next gentleman is Mr. William Oostenbrink, Chairman of the Economic Committee of the Canadian Petroleum Association. The next gentleman is Mr. Percy Baker, who is a member of both committees and has been working basically with Mr. Lindsay Milne in setting up these economic models.

As I understand it, Mr. Chairman, Mr. Jackson distributed to you gentlemen, three sets of copies of our representations.

I must apologize for this distribution. The material is not designed specifically for this presentation, but I believe it is fairly representative of our position, and, I believe, worthy of your consideration. It was prepared primarily to communicate with federal civil servants in the Department of Energy, Mines and Resources and the Department of Finance on matters relating to the oil and gas industry, and also to communicate with civil servants in the provinces, particularly Alberta, on the same matter. I thought that perhaps I could impose on you gentlemen by bringing copies and offering them to you for your consideration.

The Chairman: Our staff will handle those, so we do not need to deal with them now, particularly.

Mr. Poyen: No. I would suggest, Mr. Chairman, that when I am through with my introductory statement, possibly two of the members of my group here might highlight the conclusions reached in those submissions. They will be very short references.

The Chairman: All right. Let us go ahead.

Mr. Poyen: We recognize that the terms of reference of this review are really income tax matters, and the CPA's will act in a supplementary capacity to the Chamber of Commerce submission on the impact of the budget on income taxes as related to the oil and gas industries.

Our presentation deals with the broad economic and financial environment in which the oil and gas industry finds itself today. We are fundamentally concerned with cash flows, rates of return, and other financial and economic yardsticks by which investor confidence is generated and maintained.

As you may appreciate, having applied the various financial measurements of components, the bottom line of the profit and loss statement is the single most important criterion, and taxation is the basic component that impinges on corporate performance.

I must again apologize for not having a formal submission for you gentlemen, and I have accepted the responsibility for that. If you so request, following this hearing we will provide you with a supplementary submission.

In your discussions with the Canadian Chamber of Commerce there was some considerable discussion over royalties. I wonder if I could take a moment of your time and philosophize a little bit on what royalties really are, what they mean in relationship to provincial utilization of royalties as an economic rent, and how the federal government is now applying the taxation of royalties within this whole parameter.

First of all, I think it should be understood that a petroleum and natural gas lease, under which the oil industry operates, is a landlord-tenant relationship, and by the terms of that lease the landlord, the owner of petroleum and natural gas rights, actually sells or conveys a portion of the mineral interests to the lessee. He does not convey all of the mineral interests. He conveys the right, title and interest in a portion of the minerals to the lessee, and retains or reserves unto himself the title in the remaining portion.

Generally, this is expressed as a percentage, and generally speaking, within that petroleum and natural gas lease, the actual volume retained is retained for the lessor's account. A percentage of the volume produced is retained in the title in the name of, and in the hands of, the lessor.

However, for the sake of convenience only, the lessor often asks the lessee please to handle the lessor's own oil or gas and bring it to the surface, put it in storage tanks, transport it and sell it on behalf of the lessor.

The Chairman: That is to the extent of the lessor's interest.

Mr. Poyen: To the extent of the lessor's interest. Therefore there is no cash that moves through the lessee's hands, and is used by the lessee, of the lessor's share of his retained ownership in the particular product, whether it be oil or gas. So it is not a taxation tool, it is strictly a retained ownership.

Gentlemen, I would suggest to you that if the federal government had any possible way of taxing the lessor, which in our example is the Alberta government, they would obviously go to that lessor and tax him for his retained ownership of the proceeds of the sale of his oil and gas.

The Chairman: Can you tell me ritht there how the lessor treats the payments that he receives under that kind of agreement? Does he treat them as capital receipts, or does he treat some part of them as income?

Mr. Poyen: In the province of Alberta—and I have grown up and had all my oil experience in Alberta—The government of Alberta has always treated royalty payments as a capital account.

The Chairman: I was talking about particular payments. I was talking about the portion that is retained—the portion of the interest in the property which is being transferred to somebody who is going to develop, or operate, or sell. There is a portion that is for the account of the lessor.

Mr. Poyen: Yes, sir.

The Chairman: What I was asking was, when the lessor receives that in annual payments, as there are sales, how is it treated by him? Is it treated as a capital receipt, or is some portion of it treated as an income receipt?

Mr. Poyen: Well, Mr. Chairman, I have never been in the happy position of being one of those lessors who has this retained interest returned to him in terms of cash; but I believe he treats it as a capital recovery.

The Chairman: And he is not taxed by the federal authority on any part of it?

Mr. Poyen: He is not. Well, pardon me. As a freeholder he would be taxed, but in Alberta, for instance, 90 per cent of the minerals are owned by the province, so when I normally refer to a mineral interest I am thinking in terms of the provincial rights.

The Chairman: I was not doing that. I was thinking of the others.

Mr. Poyen: Right. Well, I think, in that case, it is considered as income in the hands of the taxpayer and must be reported as such.

The Chairman: All right.

Mr. Poyen: Now, one other thought regarding royalty levies. In so far as a province such as Alberta is presently concerned with royalty levies, there is a classic landlord-tenant relationship, as I just described it. The retained interest to the lessor is a reservation of title. The interest which is sold and conveyed to the lessee under the terms of his lease of what we call in the industry the working interest, the sharing of the production from that particular lease, is in terms of volume. There are no other factors involved in the sharing of the production.

In my judgment, when a government such as that of Alberta puts in a royalty formula under which the government's share increases with price increases, or escalations, then the government has moved beyond the classic landlord-tenant relationship under the terms of a lease, and the government is then, in Alberta in this case, getting into the realm of taxation. I think Alberta, in this case, is far beyond its constitutional rights in so far as the type of royalty and the type of royalty formula that are presently being imposed on the oil industry in Alberta are concerned, and I must say I think the same thing applies particularly to Saskatchewan and British Columbia.

Honourable senators, I wanted to philosophize with you for a moment on this. I think there are disturbing elements in this landlord tenant relationship, whether it involves the taxation of the retained interest of the lessor by the federal government or whether it is in the royalty assessment, which has other elements other than just volume, as a method of assessing a royalty level on the working interest or on the lessee interest.

I trust that will be of some interest or help to members of the committee in your thoughts regarding this matter.

The Chairman: Am I correct in concluding that so far as the Alberta and Saskatchewan governments are concerned, there is some portion of the levy—and I am not using royalty or taxation—that is separate and distinct from what is understood to be a royalty?

Mr. Poyen: That is correct, Mr. Chairman.

The Chairman: Is some part of the so-called royalty payment levied by the province in the category of tax, as distinct from the category of royalty?

Mr. Poyen: Yes, Mr. Chairman. Perhaps I can expand on that. The basic royalty in Alberta at this point in time is approximately 23 per cent. The incremental royalty is 65 per cent, and that 65 per cent is related specifically to price increases. As the representatives of the Canadian Chamber of Commerce said earlier this afternoon, when the price of crude oil went from $3.80 to $6.50, the royalty applied to that incremental increase. In other words, the 65 per cent royalty, as they called it, applied to that increment. This, again, brings into focus the remark of one of those gentlemen when he said, "We do not want any other increase in price. If the price of oil increases from $6.50 to $7.50, the incremental royalty, under the present Alberta royalty system would amount to 65 per cent of that $1 increase. In addition, the federal government imposes, by not allowing the deductibility of that royalty from the gross income of the company, an additional 41 per cent, bringing a total levy of 106 per cent on that $1 increment.

Senator Laird: Can you suggest a formula which you feel would be reasonable to be allowable as a deduction by the federal government on these levies, as our chairman termed them?

Mr. Poyen: From my judgment, Senator Laird, there has to be some give and take on this. The provincial government, in my view, must get away from this 65 per cent incremental royalty as it presently exists. I would say that the very maximum royalty that the provincial government should impose should be in the order of 35 to 40 per cent.

Senator Laird: You mentioned 23 per cent a few moments ago.

Mr. Poyen: That is right. I do not know whether we are living in very changing times or not. Possibly 23 per cent. Looking at increases in the prices for crude oil, there should be adjustments. The industry cannot pay too much. Possibly, 35 per cent incrementally. Whatever the federal royalties will be on federal lands, I would suggest that those royalties be deductible, both from the moneys generated from federal properties and also deductible in so far as provincial royalties are concerned.

The Chairman: You are talking now about Indian lands?

Senator Prowse: Also CPR, Hudson's Bay, and so forth.

Mr. Poyen: The royalties on CPR and Hudson's Bay lands are in the order of 16-⅔ per cent.

Senator Prowse: But all free holdings.

Mr. Poyen: On free holdings it is generally 12½ per cent, rising to, in come cases, 16-⅔ per cent.

Senator Prowse: Yes, depending on when the contract was entered into.

Mr. Poyen: That is correct.

The Chairman: You are suggesting that if there is an agreement between a person who acquires an interest in oil lands from the CPR or Hudson's Bay, that the limit on the royalties should be the amount in the agreement and the provinces should not levy anything in addition.

Mr. Poyen: Yes, that is what I would suggest.

The Chairman: Then, you disapprove of the so-called taxation of resources?

Mr. Poyen: I disapprove if they are exorbitant; if they are out of line with the requirements for servicing the particular industry that is reliant on government funding or government support, or participation.

Senator Cook: You spoke earlier of provincial royalties being in the order of 35 per cent. Do you mean that that would be deductible for federal tax purposes?

Mr. Poyen: Let us assume the federal royalty on federal land was 20 per cent. That being so, I would suggest that the 20 per cent royalty be a deductible item from the 35 per cent increamental royalty which the provincial government may be imposing.

Senator Cook: But you also said, did you not, that you thought the maximum provincial royalty should be of the order of 35 per cent.

Mr. Poyen: I would say that would be the upper limit, yes.

Senator Cook: That being so, you are then saying that the 35 per cent should be a deductible item in arriving at the federal tax payable?

Mr. Poyen: Yes. The question was asked as to whether there was a compromise. Is there some position by which both the federal and provincial interests could be best served? In answer to that, I must ask the question: What is wrong with having reasonable royalties and using our historical and classic method of making sure that the industry is paying sufficient tax through our normal income tax application, and possibly even through surtaxes? That may be too simplistic.

Senator Prowse: That is the whole argument between the provinces and the federal government.

Mr. Poyen: That is right.

Senator Prowse: On freehold properties, so far as you know, there has been no escalation to take into consideration changes in prices? They still operate on the straight 12½ per cent or 16-⅔ per cent, or whatever is in the contract, and being subject to mineral taxation at so much per acre. Am I correct?

Mr. Poyen: That is correct, Senator Prowse. Many of the oil companies who are leasees under these freehold leases have accepted the responsibility of paying the resource taxes, or mineral taxes, of the freeholder, because they are so burdensome in some cases. In other cases, it was written into the lease that the leasee would pay any mineral taxation or resource taxation.

Senator Prowse: But the whole area of freehold land is only affected by the present situation in so far as the 12½ per cent or 16-⅔ per cent in that it would no longer be deductible as an expense? The federal government makes no provision to distinguish between the freehold owner and the province in the right of the province.

Mr. Poyen: It is my understanding that the new budget does not cover that and, therefore, it is an allowable deduction for freehold royalties payable.

Senator Macnaughton: What is the position vis-à-vis Indien lands? I believe you raised this question, Mr. Chairman.

Mr. Poyen: The royalties have been substantially increased on Indian lands in the last little while. I think the figure was mentioned earlier, and I am quite sure it is accurate. It is a royalty of about 57 per cent. That is deductible for some reason, as are royalties payable to production in foreign countries. If you produce in the United States, of course, you can deduct your royalties payable in the United States against your production down there, but not in Canada.

Of course, this leads to a rather apparent drain. Some of our Canadian people are at present moving to the United States in order to make investments in production in the United States because of the deductibility of royalties down there, which is not allowed in Canada.

The Chairman: If you have a royalty collected by the federal government on oil production on Indian land, is that 57 cents or 57 per cent?

Mr. Poyen: Fifty-seven per cent.

The Chairman: Per cent of the receipts.

Mr. Poyen: Right.

The Chairman: With respect to the net to the person who is earning the income and who is paying the royalty, his net tax is lower, is it not?

Mr. Poyen: No.

Senator Prowse: They are entitled to depletion and then they go to 30 per cent.

The Chairman: That is right, yes. Well, we have noted what you have said. It is in the record.

Mr. Poyen: Fine. Again, Mr. Chairman, in introducing my associates I would like to state that both governments, federal and provincial, continue to pose one question to us which I have heard posed here today as well: How much does the industry really need from a barrel of oil to remain economically viable, attract new investment, re-invest its own cash flows, and explore for the new reserves which are so essential to our future economy in Canada?

The Chairman: Yes. Who is going to deal with that?

Mr. Poyen: Two of my colleagues here. It is a challenging question and it almost defies precise analysis. We can certainly provide you with some broad assessments and come to some directional conclusions. Some companies within an industry such as ours may, through a combination of aggressive management, imaginary explorative steps and progressive techniques and strictly pure luck, be more successful than others, and some may completely fail all of these tests and disappear. We cannot impose an assessment which provides for either one of those extremes, obviously, but must assess the median, and that is what we have attempted to do.

Mr. Chairman, possibly before I ask my associates to mention their studies, I might have the indulgence of your committee to try to get the record straight with respect to the *Debates of the House of Commons* of Thursday, December 5, in which there was considerable discussion about the price of Canadian crude in the Ontario market. On that day the Honourable Donald Macdonald repeatedly made the statement that the Ontario consumers had been subsidizing western Canada for the last 15 or 20 years, with western Canada selling crude to the Ontario market-place at something over world prices.

The Chairman: Before we start on that, I should point out that it is not any part of our job to correct the record of *Hansard* in the other place. We have enough work to do in keeping our own records straight.

Senator Prowse: Will you see me after, please, Mr. Poyen?

Mr. Poyen: Sir, this was not my voluntary action. I was asked to do this.

The Chairman: We thank you for your interest and concern, but if we do develop that point it will be solely on our own.

Mr. Poyen: All right. As I say, I was not trying to impose my own thoughts on this meeting. I had been asked to make that comment.

If I may, sir, I should like first of all to call on Mr. Oostenbrink to outline the government-industry sharing of revenues under the present tax royalty regime. If I may, I would refer you to the reference material entitled, "Government/Industry Takes," which Mr. Oostenbrink will summarize.

The Chairman: Did we not get those figures from the Chamber of Commerce?

Mr. Poyen: I do not think our figures are quite the same as the Chamber's. Directionally they are about the same, but I do not know whether Mr. Oostenbrink would want to correct, expand on or elucidate them further.

The Chairman: I want to know whether the figures we have already received approach closely enough to be representative figures upon which we can work. If you say we cannot, then that involves us in some study. It means that what will be thrown on us will be the job of deciding whether your figures or their figures are right. I am going to try to avoid that position. Therefore, the first thing I want to know is whether the figures which were presented to us by the Chamber of Commerce are right. There may be variations, but are there such substantial variations that you could say those figures are not reliable?

Mr. Poyen: I think a new dimension is added by Mr. Oostenbrink's study, and that is that we analyse a sort of dynamic position in time. We look at the next ten to twelve years and at the situation and some increases in the price of crude oil. We do not look just at 1974 and what the situation is in the one year. We thought it would be of interest to honourable senators possibly to have a look at our projection of what the results might be.

The Chairman: I believe I speak for the committee when I say that we would like to have your projection, but not for purposes of debating it.

Mr. Poyen: Right.

The Chairman: Because we are supposed to deal with this bill and with the provisions of the bill and not wander off into projections that might cover the next ten years. That may be material to make a present assessment of things, but we have to be more practical. We will take those projection figures and have a good look at them and ask our staff to comment to us on them, but I do not want them to develop as a debating part of the record.

Mr. Poyen: I do not think we intend to have it that way, Mr. Chairman. It is our concern that we are looking at a narrow time frame, just a snap shot of today, whereas I think all of us must be concerned about the future. That is the real practical world within which we are living. How do we look after our future? Today is one subject. Today we may be able to drift through; but ten years from now, if we go the road we are presently going in so far as royalty tax levies being imposed on this industry, we will not have an industry in Canada and, in my judgment, we will not have an economy in Canada. For those reasons I think it is a rather practical problem we have here and I would like you to indulge us with the opportunity of showing you at least one viewgraph. We certainly do not propose to go through all of them.

The Chairman: There is one question I would like to ask you before we go into that. In the exhibits we have from you, you refer to "old oil" and "new oil." What is the difference?

Mr. Poyen: There is a tremendous difference. New oil is an effort on the part of the government of Alberta to try to encourage continued exploration in Alberta and provide the necessary incentives by which the Alberta government believes it can maintain a viable oil industry at least in Alberta, regardless of other provinces. I think the Alberta government recognizes that the oil industry is vital to the economy of Alberta and it has come up with a definition of "new oil", which means oil found after January 1, 1974. The ground rules for that and the royalty rates for that oil are completely different from the ground rules and the royalty rates for oil which is presently on stream from older reserves developed and discovered in Red Water and —

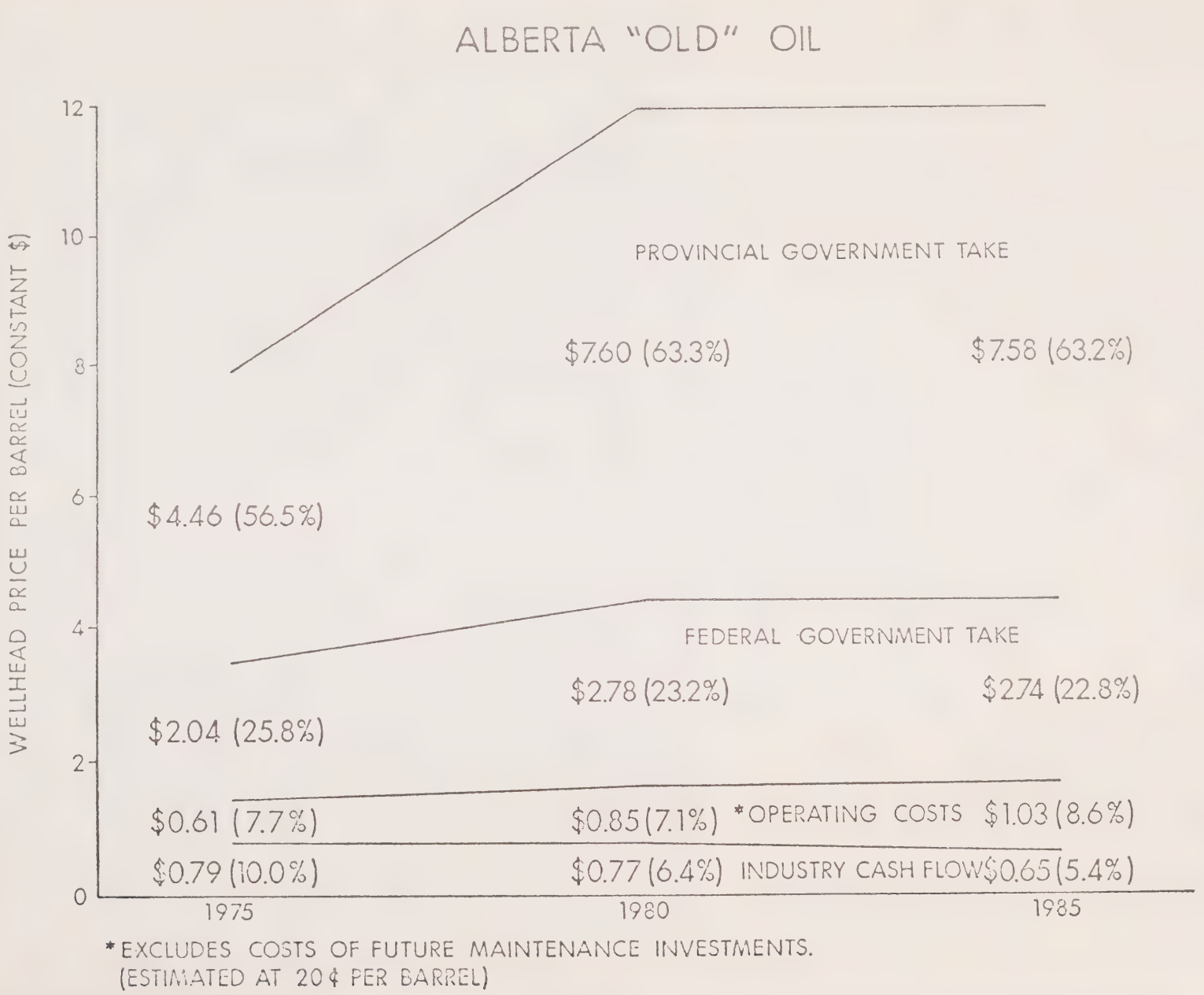
The Chairman: All right. Can we get into that projection, then? We will see how far we can get into it.

Mr. Poyen: I will ask Mr. Oostenbrink to proceed, then, and to make it as short as possible.

Mr. William Oostenbrink, Chairman, Economics Committee, Canadian Petroleum Association: Thank you, Mr. Chairman. Honourable senators, the purpose of this particular analysis which I am referring to is to determine the government/industry shares of oil production over time, under current royalty and fiscal schemes. We have done this for the years 1975, 1980 and 1985.

Briefly, what I would like to do is to show you the data base, say just a few words about that and the methodology used, and then give you some conclusions from the analysis which we have done.

Perhaps I could start with the viewgraph entitled "Alberta 'Old' Oil," which is included in the charts at the end of the brief.


ALBERTA "OLD" OIL
WELLHEAD PRICE PER BARREL (CONSTANT $)
12
10
8
6
4
2
0
PROVINCIAL GOVERNMENT TAKE
$7.60 (63.3%)
$7.58 (63.2%)
$4.46 (56.5%)
FEDERAL GOVERNMENT TAKE
$2.78 (23.2%)
$2.74 (22.8%)
$2.04 (25.8%)
$0.61 (7.7%)
$0.85 (7.1%)
*OPERATING COSTS
$1.03 (8.6%)
$0.79 (10.0%)
$0.77 (6.4%)
INDUSTRY CASH FLOW
$0.65 (5.4%)
1975
1980
1985
*EXCLUDES COSTS OF FUTURE MAINTENANCE INVESTMENTS.
(ESTIMATED AT 20¢ PER BARREL)

Mr. Poyen: You will notice, Mr. Chairman, that there is a series of charts dealing with "old oil, new oil, old gas and new gas."

The Chairman: How do you identify that chart?

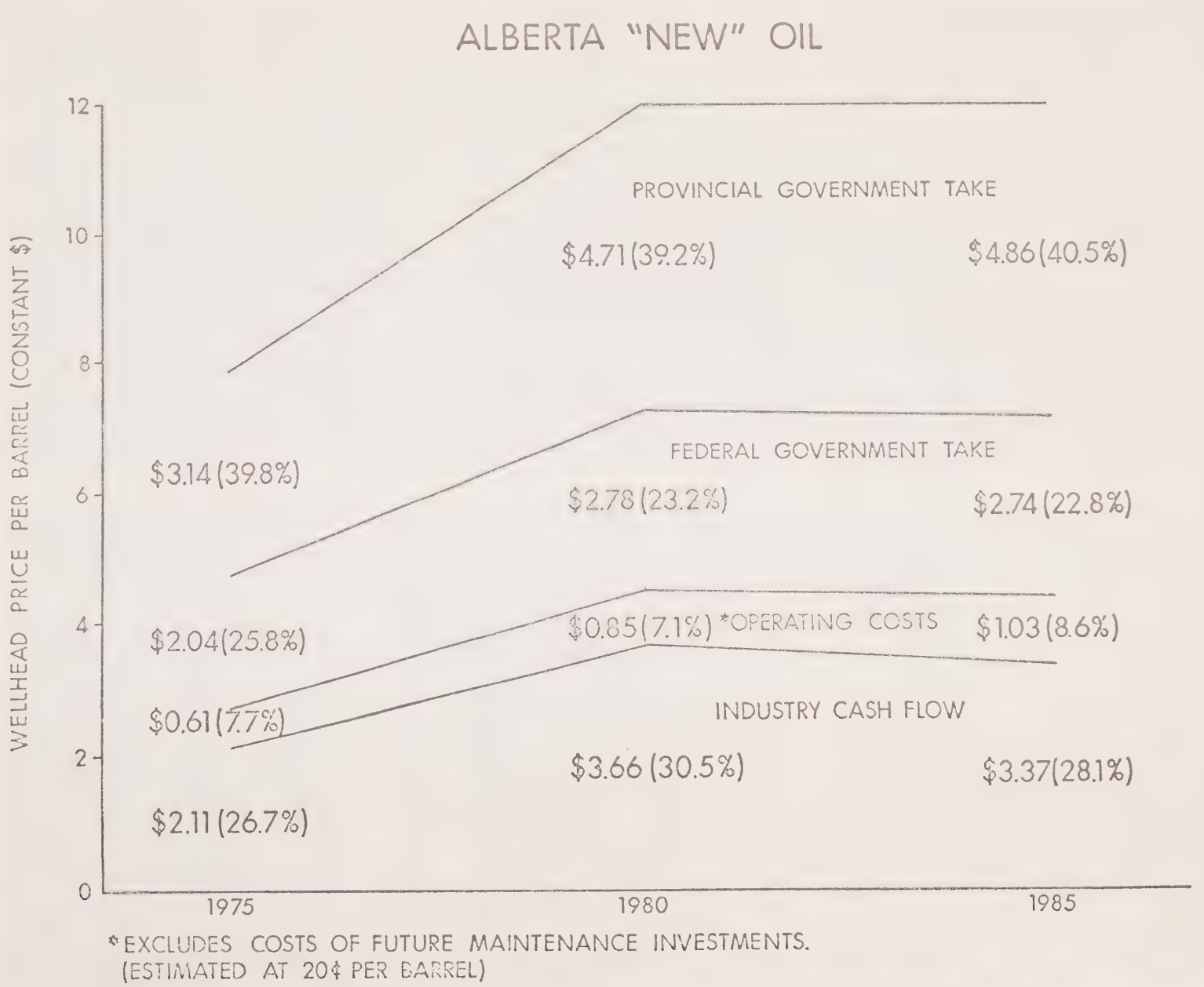
Mr. Oostenbrink: It is a chart showing the provincial government take, the federal government take and the industry's share of Alberta old oil production for the years 1975, 1980 and 1985, and what I would like to do is to make some comment with respect to the data base. The data base used for this particular chart is the same as the one used in the model developed by the CPA which analyzes the industry over time. The price which we have used is $7.90 in 1975—this is an assumed price—and $12 in 1980 and 1985. As you will perhaps notice on the left of the chart these prices are in constant dollars and this is done to exclude the effects of inflation on the industry economics. These constant dollars are 1974 dollars. The reason we used the $12 figure is that the assumption is that over time Canadian crude oil prices will move to world price levels, and therefore it will avoid this particular discussion about the export taxes, because as the price moves from $7.90 to $12 export taxes will not be around any more. Let me stress that these are not specific forecasts which we have used, but reasonable assumptions of what could happen over time. The tax rates and the royalty rates are as presently implemented by the provincial government of Alberta and the federal government, of course. As you have also noted, perhaps, they are still pictures—in other words this does not provide for any reinvestment. It is just the cash flow produced from a barrel of oil and does not take into account the forward tax effect of old investments on the one hand, and it does not take into account the tax effects of the forward investment either. It is just a snapshop picture of, let us say, a barrel of oil as it comes out of the ground and where the money goes.

As you can see, in 1975, 56½ per cent will go to the provincial government of Alberta, 25.8 per cent or $2.04 per barrel will go to the federal government, 61 cents or 7.7 per cent will be eaten up by operating costs leaving the industry with a net cash flow of 79 cents per barrel, or 10 per cent of the total.

These percentage figures increase to 63.3 per cent in 1980 for the provincial government, 23.2 per cent or $2.78 for the federal government and the operating costs will increase or are projected to increase to 85 cents in 1980, representing by that time 7.1 per cent, and the industry cash flow remains fairly constant at 77 cents per barrel. In 1985 similar figures apply to that year. The operating costs will have increased slightly to $1.03 leading to a decrease in the industry cash flow to 65 cents or 5.4 per cent of the total.

So this is the kind of picture which we as an industry see, and the question it raises for us, and which you have already raised before, is as to the economic viability of the industry. The question is this; the 79 cents net cash—and by the way I would like to point out that this excludes the cost of future maintenance in investments which are estimated at 20 cents. In order to keep producing that oil, we would have to reinvest a certain amount of money estimated at a minimum of 20 cents per barrel. So the question is then, is the 79 cents enough, and the answer has to be a categoric no. It is not enough.

The reason it is not enough is first of all the rate of return provided by the 79 cents is not sufficient. If, for example, this was backed up by an historical investment of 50 cents, we would get a 3 per cent rate of return on the historic investment and the industry does look at the rate of return on historic investments. That 79 cents cash flow in the future would only support roughly 22 cents of investment presently. In other words, if you were to invest presently 22 cents and were promised over time that you would receive 79 cents for the tenth year, that 79 cents would only support an investment of 22 cents given the fact that you want a 15 per cent d.c.f.—discounted cash flow—rate of return.


ALBERTA "NEW" OIL
WELLHEAD PRICE PER BARREL (CONSTANT $)
12
10
8
6
4
2
0
PROVINCIAL GOVERNMENT TAKE
$4.71 (39.2%)
$4.86 (40.5%)
FEDERAL GOVERNMENT TAKE
$3.14 (39.8%)
$2.78 (23.2%)
$2.74 (22.8%)
$2.04 (25.8%)
$0.85 (7.1%) *OPERATING COSTS
$1.03 (8.6%)
$0.61 (7.7%)
INDUSTRY CASH FLOW
$3.66 (30.5%)
$3.37 (28.1%)
$2.11 (26.7%)
1975
1980
1985
*EXCLUDES COSTS OF FUTURE MAINTENANCE INVESTMENTS.
(ESTIMATED AT 20¢ PER BARREL)

Mr. Oostenbrink: Now perhaps I should turn just briefly to new oil because these are the tests which we place with new oil. As you will note the industry cash flow has increased from 79 cents as shown for old oil in 1975 to $2.11 representing 26.7 per cent and the industry cash flow at the bottom there for 1980 is increased to $3.66 for 30.5 per cent and it decreases to 28.1 per cent in 1985. As you can see from the new oil the industry share of cash flow has increased significantly. The question that is posed again is this; is it enough? And I would have to answer no, it would not be enough, because if we took a look at this particular rate of return, for example the $3.37 in 1985, that would only provide 10 per cent of d.c.f. rate of return on an investment per barrel of $1.30. And we consider a 10 per cent rate of return not sufficient to attract money to the industry.

Senator Laird: What do you consider to be sufficient?

Mr. Oostenbrink: We would consider a d.c.f. rate of return of 15 per cent necessary to attract money for investment.

I think I have said all I would like to say about this particular topic.

The Chairman: All right. Who is next?

Mr. Poyen: Mr. Lindsay Milne would like to follow that with a very, very brief description of the economic model which will cover a time frame of about 15 years.

Mr. Lindsay Milne, Member of Economics Committee, Canadian Petroleum Association: Thank you, Mr. Chairman. I would like to direct you attention, gentlemen, to the second document you have on your table and which is entitled "Preliminary Study of the Economics of the Exploration Production Sector of the Petroleum Industry under the November 18, 1974 Federal Budget."

First of all, gentlemen, I want to make eminently clear that this is a study of the exploration and production sector of the oil and gas industry. By that I mean that it excludes such things as major transportation systems, marketing and refining operations. It is strickly an assessment of the exploration and production activities which go on in the petroleum industry.

The economic model we looked at covered the period of 1974 to 1988 and I shall be expanding a little more on that a little later. I want to indicate to you that a fundamental underlying principle of this particular study assumed that Canadian self-sufficiency in oil and gas was a desirable goal. Some estimate then was made as to what it would take to achieve self-sufficiency. Now the period 1974 to 1988 was selected because we assumed for the purposes of our model study that if the industry had the type of environment and cash requirements necessary and was able to see the future rates of return it desires on investment, then, during this period it will be possible to achieve what we estimate to be Canadian self-sufficiency.

Economics have been calculated for a number of different segments of the industry, and I want to define those segments for you and make sure they are in your minds. Our first calculation is what we call full-cycle blowdown of the known reserve base in established areas. The established areas, I think you are well aware, are primarily Alberta, British Columbia and Saskatchewan. There is very little oil production in any of the other provinces or the Northwest Territories. Within this particular study we have not considered just the time frame 1974 to 1988. We have considered all of the investments which have been made from 1947 to 1973, all of the investments that would be required from hereon to deplete fully that reserve base.

An underlying basic assumption, then, in this study is that there will be no more exploration done within the established areas, and we would simply blow down the reserve base and look at the rate of return which we would achieve on the total reserves which have been found since 1947. You can see the study starts in 1947 and does not end in 1988, but rather blows down the total reserve that we have found to date, and that time period would take us way beyond the year 2000. As a matter of fact, our study goes beyond the point where we are producing in the year 2015.

Senator Cook: Is "blowdown" the same as "use up"?

Mr. Milne: "Use up" would be a very good analogy to "blowdown."

Mr. Poyen: To depletion.

Mr. Milne: That, gentlemen, is the first segment of our study, and we have calculated our economics on that particular segment.

The second segment of study is what we call full-cycle blowdown of all the known reserves in the same base that I have been talking about, but with the addition of new reserves that we have found in the established areas. In this particular case, therefore, we are assuming that exploration continues. According to some estimates that have been made by CPA, we have then projected new reserves that would be found and calculated the economics from 1947 through this 1988 period; we have calculated exactly the picture we would see if there were a continued exploration within this established area and it was supported by the reserve base that has now been found.

The Chairman: This is all based on available oil supplies?

Mr. Milne: Yes, sir, it is.

The Chairman: And the cost of maintaining them at a level of self-sufficiency.

Mr. Milne: Yes, sir. Of course, I should point out that the established reserve base alone would not provide self-sufficiency.

The Chairman: But you have not reflected what, if anything, would be the percentage of return on a discount cash flow basis that the integrated oil companies may receive on their refining and marketing activities.

Mr. Milne: No, sir. We have excluded that particular component. Our interest in this case was strictly the exploration and production sector of the oil industry.

The Chairman: This should be a plus, should it not?

Mr. Milne: I am not sure that I am qualified to answer that particular question.

The third segment of this particular study looked at what we call full-cycle depletion of the reserves that we think could possibly be found in the frontier areas. There is a bit of a hazard in that particular study, because what we have assumed is that reserves would be found in the established areas, and the level that we were incapable of meeting with respect to total Canadian demand would be fully made up from the frontier areas. I guess what I am

saying by that, just to clarify it a little further is that we have somewhat forced fit our model to Canadian self-sufficiency. We have said that whatever is not found in the way of new reserves, or does not come from blowdown of our established areas, will have to come from the frontier areas. The CPA, however, believes that there are reserve bases within Canada sufficient to generate self-sufficiency within the time frame we have looked at.

Senator Prowse: Would you clarify one thing? In your frontier areas do you include the development from the tar sands, or is that excluded?

Mr. Milne: I am glad you have brought that up. It was one thing I was going to mention a little later. We have excluded tar sands and synthetic oils completely from our study. We have included them to the extent that we have removed the expected supply from them, but we are dealing with strictly what we might call conventional oil and gas.

Mr. Poyen: There was a question asked by the chairman, which I think was left hanging. Perhaps I might make an effort to answer it. It related to the integrated oil companies and the rate of return expected from the total functions of the integrated oil company. I am subject to possible check from Douglas Martin, who is sitting in the back of the room, but if one considers three basic profit centres within an integrated oil company, they look at exploration and production as one profit centre, as one function, they look at marketing as a profit centre or function, and they look at refining or manufacturing as a profit centre. Within those three they are, generally speaking, willing to accept a relatively low return, a very low return, on marketing, let us say in the order of four, five or six per cent. They try to force out or to maintain a return in the manufacturing or refining area of, let us say, about eight or nine per cent, and they hope that the exploration and production function will provide the extra sort of return to bring the total corporate return up to 9, 10 or 11 per cent. I think that is a fundamental of integrated oil companies.

Senator Prowse: There are also different tax features in there that are not included in this.

Mr. Poyen: Yes, that is correct.

Mr. Milne: I might say that after reviewing with you the three segments of the industry that we studied, the economic viability of these various segments was judged using three criteria. First of all, the industry must achieve a reasonable rate of return on past investments before it will have the confidence to go ahead and consider future investments. Secondly, the industry must perceive of a reasonable rate of return on future investments before it would go ahead and make those investments. Thirdly, sufficient cash must be available from the industry to go ahead and make the investments. Our cases were judged on those criteria of looking back at what we have done over the past to see how well we have done, and what we perceive the future to be in terms of d.c.f. rate of return.

To give you an insight into the model—and I do not want to go into all the assumptions, because there are literally hundreds of them to be made—I would like to review some of the basic assumptions of the study.

The Chairman: It seems to me that to some extent these points are developed in this brief.

Mr. Milne: They are.

Mr. Poyen: They are all there.

The Chairman: To the extent that it simply involves our reading this, we can do that ourselves. I thought there were some points along the route that you were going that you might feel our reading of this material would not give us an insight, and that was the only development I thought we would get.

Mr. Milne: Possibly I could go to the results of the study, having explained the general information that goes into the model.

The Chairman: That is right.

Mr. Milne: I might just say, for the purpose of clarification, the model assumes that the demand for Canadian crude oil, including synthetics, will rise from its present level to something like three million barrels per day by 1988. The demand for Canadian natural gas will rise from its present levels to five trillion cubic feet per year by 1988.

The Chairman: All this is in your brief too.

Mr. Milne: Yes, sir, it is.

The Chairman: I am just trying to avoid repetition.

Mr. Milne: I think we will very quickly come to the two or three key points that I would like to establish. I will skip some of the others.

There is just one thing I would like to say before going on. It is on page 5, point number 14. I think it is probably a key point as far as we are concerned. It has to do with the constant dollar d.c.f. rates of return that we would expect to receive on past investments and future investments. We believe from our review of industry operations that the industry will view the constant dollar—I stress the constant dollar, because our entire study was done in constant 1974 dollars—we believe the industry will view constant dollar d.c.f. rates of return of 10 to 15 per cent as reasonable on past investments associated with these reserves that we have now found. Furthermore, we believe that industry will view a 15 per cent minimum "hurdle" rate as necessary for exploration and development of new reserves because of the risks involved in the finding of these new reserves.

With respect to the results of the study, and with respect specifically to the fullcycle blowdown of the known reserve base, based on the November 18 budget and the existing royalty plans now in place within the provinces, we have calculated a discounted rate return of 5.5 per cent. Further operations in Saskatchewan are uneconomic from 1974 on. Gas operations in British Columbia will be uneconomic from 1974 on.

The Chairman: That is without additional exploration?

Mr. Milne: This assumes no additional exploration. The rate of return on blowdown of reserves in the established areas, excluding the uneconomic parts and not allowing them to weigh on the entire study, is still too low to instil industry confidence in the future, when we view 10 to 15 percent as a necessary rate of return before we can go ahead and make additional investment.

Furthermore, full-cycle economics of established areas, including the new oil and gas reserves that we expect to be found and using, again, the existing royalty rates and the November 18 budget: The d.c.f. rate of return is 6.8 per cent. Now, in this particular situation the rate of return

has become far too low to instil in industry confidence in going ahead and making future investments to find no reserves. If full deductibility of royalties were allowed for income tax purposes, this rate of return would increase from 6.8 per cent to 9.2 per cent, indicating again that the rate of return is far too low and also indicating that the provincial royalties are excessive.

With respect to returns in the established areas, we believe that if it is assumed that industry will expect an 11 per cent d.c.f. rate of return, its required share of wellhead revenue less operating costs is roughly 50 per cent. This is based on oil prices rising to world levels and gas achieving an oil equivalent price in constant 1974 dollars and gas rising from its present levels to oil equivalent prices at the burner tip.

Looking at the full-cycle economics of the frontiers, and these are primarily new reserves and using what we call low exploration and development costs of somewhere in the order of $1.30 per barrel, the industry will require somewhere in the order of 70 per cent share of the frontier dollar in order to achieve a reasonable rate of return.

Now, a 70 per cent share assumes no royalties and this would allow a 16 per cent rate of return. Since we are viewing the future in this particular circumstance, we will view that future and go ahead and make investments in the future if we meet the further rate of return of 15 per cent, which I mentioned to you earlier. The 16 per cent, presumably, would allow us to do this.

At the higher investment cost which we have assumed and we are using a range of investment costs here, but if it went up to $2.60 per barrel for exploration and development and no royalties were applied, our d.c.f. rate of return would be 13 per cent, insufficient to meet this hurdle rate of return which I have mentioned.

The Chairman: You are demonstrating that with respect to a wasting asset it can only be developed properly if the provinces receive no royalties in relation to that wasting asset?

Mr. Milne: Well, I would like to make that point clear, sir: We have said that in the frontiers we would require a 70 per cent share and, assuming no royalties, we would then receive a reasonable rate of return. However, within the established areas, or the provinces, if you like, a 50 per cent share would be required by the industry to achieve the necessary rate of return required on past investments and to give a future rate of return on new investments to encourage exploration.

Senator Cook: It would be a share of the wellhead price?

Mr. Milne: It would be wellhead price, less operating costs.

Senator Macnuaghton: Would the witness explain for my benefit what he means by "frontier"?

Mr. Milne: In this particular situation we have not been specific as to what we mean by frontier, but I could be specific by saying the Mackenzie Delta, the Arctic Islands, the East Coast offshore and the Labrador Coast offshore. I would caution you that our assumptions in this setting recognize that frontier reserves are primarily from the Mackenzie Delta area. In other words, we think that probably this is the area from which we would receive our new reserves first. Pipelines can be put into place there probably quicker than into other areas. Reserves have been found there and will probably be developed from that area first. We could possibly consider this to be some other area, but we think that possibly the frontiers really mean the Mackenzie Delta at this time.

Senator Macnaughton: The Nova Scotia offshore?

Mr. Milne: Nova Scotia is possible.

Mr. Poyen: Mr. Milne is really saying that we are endeavouring to answer government requests as to the requirements of the industry in order to provide a viable industry and to provide Canada with self-sufficiency in the future. In my opinion this is an excellent economic model, but I would say that for the frontier areas somewhere in the range of 50 per cent to 70 per cent of the proceeds must accrue to and be invested by the oil industry in maintaining supplies.

The Chairman: You mean 50 per cent of the receipts must go into the bank.

Mr. Poyen: For re-investment.

The Chairman: Well, for any purpose.

Mr. Poyen: For any purpose but we are assuming re-investment all the way through this.

The Chairman: The remainder of this particular study we can read ourselves.

Mr. Milne: Yes. The tables really provide the basis of the total economic model study, to give you the total input that was used for it.

Mr. Poyen: Mr. Chairman, before you excuse us, let me say one thing to your honourable members. This afternoon the Premier of Alberta called and I must be present at a command performance tomorrow morning at 8 o'clock in Calgary. He is going to disclose Alberta's incentive, or contingency plan at that time to me. So it is too bad that this did not happen yesterday, or we might have tried to alter some of our presentations. However, maybe there is some good news.

The Chairman: If there is, maybe you will interpret it for us?

Mr. Poyen: We certainly will.

The Chairman: Indicating the extent to which you are prepared to term it good.

Mr. Poyen: Sir, we will do everything we can.

Senator Cook: Be sure to give the premier our regards.

Mr. Poyen: Personally, sir?

Senator Cook: From the committee.

The Chairman: We have had a long day and I think we have obtained quite a good deal of information this afternoon. Maybe this is a good time to terminate the meeting.

Mr. Poyen: We certainly appreciate your tolerance and that of the honourable senators.

The Chairman: Thank you very much, gentlemen.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable ALAN MACNAUGHTON, *Acting Chairman*

Issue No. 16

THURSDAY, DECEMBER 12, 1974
TUESDAY, DECEMBER 17, 1974

Complete Proceedings on Bill C-15, intituled:

"An Act respecting oil and gas in Indian Lands"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

28510—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, December 5, 1974:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator McDonald, seconded by the Honourable Senator Langlois, for the second reading of the Bill C-15, intituled: "An Act respecting oil and gas in Indian lands".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator McDonald moved, seconded by the Honourable Senator Langlois, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate..

Minutes of Proceedings

Thursday, December 12, 1974
(19)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to consider the following:

Bill C-15 "An Act respecting oil and gas in Indian lands."

Present: The Honourable Senators Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Flynn, Laird and Macnaughton. (7)

Present, not of the Committee: The Honourable Senator McDonald. (1)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Upon motion of the Honourable Senator Cook the Honourable Senator Macnaughton was elected *Acting Chairman.*

WITNESSES:

Department of Indian and Northern Affairs

Mr. D. G. Meredith, Associate Director, Indian-Eskimo Economic Development Branch; Indian and Eskimo Affairs Program; and

Mr. E. Moore, Supervisor of Indian Minerals.

The Honourable Senator Flynn drew the attention of the Committee to a letter sent to him by the Association of Iroquois and Allied Indians objecting to the passing of Bill C-15.

Following discussion, it was *Agreed* that the Association be permitted to appear before the Committee and present their views respecting the above-mentioned Bill.

Mr. E. G. B. Seymour of the National Indian Brotherhood appeared and was given the opportunity to outline some of the objections to Bill C-15; following which he undertook to contact the spokesmen for the Association and to appear with them before the Committee next week.

The Committee then proceeded to a clause-by-clause consideration of the Bill during which clauses 2 to 8, both inclusive, were declared *carried.*

Consideration of Clause 1 and the preamble to the Bill was deferred until a day next week in order to permit the above-mentioned Association to appear before the Committee.

At 10:40 a.m. the Committee adjourned to the call of the Chairman.

Tuesday, December 17, 1974
(20)

Pursuant to adjournment and notice the Committee *resumed* its consideration of Bill C-15 at 9:30 a.m. this day.

Present: The Honourable Senators Buckwold, Cook, Everett, Flynn, Laird and Macnaughton. (6)

Present, not of the Committee: The Honourable Senators Petten, Smith and Williams. (3)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Upon motion of the Honourable Senator Flynn, the Honourable Senator Macnaughton was elected *Acting Chairman.*

WITNESSES:

Department of Indian and Northern Affairs

Mr. D. G. Meredith, Associate Director, Indian-Eskimo Economic Development Branch; Indian and Eskimo Affairs Program; and

Mr. Jim Barrett, Administrator of Indian Minerals.

National Indian Brotherhood

Mr. Paul Williams, Counsel, Iroquois & Allied Tribes Association;

Mr. Delbert Riley, Director of Research, Union of Ontario Indian; and

Mr. E. G. B. Seymour, Housing & Economic Development Officer.

NOTE: At 11:10 a.m., upon motion, it was *Resolved* that the Committee proceed *in camera.*

Following further discussion and upon motion of the Honourable Senator Flynn, it was *Resolved* to report the said Bill without amendment.

At 11:20 a.m., the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Tuesday, December 17, 1974.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-15, intituled: "An Act respecting oil and gas in Indian lands" has, in obedience to the order of reference of Thursday, December 5, 1974, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Alan A. Macnaughton,
Acting Chairman.

28510—2

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, December 12, 1974.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-15, respecting oil and gas in Indian lands, met this day at 9:30 a.m. to give consideration to the bill.

Senator Alan A. Macnaughton (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, we are dealing this morning with Bill C-15, respecting oil and gas in Indian lands. Appearing before the committee this morning are: Mr. D. G. Meredith, Associate Director, Indian-Eskimo Economic Development Branch, Indian and Eskimo Affairs Program; and Mr. E. Moore, Supervisor of Indian Minerals. Mr. Meredith, I understand, is going to lead off.

Mr. D. G. Meredith, Associate Director, Indian-Eskimo Economic Development Branch, Indian and Eskimo Affairs Program, Department of Indian and Northern Affairs: Mr. Chairman, this bill was introduced in order to assist in the management and control of the regulations relating to the production of oil and gas in those Indian reserves which are fortunate to have such resources available to them. Prior to April of this year, the oil and gas industry underwent a series of rather significant upheavals in terms of market structure and pricing. The government, traditionally, starting with our oil and gas exploration in Indian lands in the late 1940s and early 1950s, had entered into a series of long-term agreements with suppliers, producers and exploration companies. As those agreements ran out, the government attempted to renegotiate with those companies in terms of royalties, exploration charges, bonuses, and arrangements of that nature. It was determined that the regulations in effect at the time tended to inhibit the flexibility which the government wished to have in order to respond more adequately to market pressures, changes in demands and prices.

In March of this year, the Department introduced a series of royalty structures designed more to put Indian producing lands on a par with other lands outside of the reserves in Alberta and Saskatchewan, Alberta being the primary producer. The regulations were put into effect through the Indian Oil and Gas Regulations, but the Department realized that the basis of those regulations was not in keeping with the degree of flexibility which should obtain under the circumstances. For that reason, the Department introduced Bill C-15, which allows it and the Indians more flexibility in terms of determining how best to manage that particular resource on Indian reserves.

The Acting Chairman: I understand there was a solicitor acting for the producing bands and a solicitor acting for the Alberta Indian Association.

Mr. Meredith: The solicitor you may be referring to, Mr. Chairman, might be Mr. Roddick, who was acting for the major producing band, the Samson Hobbema, outside Edmonton. I am not aware of any other solicitors being involved.

Senator McDonald: Mr. Chairman, the only criticism I have heard in connection with this bill has come from Indians who are not residents of the reserves or members of any of the bands who happen to have oil and gas under their reserves. However, there seem to be some Indian people living in other parts of Canada who feel that there should be consultation with them. I suppose they feel they should receive some of the return from gas and oil on Indian reserves. It is my understanding that the only negotiations that have taken place have been with the bands on the reserves; that is, with those bands who live on Indian lands where oil and gas are being developed or are about to be developed. There is no consultation with Indians generally across Canada respecting oil development under the Indian Act or oil development under this new act. Is that correct, Mr. Meredith?

Mr. Meredith: Yes, that is correct, Senator McDonald. The Indians the department tends to deal with, other than those on the reserve in question, would be included in our negotiations with the National Indian Brotherhood. In other words, we take the Brotherhood as representing the desires and wishes of all registered Indians, all status Indians in the country. We do not deal uniquely with Indians living off the reserve, under which there may be gas or oil.

Senator McDonald: You say "living off the reserve." The Indians I am referring to are those who may live on a reserve in Southern Ontario, for instance. You do not negotiate with them when you are negotiating for a development lease on Indian property in Alberta, say, do you?

Mr. Meredith: That is correct, senator.

Senator Cook: Do I understand correctly that this is merely an enabling bill?

Mr. Meredith: Yes, senator, that is correct.

Senator Cook: So that any consultation will take place when you proceed under this legislation.

Mr. Meredith: Consultation with Indians?

Senator Cook: Yes, respecting an agreement to be entered into, or a lease, or an instrument under this legislation. This is merely enabling legislation, is it not?

Mr. Meredith: That is correct.

Senator Flynn: Mr. Chairman, has the committee received a letter from any Indian band or bands asking to

appear before this committee? I, myself, have a copy of such a letter.

The Acting Chairman: Not to my knowledge, no.

Senator Flynn: I believe I have a copy of such a letter in my office.

Senator Cook: I also have a copy.

The Clerk of the Committee: I was approached last Tuesday in that connection, Senator Flynn, and at that time I asked them to submit a formal application, and deliver it by hand, if necessary. They are right here in Ottawa. That application has not been forthcoming. The name of the gentleman to whom I was speaking escapes me at the moment.

The Acting Chairman: Are they aware of this committee meeting?

The Clerk of the Committee: They are, Mr. Chairman, yes. They were advised that the committee would be meeting this morning to consider this bill.

Senator Flynn: I think we should have a copy of that letter before the committee, Mr. Chairman.

Mr. Meredith, does this cover only the land comprised in a reserve as such, or does it also include lands which are acquired by the department and put at the disposal of the Indian band concerned?

Mr. Meredith: It would just apply to Indian reserves, senator.

Senator Flynn: So, it would not apply to lands adjacent to a reserve which are acquired by the government and put at the disposal of the band? I have in mind the situation which exists at Lorette. In that case there is the reserve itself, and then the adjacent land has been acquired and put at the disposal of the Indian band occupying that reserve.

Mr. Meredith: If the department acquired land and made it a reserve, it would come under the terms of this legislation.

Senator Flynn: I realize that, but I am just thinking in terms of land adjacent to a reserve put at the disposal of the band occupying that reserve.

Mr. Meredith: If the land did not from part of the reserve, it would be my understanding that this legislation would not apply. It would simply be crown land, and the ownership of gas or mineral rights in that land could vary, depending on the history of mineral rights on that piece of land.

Senator Flynn: There may be more of a problem in this respect in the province of Ontario. On occasion, this land is purchased with the money of the band itself. On other occasions, the funds for the land are acquired from the department and the band then pays the department. So, it practically amounts to the same thing as land in a reserve created as such.

Mr. Meredith: Except that it may not be designated as a reserve for purposes of the Indian Act.

Senator Flynn: I realize that.

Senator McDonald: I presume you are referring to provincial land, Senator Flynn.

Senator Flynn: Well, it may be private land purchased by the department.

Senator McDonald: A great deal would depend, would it not, on whether the mineral rights went with the surface rights?

Senator Flynn: It may be that the province would retain all rights to minerals, and so forth.

Senator McDonald: The mineral rights may not be transferred with the surface rights.

Senator Flynn: It all depends on the original concession.

Senator Buckwold: How are royalties and cash payments dealt with? I gather any royalties are put into trust for the band concerned?

Mr. Meredith: Perhaps I could just review the process, senator. Royalty payments are calculated monthly. The figure is arrived at about the third week of the following month. A cheque is then made payable to the crown and, in the case of Alberta, passed to our Calgary offcie, where it is promptly deposited. Notification of the deposit is then passed back to Ottawa where accounts are kept for the various band funds. Royalty payments are credited to the capital accounts of the various bands from whose reserves oil and gas have been extracted and upon which the calculation is based. Within the context of the Indian Act, the bands themselves can declare how they wish to dispose of the money.

Senator Buckwold: They are not restricted to using it for capital purposes? You mentioned capital accounts.

Mr. Meredith: Within the context of the Indian Act, they can dispose of this money is any way they wish. The minister, I believe, has the final discretion.

Senator Buckwold: Is there any control over that by your department, or is it simply left to the bands concerned?

Mr. Meredith: I would say there is a degree of control within the act, at the minister's discretion. Again, some bands are more advanced than others in having the expertise to make use of the funds.

Senator Buckwold: Have you had any difficulty in the past with regard to royalty payments and their disposal?

Mr. Meredith: Not to my knowledge.

Senator Buckwold: What about a cash payment for the purchase of the rights, the bonuses that are paid?

Mr. Meredith: The process would be the same; it would go into the band funds.

Senator Buckwold: What about federal tax relationships on royalties? Is there any conflict here in this great struggle that is going on over royalties, prices of the product, in so far as Indian lands are concerned?

Mr. Meredith: The ways and means Motion had built into it, or included in it, a statement to the effect that royalties payable on behalf of gas and oil production on Indian lands would not be included in the calculations of income for income tax purposes by producing companies taking oil from those lands.

Senator Connolly: Would you say that again?

Mr. Meredith: The ways and means Motion has included in it a statement to the effect that royalties payable on behalf of gas and oil production from Indian lands is not included as income for income tax purposes calculation by the producing companies. It is tax exempt by producing companies.

Senator Beaubien: It is written off as an expense?

Mr. Meredith: It is written off as an expense.

Senator Buckwold: In other words, it is an exception to the general rule?

Mr. Meredith: Yes, sir, that is correct. This is different from the original May budget.

Senator Connolly: We should not ask you these questions. Is that the only exception in that resolution?

Mr. Meredith: It is the only one I was interested in.

The Acting Chairman: A good answer.

Senator Buckwold: How extensive is the exploration for gas and oil on Indian lands? Perhaps you could give us a picture of how many producing wells there are and what the kind of production is.

Mr. Meredith: I can give you very precise figures, if you wish.

Senator Buckwold: We would be glad of them.

Mr. Meredith: Mr. Chairman, could I table them?

The Chairman: Yes.

Mr. Meredith: Mr. Moore might speak to your point, if you would allow him.

The Acting Chairman: Yes. Mr. Moore is supervisor of Indian minerals.

Mr. E. Moore, Supervisor of Indian Minerals, Department of Indian and Northern Affairs: Mr. Chairman and honourable senators, we have here an annual report for 1973 where we show a summary by province and also a summary by district and reserve, where we show the number of acres under permit and under lease last year. During the 1973-74 fiscal year we show the number of productive wells and the number of wells which are suspended or capped, both for gas and for oil. We show the number of wells drilled during the current year, the rentals, royalties and bonuses received for that particular year. This would answer your question. I could just summarize by saying that there were actually 19 wells drilled across Canada on Indian reserves last year. An interesting statistic, that we usually carry in our minds, is that we have in Alberta approximately 1.8 per cent of the area which is under the sedimentary basin and we are getting perhaps 2½ per cent of the royalties in Alberta, which is much better than the provincial average.

Senator Buckwold: When you say the national average from royalties, you mean from productive wells—from total wells or from producing wells?

Mr. Moore: Total wells drilled, including the abandoned ones as well as the productive wells.

Senator Buckwold: Of the 19, how many were productive?

Mr. Moore: That statistic is not here. I am afraid I would have to look for it a little further.

Senator Connolly: Could you tell us how many producing wells there are on Indian lands?

Mr. Moore: There are 135 oil wells which are capable of production. That does not mean to say that they are all producing, but they would be getting allowables and the allowables would be transferred. There are 78 gas wells.

The Acting Chairman: Honourable senators, we have a summary here which contains this information, with backup sheets. I suggest that we file, not the whole summary but just the summary of the points raised.

Senator Buckwold: Would it be possible to get the dollar figure of what you had last year and what you expect this year in royalty revenues? It might be an interesting figure.

Mr. Moore: Reading from this sheet, the figure for revenues—total royalties, rentals and bonuses—was $10,198,000 in round figures.

Senator Buckwold: That is last year?

Mr. Moore: Yes.

Senator Buckwold: 1974?

Mr. Moore: 1973-74. We are anticipating this year that, if somebody does not change the amount of export that we are having, which is of course the subject to a lot of discussion these days, we will have something in the neighbourhood of $40 million in royalties and maybe another $2 million in rentals and maybe a few dollars in bonuses.

Senator Buckwold: Do you anticipate an increase in the number of wells?

Mr. Moore: In the number of wells, I do not think there are going to be too many.

Senator Buckwold: They are going to go up fourfold in revenue?

Mr. Moore: This is right. The price of oil has increased and the oil royalties have increased. Of course in the case of gas, the royalty has increased and the price has increased about fourfold.

Senator Buckwold: And the bands are getting the full benefit of this, as against other oil producers who have a good part of the additional revenue syphoned off by export taxes and other royalty charges. Is that the reason that there is such an anticipated increase?

Mr. Moore: Mr. Chairman, there are export taxes of course charged Indian oil at the moment as for any other oil. This is under discussion.

Senator Buckwold: That is what I am trying to relate, the increase from $10 million to $40 million in net revenue—I presume it is net revenue—keeping in mind what has happened to other oil companies which have gone up, but certainly not in that proportion. I am just trying to find out why.

Senator Cook: Oil went up by $2.70 a barrel.

Senator Buckwold: I realize that.

Senator Cook: And the other people have it all syphoned off with the federal and provincial royalties.

Mr. Moore: Mr. Chairman, can I answer that?

Senator Connolly: I wish you would, because it is important.

Mr. Moore: The provincial oil royalties went up from a maximum of 16 ⅔ per cent to a figure of 43 to 45 per cent at our largest pool, at that rate of production. Our royalties went up from about 19.6 per cent to about 50 per cent for that same pool. This then is 2½ times the royalty and the price has gone up by half. It makes a big difference. That is the oil portion of it. As I have already mentioned, gas went up from 20 cents to 60 cents on the average. And the royalty rate went up from 16 ⅔ per cent to about 35 per cent. And of course at the present moment the export of gas is to be at a dollar and we do not know just how much of this is going to filter back to us.

Senator Buckwold: Perhaps I could put the question in a different manner: In your opinion are the bands which are fortunate enough to have land containing producing gas and oil wells considerably better off than private companies, who would be on privately owned lands?

Senator Cook: They are not paying any royalties.

Senator Buckwold: Well, whoever the owner is. I am still endeavouring to determine this relationship.

Mr. Moore: I am just not quite sure of your question, sir.

Senator Buckwold: I will simplify it by taking Senator Flynn's point that there is land adjoining a reservation which is privately owned and a company, whichever it was, drilled some wells which produced oil and gas, on which they pay royalties. The same company moved into the Indian lands and royalties accumulate. I gather there would be substantially more royalty payments going to the owners of the land, which would be Indians, than there would be to the privately operated well on the privately owned land.

Mr. Moore: In the case of freehold lands, most were at a very low rate of royalty, in which there was no method of review. If you are relating the Indian lands to provincial crown lands, we are quite competitive, particularly with gas and with oil less the deduction related to income tax exemption. As we mentioned in the ways and means bill, we will be competitive in oil. This is done deliberately in order to encourage further development of other reserves on which there is no production.

Senator Buckwold: In other words, it would be a greater encouragement for companies to move for drilling and exploration purposes on to Indian reserves, if they could obtain the rights from the department.

Mr. Moore: At the moment we are fairly competitive, but it depends on which province. None has the same rate of royalty. Therefore, we would be very competitive in Saskatchewan, a little less in B.C. and quite competitive in Alberta.

Senator Cook: You said the returns to the bands will increase from $10 million to $40 million.

Mr. Moore: That is correct.

Senator Cook: That is because the price of the product has increased?

Mr. Moore: Plus the increase in royalties.

Mr. Meredith: The royalty rates have also increased.

Senator Flynn: You mean the amount paid to the band to extract the oil or gas.

Senator Cook: Yes.

Senator Flynn: You are not speaking of the royalties payable to the province?

Mr. Moore: No, we are referring to money payable to the bands.

Senator Cook: In other words, this amount does not pay any provincial royalties.

Mr. Moore: No.

Senator Laird: I am most anxious to follow up the point raised by Senator McDonald and pursued by Senator Flynn, namely the letter from Wallaceburg. Frankly, in this rat race, although I received a copy of the letter I did not realize its significance. This, I take it, is a protest on the part of those Indians on the reserve on Walpole Island in connection with lack of consultation with them in the event that oil is found there. This seems to me to be a very serious ommission. Elsewhere in southwestern Ontario, which is where I come from, there is the Moravian town reserve also and I know that Mr. Jackson has indicated that he has communicated with them and they failed to attend here.

The Clerk: No, sir. I did not say that. I said that a representative of the National Indian Brotherhood attended here last Tuesday during a meeting. They have been informed of the progress of this bill, as late as 9.10 this morning.

The Acting Chairman: Did they telephone you this morning?

The Clerk: Yes.

The Acting Chairman: What did they tell you?

The Clerk: That they wished to attend the meeting.

Senator Flynn: This is not the same group.

The Clerk: No.

Senator Laird: We would be open to criticism when, in fact, under the terms of this act—

Senator McDonald: Could I ask the senator a question please: You referred to this group as being on Walpole Island.

Senator Laird: That is correct.

Senator McDonald: Is there oil exploration on Walpole Island?

Senator Laird: At the moment, no, but in the area, for example at Petrolia, close by, there is oil.

Senator McDonald: Yes, but as I understand this legislation, if there is to be exploration for oil on Walpole Island, before that exploration can take place there will be consultation with the band which resides there. There is no need to consult the Indians on Walpole Island in connection with drilling a well in Alberta.

Senator Laird: Can I have this assurance—

Senator Flynn: The point is that they say they wished to appear before the standing committee of the other place and were denied that privilege. I suggest that we should invite them to attend here next week so that they cannot tell us that we have done the same thing.

Senator Cook: And we should explain the bill to them so that they will understand.

Senator Flynn: Yes, maybe they will have nothing to say but, as they wish to appear, at least we should give them the opportunity.

Senator Cook: Probably when they understand the provisions of the bill they will not have anything to say.

Senator Flynn: It would be silly on their part if they had not read the bill before writing this letter.

Senator McDonald: I wonder if I could see that letter?

Senator Flynn: I know that the terminology is not too clear, but that is their complaint. They wish to be consulted in connection with this bill, and asked to appear before the standing committee of the House of Commons and were denied that.

Senator Laird: Is there any rush about reporting this bill immediately?

The Acting Chairman: No, senator.

Senator Laird: Well, do you not think that Senator Flynn's suggestion is proper?

The Acting Chairman: I suggest that this letter be read into the record.

Text of document follows:

December 5, 1974,
LRH-JG/0169-74

Hon. Pierre E. Trudeau,
Prime Minister,
House of Commons,
Parliament Buildings,
Ottawa, Ontario.
K1A 0H4

Mr. Prime Minister:

On behalf of the Association of Iroquois and Allied Indians, we object to the passing of Bill C-15, the Indian Oil and Gas Act.

There has been no consultation with us and we do not feel this Act to be in our best interests or those of the Canadian Public.

We have repeatedly requested that an amendment be made to the Fisheries Acts, the Immigration Act, the Family Allowances Act, the Income Tax Act, which we the Indian Public feel is in our best Interests and for further development of Social, Economic and Political atmosphere in our communities, and to help (eventually) the Tax burden of the Public, but to this date we have had no response from your Government.

If the Honourable Mr. Buchanan, Minister of the Department of Indian Affairs would kindly make these recommendations on our behalf we shall indeed appreciate the co-operation. We have attempted to meet with the Standing Committee, but they have refused to speak to us to this date.

Yours truly,

L. R. Hopkins,
President,
ASSOCIATION OF IROQUOIS
and ALLIED INDIANS

LRH/ds

c.c.-
All Federal M.P's.
Senate
Board of Director
of the A. I. A. I.

Senator McDonald: The point is that they do not say that they were refused a meeting with respect to Bill C-15, but refer to the Family Allowances Act, the Fisheries Act and the Income Tax Act. I agree, however, that if they wish to appear, they should be invited.

Senator Flynn: I agree that the letter is not too clear, but they say:

> On behalf of the Association of Iroquois and Allied Indians, we object to the passing of Bill C-15, the Indian Oil and Gas Act.
>
> There has been no consultation with us—

They mean prior to the drafting of the bill, I suppose. The letter continues:

> . . . and we do not feel this Act to be in our best interests or those of the Canadian Public.

In the other paragraphs they refer to other grievances concerning other legislation. The letter continues in the final paragraph:

> If the Honourable Mr. Buchanan, Minister of the Department of Indian Affairs would kindly make these recommendations on our behalf we shall indeed appreciate the co-operation. We have attempted to meet with the Standing Committee, but they have refused to speak to us to this date.

The Acting Chairman: That is in the other place.

Senator Flynn: They cannot refer to anything but the standing committee of the other place. That is why I wish to avoid the same criticism being levelled at this committee. We simply invite them to appear, and if they have something important to say we may as well hear them.

Senator Cook: I suggest that the committee reply to the letter, send them a copy of the act, drawing their attention to clause 7(1) and ask them if they still wish to appear and, if so, we will be happy to receive them.

Senator Flynn: And let us know as soon as possible.

Senator Connolly: Fix a date.

Senator Laird: "Either be here by next Wednesday or else!"

Senator Cook: Let them have a copy of the act and, if they want to come, it is up to them.

Senator Laird: Perhaps we should do that by telegram rather than by letter. We know what the mail service is like at this time of year.

The Acting Chairman: They have not asked to come, but is it the desire of the committee that they be notified that they have the right to come?

Hon Senators: Agreed.

The Acting Chairman: At the same time, may I have the committee's agreement to file page 1 of this summary?

Hon. Senators: Agreed.

Senator Buckwold: Mr. Chairman, I did not get my last question answered regarding the number of bands involved in the $40 million anticipated revenue. Perhaps I could be informed of the highest amount going to any individual band, and the lowest amount. It might be of interest to see what amount of money is going to them.

Senator Cook: How many are there in the band?

The Acting Chairman: The witnesses cannot put their finger on it at the moment. We shall get it for you for the next meeting.

Mr. Meredith: As a matter of interest, there are some 18 bands involved in the oil and gas industry. The one getting the most money, or will appear to receive the most money this year, is a group of four outside of Edmonton. They will get something like $30 million on present production and oil prices.

Senator Cook: Approximately how many are there in that band?

Mr. Moore: Approximately 4,000 in the four bands.

Senator Buckwold: From that pool of $30 million?

Mr. Meredith: That is correct.

Senator Buckwold: I wanted to know what was the highest and the lowest amount.

Mr. Meredith: The lowest amount could be $1,000.

Senator Buckwold: It might be interesting to find out how many there are in the band.

Mr. Meredith: Four thousand.

The Acting Chairman: Is it the desire of the committee to proceed with the examination of each clause?

Senator Connolly: Before we deal with the bill clause by clause, can the officials tell us, in a general way, how the bands use these moneys that are made available to them? Do they, for example, ever attempt to distribute it on a per capita basis? Do they use it for community projects?

Mr. Meredith: In some cases that I am personally aware of they augment economic undertakings from their particular funds. In other words, they will contribute on a share basis with the federal government and other financing agencies to enhance their economic potential, such as building roads, and so on. I know of one particular band which is making an addition to a furniture factory using the money from this source. They enhance their own administrative practices, improve their roads and schools, and things of that nature. In other words, they are like a town council, and they apply the money to where the band council feels will best serve the interest of the band as a whole. It will vary band by band, depending on what they say is in their own interest.

Senator Cook: This year they will get $30 million. Last year they got approximately only $7 million.

Mr. Moore: I would say $8 million.

Senator McDonald: With regard to the $7 million last year, and the $30 million this year, is any of that money paid out directly to individual Indians?

Mr. Meredith: That is not part of my ship, senator. Perhaps Mr. Moore can answer that.

Mr. Moore: The act provides for 50 per cent of capital moneys coming in to be distributed on a per capita basis. It has to be an equal per capita basis. Some bands do and some don't. The particular band you are referring to usually has a fairly large distribution during the Christmas period. However, one realizes that when they do get the distribution, welfare drops away down. To the taxpayer that is good.

Senator Flynn: To which act are you referring?

Mr. Moore: The Indian act.

The Acting Chairman: Gentlemen, shall we proceed with the examination of the separate clauses, starting with clause 2, Interpretation? Are there any questions?

Senator Flynn: I put the question about the definition of Indian lands.

The Acting Chairman: Is clause 2 carried?

Hon. Senators: Carried.

The Acting Chairman: Clause 3, Indian Oil and Gas Regulations. Is clause 3 carried?

Hon. Senators: Carried.

The Acting Chairman: Clause 4, Regulations.

Senator Connolly: With respect to paragraph (b), it says that regulations may be made by the Governor in Council:

> (b) respecting the disposition of any interest in Indian lands necessarily incidental to the exploitation of oil and gas in such lands and the terms and conditions thereof:

I suppose that involves surface rights, and that type of thing, to enable exploration and production to be carried on?

Mr. Moore: That is right, sir.

Senator Flynn: It is the same thing as the provincial law—appropriation for purposes of mining.

The Acting Chairman: Are there any further questions with regard to clause 4? Shall clause 4 carry?

Hon. Senators: Carried.

The Acting Chairman: Clause 5, Royalties. We have had considerable discussion on this item this morning. Is clause 5 carried?

Hon. Senators: Carried.

The Acting Chairman: Clause 6, Existing grants, leases, etc. Is clause 6 carried?

Hon. Senators: Carried.

The Acting Chairman: Clause 7, Minister to consult. Is clause 7 carried?

Hon. Senators: Carried.

The Acting Chairman: Clause 8, Coming into force. Is clause 8 carried?

Hon. Senators: Carried.

The Acting Chairman: The short title and preamble will be dealt with next week. I understand that a "smoke signal" has gone up and there seems to be a representative waiting in the corridor. It is not yet certain whether he wishes to appear.

Honourable senators, we will now hear from Mr. Seymour, a representative of the National Indian Brotherhood.

Mr. E. G. B. Seymour, National Indian Brotherhood: Honourable senators, the office with which I am attached has received enquiries from a number of Indian groups outside of Alberta in connection with the bill before you. There is no question that the major oil producing province is Alberta, but there are groups in the treaty areas who are concerned about some of the contradictory clauses contained in this bill. Other groups are concerned from the point of view of the revision of the Indian Act. Those groups feel that the revision of the regulations under section 57(c) of the Indian Act is not really necessary. For that reason, our office has been asked to acquaint ourselves with the arguments put forth by the lawyers for the Texaco Oil Company in order to invalidate the regulations under section 57(c) of the Indian Act.

This piece of legislation will be the first legislation dealing with Indians outside of the Indian Act, and for that reason there is concern among those groups. Also, many groups in the treaty areas are concerned with some of the specific clauses within Bill C-15. They feel that this treaty does not apply to them because of clause 7(2), which reads as follows:

> (2) Notwithstanding anything herein contained, nothing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.

The groups in the non-treaty areas are concerned because of that clause. I believe some of them have even written to the Prime Minister in this connection. I have been asked to express on their behalf that they be given an opportunity to speak to your committee in this connection.

The Acting Chairman: Can you get in touch with them and have them here by next Wednesday? We will hear them as soon as arrangements can be made, but not later than Wednesday, December 18.

Senator Cook: Mr. Seymour, you made the statement that there are some controversial clauses in this bill. What do you mean by that?

Mr. Seymour: The House of Commons Standing Committee on Indain Affairs and Northern Development reviewed clause 4, which reads as follows:

> 4. The Governor in Council may make regulations—

And it then sets out the areas in which regulations may be made. The suggestion at that time was that it should read:

> The Governor in Council may make regulations in conjunction with the Band Council's approval—

That suggestion, however, was not incorporated. Instead, it is left as simply, "The Governor in Council may make regulations . . "

Senator Cook: And you say it should read, "in conjunction with the Band Council concerned."

Mr. Seymour: Yes. That suggestion was made to the committee of the House of Commons. Also seen as being contradictory is clause 7(1), which reads:

> 7. (1) The Minister, in administering this Act, shall consult, on a continuing basis, persons representative of the Indian bands most directly affected thereby.

They feel that although clause 7 states that the minister shall consult, he is not obligated to follow the recommendations arising out of any such consultation because of clause 4, especially clause 4(b) respecting the disposition of any interest in Indian lands. In that connection, some groups are afraid of the word "any". They feel that may include their interest also in the oil and gas on Indian lands.

Senator Connolly: You are referring now to their personal interest?

Mr. Seymour: As it reads now, it says:

> 4. The Governor in Council may make regulations . . .
>
> (b) respecting the disposition of any interest in Indian lands necessarily incidental to the exploitation of oil and gas in such lands and the terms and conditions thereof;—

That could be interpreted as personal interest or band interest. For that reason, many goups have reservations concerning that clause.

Senator Connolly: You might ask those appearing before the committee next week to come prepared to discuss whether or not cluase 7(1) is complementary or supplemental to clause 4.

Senator Flynn: You have to remember that in clause 7 it is the minister, whereas in clause 4 it is the Governor in Council. The Governor in Council, therefore, is not obligated to consult. But maybe there is something in the suggestion—maybe with the conference of the band concerned.

Senator McDonald: The witness for the National Indian Brotherhood gave us a section of the Indian Act. Was that section 57?

Mr. Seymour: It was 57(c).

Senator McDonald: That is the section of the Act.

Mr. Seymour: There are some groups who feel that this whole bill should be the regulations made under section 57(c) instead of a separate act.

Senator Cook: We want to get the points, so that we can think them over. Are there any other points on this?

Mr. Seymour: Not offhand.

The Acting Chairman: There is nothing you know of?

Mr. Seymour: No.

Senator Flynn: It would be useful if the officers of the department would look into the points raised by the witness—and maybe they could report to us next week?

Mr. Meredith: Yes.

Senator Cook: These points are not new, are they?

Mr. Meredith: No.

Senator Flynn: They have been raised. I would be glad to have your reply and your views on them.

Mr. Meredith: I will let you have my reply.

Senator Connolly: I do not think we need written replies; I think we should get them in committee, from you.

The Acting Chairman: That is right.

Senator Connolly: Say one week from now?

Senator Cook: Then this meeting is going to be adjourned until next week?

The Acting Chairman: Yes.

Senator Buckwold: I think Mr. Seymour should be here in addition to the others invited, because he has raised some interesting points. Undoubtedly they will be questioned carefully.

The Acting Chairman: Mr. Seymour, I assume that you are bringing the others with you, that you will show them how to get here, and tell them a little about our procedure and how we act.

Mr. Seymour: Yes.

The committee adjourned.

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Tuesday, December 17, 1974

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-15, respecting oil and gas in Indian lands, met this day at 9:45 a.m. to give further consideration to the bill.

Senator Alan Macnaughton (Acting Chairman) in the Chair.

The Acting Chairman: Honourable senators, you will recall that we delayed passage of the bill in order to hear from certain Indian bands and associations who wished to appear before the Committee. With a great deal of effort they have made it this morning and are now here. Before we hear these witnesses, however, I suggest that we have Mr. Meredith, the Associate Director, Indian-Eskimo Economic Development Branch, Indian and Eskimo Affairs Program, give the answers to a few questions that were raised and that I know you want to hear.

Mr. D. G. Meredith, Associate Director, Indian-Eskimo Economic Development Branch, Indian and Eskimo Affairs Program Department of Indian and Northern Affairs: Honourable senators, with regard to the points that were raised during the last meeting, if you would bear with me I would like to touch on them generally and see if I answer the questions you had in mind.

Mr. Chairman, you asked about solicitors who had been engaged in the studies. I answered to the effect that there was one, Mr. Roddick. There were in fact two other solicitors involved in the preparation of the new regulations in connection with which studies took place through last year. The solicitors were Mr. Smith, who represented the Alberta Indian Association, and Dr. Andrew Thompson, who is one of the leading authorities in Canada on oil and gas law. There were therefore three solicitors who took part in the determination and study of new regulations which were introduced on April 1st of this year.

Senator Buckwold: May I ask this question again? One of the solicitors in fact represented the Indian bands?

Mr. Meredith: Yes, sir. Mr. Roddick represented the major producing bands, and he still does. He is their solicitor. Mr. Smith represented the Indian Association in Alberta.

Senator Buckwold: They were instrumental in drawing up this act?

Mr. Meredith: They were instrumental in drawing up the new regulations which were instituted on April 1st of this year.

Senator Buckwold: The regulations that were instituted on April 1st of this year, are they the ones that in fact will back up this act?

Mr. Meredith: Yes. And the royalties which reflect those regulations. Those regulations had already been in effect, and they are supportive of this act.

Senator Buckwold: In fact, those regulations have already been in effect, but they will be complementary or supportive of this particular act?

Mr. Meredith: That is correct, senator. Senator Buckwold asked for data on the 19 wells drilled in 1973-1974. Of these wells 15 were capable of producing and four wells were abandoned.

I now come to Senator Laird's comment on Walpole Island and the Moravian Reserves. On Walpole Island there is only one small lease in existence, and over the past ten years the band has received in excess of $300,000 in bonuses and rentals. A permit on the Moravian Reserves generated about $4,000 in revenue, but it has since been surrendered.

In addition, Senator Buckwold asked for data concerning the projected $40 million in royalties for this fiscal year. Eighteen bands have so far received in excess of $18 million this year in royalties. Of the $18 million, $14,100,000 has gone to the bands at Hobbema, just outside Edmonton. The highest per capita royalty going to any band that we have a record of is $10,000 for each band member, and that is the Sawridge Band.

Senator Flynn: Is that yearly?

Mr. Meredith: That is so far this year, senator.

Senator Smith: Where is that band?

Mr. Meredith: At Lesser Slave Lake. So far this year, 55 bands have received revenues from oil and gas in the form of mineral rentals, royalties, surface use payments and bonuses. Of the 55, only 18 hvave actually received royalties.

There was a comment made concerning section 57(c) of the Indian Act, and it was determined, and agreed to by Mr. Moore, who was my major supporting witness at the last meeting and who works in the department, and by Messrs. Smith and Roddick, the two solicitors representing the Indians.

Section 57(c) of the Indian Act was inadequate in terms of permitting timely and acceptable responses to situations which developed in the oil and gas industry. It was too

restrictive in terms of being able to respond to changes in market conditions and changes in the industry in terms of exploration, extraction and processing. In addition to this the Department of Justice inferred that we could not stand the pressure of a court case if we were taken to court by industry as a result of applying regulations and royalties under those regulations. 57(c) is an old part of the original Indian Act, or at least, it goes way back; and it just was not designed to respond to the conditions existing today vis-à-vis the oil and gas industry.

The bands concerned, and we ourselves, did not wish to jeopardize their income by enforcing regulations under 57(c) which could very well wind up in court, resulting in a loss. The major bands concerned would have reverted from a royalty rate of something like 45 per cent to 19 per cent, which would have cost them dearly—many millions of dollars—and we just did not feel that it was worth the risk to take a dubious section of the Indian Act into court and try and enforce it. We therefore determined that the way to handle it was to produce within this oil and gas bill a more flexible and positive posture, from which we could regulate, in concert with the Indians, their oil and gas business.

Senator Flynn: Are you not acting retroactively with this clause 3? Are you not saying that these regulations, the legality of which you doubt, are deemed to have been valid?

Mr. Meredith: We did not wish to take it to court, senator, to find out.

Senator Flynn: But my question is clear. You want to say that these regulations, even if they were not legal, would now be legal as a result of this act?

Mr. Meredith: Yes. For greater certainty.

Senator Flynn: That is a nice expression, indeed.

Mr. Meredith: It was not mine, but it is a very appropriate expression, I think. The requirement for a new act was very carefully explained in a series of two-day meetings with groups of oil producing, or potentially oil and gas producing, Indian bands in Alberta and Saskatchewan. We held a series of meetings through the spring and summer of 1973, at which all this was explained to them by ourselves and by their legal representatives. In addition to this, the requirement for an act was explained in writing to Mr. Manuel of the National Indian Brotherhood. So we felt, as did the producing bands, that this was the only way to go towards producing a more flexible piece of legislation. They concurred in that.

A question was noted on Clause 7.(2) of the proposed bill. That particular clause was added to the bill by the House of Commons Standing Committee in order to ensure that there would be no jeopardy as a result of this bill to any Indian or group of Indians who had unsettled land claims still to be considered. This bill in no way would inhibit their access to those claims. Mr. Seymour had suggested a change to clause 4, that "the Governor in Council may make regulations in conjunction with the bank council's approval." I think, Mr. Chairman, with your permission I would defer comment on that, as Mr. Seymour is here. If you wish, you may question me further on that later in the meeting.

The Acting Chairman: You say his suggestion was to add the words "the Governor in Council may make regulations"? Those words are in the act now.

Mr. Meredith: But, "in conjunction with the band council's approval."

The Acting Chairman: Was there anything else?

Mr. Meredith: No, sir. That would be all. I think I have answered all the comments and questions of the senators.

The Acting Chairman: You are staying here and will be available for further questions, if necessary?

Mr. Meredith: Of course.

The Acting Chairman: Mr. Jim Barrett is with you, I understand, replacing Mr. Moore. Mr. Barrett is a senior administrator of Indian Minerals Program.

Mr. Meredith: Yes, sir, he is an associate of mine in the minerals program.

The Acting Chairman: Honourable senators, we have this morning the National Indian Brotherhood represented by Mr. Seymour.

Mr. Seymour, I understand that you have brought with you Mr. Paul Williams, who is a barrister domiciled in Toronto but representing Indians. Is that right?

Mr. E. G. B. Seymour, Consulting Mining Engineer Union of Ontario Indians: Yes, sir, the Union of Ontario Indians and the Association of Iroquois and Allied Tribes. Sitting next to him, Mr. Chairman, is Del Riley. He is the Director of Research for the Union of Ontario Indians. His assistant is Jim Gabow.

The Acting Chairman: Is Mr. Gabow here only as an observer?

Mr. Seymour: I believe so.

The Acting Chairman: Mr. Seymour, we thank you and your witnesses for making the effort to get here in very snowy conditions. Have you a statement you wish to make?

Mr. Seymour: Yes. I would prefer Paul Williams to take the lead in the discussions, but, basically, we are looking for two basic amendments. One amendment is that which Mr. Meredith mentioned, and which I mentined last time, namely, the amendment to clause 4, "the Governor in Council may with the approval of the Indian band make . . . " That was introduced in the standing committee by the Hobbema people. We would just like to reiterate that, because the Ontario group were not consulted on the process of this bill, and there is potential oil and gas in Ontario. We agree with the Hobbema group that that amendment will not make redundant section 7(1), I believe it is.

Senator Cook: Section 7(2), I think.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: When you say, "with the approval of"—with the approval of whom? Could you specify?

Mr. Seymour: The Indian bands affected, I guess.

Mr. Hopkins: I am asking.

Mr. Seymour: Well, I would put it as the Indian bands affected. The Hobbema people have just said the "Indian band." There is a difference between saying "Indian band" and "Indian band council." The Indian band council requires a band council resolution for approval. The Indian

band would require a total band referendum for approval. You are concerned with which Indian bands are involved?

Senator Flynn: No, it is just the wording. Perhaps Mr. Williams could speak on that.

Mr. Paul Williams, Barrister, Representing the Union of Ontario Indians and the Iroquois and Allied Tribes Association: I think the idea behind this is that without the clause stating that there must be approval of the bands in question, then these regulations would be made after consultation and not necessarily after approval, so that the Governor in Council could make these regulations applicable to bands even over the objections on those bands. In the present case what has happened is that Ontario was not consulted in any aspect of this bill. The National Indian Brotherhood does not have any membership from Ontario at this time, so a letter to Mr. Manuel would not be very effective in consulting with Ontario, and the only provinces which were consulted were Saskatchewan and Alberta. In fact, Ontario has considerable oil and gas reserves in Indian lands which are not yet exploited.

Senator Flynn: You mean the bands in Ontario, not the Province of Ontario?

Mr. Williams: That is right, and we are especially concerned that these future reserves should not be subject to regulations in which the Indian people would not have any say, so that by adding the words "the Governor in Council may with the approval of the bands affected make regulations," in clause 4, that would impose upon the Governor in Council and the Minister of Indian Affairs the obligation to respect the wishes of the Indian people, as they have repeatedly stated they wish to do.

Senator Buckwold: Would "Indian bands affected" not be better?

Mr. Hopkins: "Band" is defined in the Indian Act.

Mr. Williams: We could change it to "Indian bands," but I would like to get into the technicalities of that later.

Senator Flynn: What about the approval? Is there any mechanism provided in the Indian Act?

Mr. Williams: There is a mechanism in the Indian Act under section 98 as to whether or not a reserve should be wet or dry—in other words, whether possession of liquor on the reserve would be legal or illegal. What is provided in section 98 of the Indian Act is a referendum by the band to choose whether or not certain sections of the act should be applicable to that band. I would suggest that the same type of referendum, in fact exactly the same procedure, should be applied as to the applicability of these regulations to a particular band.

Senator Buckwold: There could be a series of regulations, Mr. Williams. There could be any number of changes, some of them very minor, involving a degree of regulation. Are you suggesting that every time a regulation, no matter how minor, would be brought forth it would have to go through the vote of the entire band? You are not satisfied to accept the council's vote? Would you not feel that in the end that becomes such a nightmare that the whole process might break down? It says "regulations," not "principles," not "major decisions," but "regulations." There could be any number.

Mr. Williams: These regulations deal with rather major principles.

Senator Buckwold: Yes, except that to effect these major principles there could be a series of minor regulations too.

Mr. Williams: For the minor regulations the band could pass a referendum accepting the power of the Governor in Council to make these minor changes.

Senator Buckwold: I do not know how that would work legally.

Senator Cook: Are you familiar with the present regulations?

Mr. Williams: Yes, I try to keep up with the present regulations.

Senator Cook: Are there any of them which are objectionable?

Mr. Williams: There are none of them which are objectionable, but there are certain sections of this act which may be objectionable. I would like to mention to you that the definition of "Indian lands", in this act, differs from the definition of "Indian reserves for surrendered lands" in the Indian Act.

Senator Buckwold: That is not a regulation, though, is it?

Mr. Williams: No, this is part of the act.

Senator Flynn: Let us try to solve the question of approval first.

The Acting Chairman: Yes, let us stick to paragraph 4. How would you suggest the administration would be carried out under your proposal?

Senator Flynn: Especially with regard to the point raised by Senator Buckwold.

Mr. Williams: What I would suggest involves little more than merely changing one part of section 4. Perhaps I could try to summarize it in one package, if I may. The first thing that strikes one, when one reads this, is that the Governor in Council may make regulations respecting the disposition of any interest in Indian lands necessarily incidental to the exploitation of oil and gas in such lands. By placing the right in the minister to dispose of any interest in Indian lands, by placing this right outside the Indian Act, this bill takes away the safeguards and guarantees of the Indian Act against arbitrary taking of Indian lands without surrender; it takes these safeguards out of the Indian Act and removes them. The Governor in Council can now make regulations respecting the disposition of any interest in Indian lands incidental to the exploitation of oil and gas.

The Acting Chairman: I am sorry to interrupt you, Mr. Williams, but I would refer you to section 7, which does not seem to agree with what you have just said.

Mr. Williams: In Ontario especially there are certain places in which the mineral rights have not been surrendered, even though the lands may have been surrendered. There are a number of surrenders which are silent as to minerals. The words "land claims" in section 7.(2) do not seem to include mineral claims. If the land rights have been surrendered and the mineral rights have not been surrendered, I do not think that section 7 would take these into account.

Senator Everett: Mr. Williams, you say that section 4.(b) in some way removes the powers of the Indian bands which have been conferred upon them by the Indian Act, in that it allows the government to include in a disposition Indian lands "necessarily incidental to the exploitation of oil and gas." Is it not true that the practice and jurisprudence in respect of necessarily incidental land is fairly clear and could in no way involve a loss of land other than that which is absolutely necessary for the exploration and development itself? Are you not going just a little far?

Mr. Williams: I am not saying there would be massive chunks of land taken. For instance, I could refer to the Chippewa, the Thames and United Reserves in southwestern Ontario, outside London, which, according to studies which have been made, have quite large possible oil reserves underneath. Now what could happen, since those two reserves are rather heavily populated, is that theoretically the minister after consultation, as prescribed in section 7, could decide it could be a good thing to grant a lease for the exploitation of the oil and gas in those lands and that these heavily resident reserves could be subject to all kinds of gas and oil exploration against the wishes of the people.

Senator Everett: Well, let us just separate this out for a moment. It might well be against the wishes of the people who live there, but what you are dealing with here is the amount of land taken.

Mr. Williams: That is right.

Senator Everett: And I am suggesting to you that the practice in the oil industry and, indeed, I believe, the jurisprudence would not allow them to take any significant amount of land.

Mr. Williams: It may not allow a significant taking of land, but it would allow a number of outside workers to come in there and it would allow a number of oil trucks running through the reserve.

Senator Everett: But that is another matter. The point we are dealing with is found in the words "Indian lands necessarily incidental to the exploitation of oil and gas." I just wanted to settle the point that you made earlier that this was in effect a major amendment to the Indian Act in respect of the taking of Indian lands. I do not believe that it is.

Mr. Williams: There may not be many lands taken, but there is not much land left either. There are three reservations in the United States that are larger in area than all the reservations in Canada at the present time.

Senator Everett: You have made your point, but, again on another subject, the point I want to narrow down is that related to the incidental taking, and it seems to me that this is something that was fought out over a long period of time in Alberta when they were originally negotiating oil leases there and the question of the lands that were incidental to the development of oil and gas reserves.

Mr. Williams: There may not be much land taken, agreed, but the injurious effect to the residents of the reserve and to the other land in the reserve may be greater than the effect of the land incidentally taken.

Senator Everett: Well, then, maybe we can leave that point and get back to the wish of the Indian people in respect of this act.

Senator Cook: I gather you do not attach much weight to the obligation imposed upon the minister in the act to consult on a continuing basis with representatives of the Indian bands. You do not feel that section 7.(1) holds out much promise or that it has that much effect?

Mr. Williams: It has been my experience that consultation is not necessarily binding, despite the fact that there may be a trustee relationship existing. Even if the minister does consult, that does not mean that the wishes of the band would be binding on him. Consultation is not the same thing as approval. Approval would be binding, but consultation merely means an obligation to apprise the band of what is going to happen. If the band doe not agree, that does not mean that the minister is bound to follow their decision.

Senator Buckwold: Mr. Williams, does this lead one to believe that the process that has been going on now for a fair number of years, and from which a fair amount of experience has been developed, with the Indian department, about the exploration for oil and gas on Indian lands, has led to dissatisfaction? Have the Indian bands been unhappy with the administration of this act and the decisions made basically on a consultative basis? Can you give us some examples of that?

Mr. Williams: Unfortunately, I have not done much research into the situation in western Canada where the major royalties are applicable, but I have concentrated on southern Ontario where there is not much exploration for oil and gas. At the Six Nations, which, as you may be aware, may not be a reserve but may be Indian land in fee simple or Indian land under royal proclamation, there are a number of people unhappy with the situation. I am still trying to figure out what is causing their unhappiness and what the situation is.

Senator Buckwold: But there are always some people who are unhappy.

Mr. Williams: Yes, but much of it stems from the kind of contract that is in effect there, and I believe the band council was consulted, but, there again, we have a problem as to whether it was the elected band council or the traditional band council.

Senator Buckwold: But you are referring to a relatively obscure area, while I am talking about an extensive experience built up over a number of years and under which, I think—and I stress the words "I think" because this is what I have heard from a number of my Indian friends—that in fact the administration has been very considerate of Indian interests, and that they have benefited to the maximum. Perhaps they could have benefited more, I don't know, but it was the best they could do in the development of this whole process in the area in which there is extensive oil and gas reserves and production. It is a very highly technical area of negotiation and you are dealing with royalties and contracts, and I am not at all minimizing the ability of the Indian people to be able to handle this, but I am saying it is a very sophisticated business requiring experts on all sides when you start giving out oil leases and lands and this kind of thing. I am simply suggesting to you that that experience has been pretty valuable and has worked very well. You are suggesting that all that should be tossed aside; it is there, but in effect a decision should be taken by a vote of all people in the band to effect any regulation. Again I am not trying to minimize the right of

the people to do it, but under the consultative process it seems to have worked very, very well.

Mr. Seymour: Perhaps I could comment on that. I have done some work on mineral development, and I was working in a master's program on mineral development in Indian reserve lands, and it developed an Indian mining corporation concept primarily from the work that the people in Calgary are doing. The big problem in that whole approach is that they are doing too good a job; the people are sitting back and they really do not know what is available and at their disposal. They are just gradually learning what is available or at their disposal, for example, this whole process of consultation to revise this bill. So they just sit back and collect their royalty.

Senator Buckwold: Do you think the process you suggest will change that very much, other than the fact that somebody may have a vote?

Mr. Williams: If they have to get involved in making decisions on the process, they are going to have to get involved with the technical aspect. There is a whole range of technical jobs that a lot of these people could be getting involved in. There is a whole range in dealing with the money that they could be using to promote development in other areas. The department has done too good a job. I think now there should be a transition, so that the people themselves start taking over their own affairs.

Senator Cook: It goes far beyond this bill. That is a philosophy that has not much to do with this particular bill.

Senator Everett: It seems to me that we have two distinct questions here: one is the question of the approval itself; and the other is the question of the method of issuing that approval. I should like to deal for a moment more with the method that you would use to obtain the approval of the band. Would you outline that again for the committee? Maybe you could be quite specific about it.

Mr. Williams: There are two possibilities. The first one is to say, "with the approval of the Indian band affected expressed in writing to the Minister of Indian Affairs by a resolution of the Band Council," and that is one way that is already in the Indian Act.

Senator Buckwold: You have already indicated that you do not want to accept that.

Mr. Williams: That would be acceptable if it is found that it would be impracticable for a referendum to take place. I agree it would be impracticable for a referendum to take place on each minor change, but perhaps a referendum could take place on the idea of these regulations applying to the lands that certain bands are interested in.

Senator Everett: Would that not be a discrimination between band and band though?

Mr. Williams: That is a real problem. I would like to get into that when we discuss the concept of Indian lands in this bill, because it is very different from anything in the Indian Act.

The Acting Chairman: Mr. Williams, I wonder if you would answer one direct question. What area are you in fact representing? Is it the Ontario bands?

Mr. Williams: I suppose at this time I am representing the Association of Iroquois and Allied Indians. The president of that association could not be here because he was without transportation in Toronto. I am also speaking for the Union of Ontario Indians.

Senator Everett: Are you retained by both those people in a legal capacity?

Mr. Williams: Yes, I am.

The Acting Chairman: But you are not speaking for the Indians out West?

Mr. Williams: No, I am not.

Senator Cook: How many people do you represent, just broadly?

Mr. Williams: Broadly I would think about 35,000, 60 different bands.

Senator Cook: 35,000 in the two groups?

Mr. Williams: In the two groups, that is right.

The Acting Chairman: In Ontario.

Senator Everett: Are there any known mineral reserves on those lands?

Mr. Williams: Yes, there are. There is oil exploitation on Walpole Island and Sarna. There are known reserves on Oneida of the Thames and Chippewa of the Thames. There is natural gas on the Six Nations Reserve. There is gypsum on the Six Nations Reserve. There is iron in Michipicoten. I am not familiar with the technical aspects of it, but there are known mineral reserves of oil and gas and other minerals on those reserves.

Senator Flynn: What is the problem with Indian lands?

Mr. Williams: The old Indian Act regulations for oil and gas state:

> These regulations apply to Indian Reserves in which the oil and gas rights have been released or surrendered to the Crown pursuant to the provisions of the Indian Act.

Generally we have at this time three categories of Indian lands. One is an Indian reserve, which is defined in the Indian Act as:

> ... a tract of land, the legal title to which is vested in Her Majesty ... for the use and benefit of a band.

Or bands. The second one is surrendered lands, which means:

> ... a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been surrendered by the band for whose use and benefit it was set apart.

Senator Flynn: Surrendered to whom?

Mr. Williams: Surrendered to the Crown. A surrender can be made only to the Crown.

Senator Flynn: Then the Crown can dispose of it?

Mr. Williams: That is right.

Senator Flynn: For the benefit of people other than Indians or Indians bands?

Mr. Williams: The disposition by the Crown usually depends on the terms of the surrender. If the surrender

says, "We surrender this land to the Crown so that this land may be sold for our benefit," then the sale must be for the benefit of the Indian people. If it is sold for money, then the Crown is free to dispose of it at will. The definition of "Indian lands" in the bill is:

> "Indian lands" means lands reserved for the Indians, including any interests therein, surrendered in accordance with the Indian Act and includes any lands or interests in lands described in any grant, lease, permit,

and so on. "Indian lands" means lands reserved for the Indians surrendered in accordance with the Indian Act. The first thing one notices is that by this definition of Indian lands no separation is made, as the old regulations did, of the lands in which the oil and gas rights have been released or surrendered to the Crown. In many places in Ontario the lands may have been surrendered to the Crown, but the oil and gas rights may not have been surrendered to the Crown.

Senator Flynn: Would they have been surrendered to somebody else?

Mr. Williams: They would be unsurrendered. The Crown would have no interest in those lands, except the underlying interest that it would have acquired in 1763 with the conquest of Quebec.

Senator Everett: I am sorry, I did not follow that, Mr. Williams. Would you go over it again?

Mr. Williams: Before 1763 Indian lands were owned, let us say, by the Indian people. In 1763 the royal proclamation of that year reserved for the Indian people, for their use, most of the land in Canada except for a certain exempted area around the St. Lawrence River. To create an Indian reserve, the usual procedure is for the Crown to approach the Indian people in an area, to have them surrender all their rights to all their land, and then to reserve, in the name of the Crown, certain sections of that land for the Indian people. That is an Indian reserve. Many lands in Ontario were not set aside by the Crown for the Indians, but the wording of the treaty was, "We give all our land to Her Majesty except the following, which we reserve to ourselves." These lands, whether they are reserves or not, are not surrendered in accordance with the Indian Act and the minerals rights unsurrendered. In other lands in Ontario, the land may have been surrendered but the mineral rights may not have been surrendered; yet in other lands, such as most in British Columbia, the Yukon and, until recently, Northern Quebec, there have been no Indian interests whatsoever surrendered, so that the rights of the Indian people to those lands remained as they did in 1763.

Senator Flynn: But the bill would not apply.

Mr. Williams: I do not know whether this bill would apply or not.

Senator Everett: Is it not fairly clear that it would not apply?

Mr. Williams: In that case I am wondering why they would not say "reserved lands" instead of creating a new category of "Indian lands." It becomes confusing legally. As a lawyer, I am confused.

Senator Williams: Has the Province of Ontario any participating in land use, such as minerals and other resources that may be on that land? You have made reference to the 1763 proclamation by George III. There were many aspects of the Indian way of life that were not at all yet visible to them, with respect to what this new society was going to involve them in. Has the Province of Ontario any rights or claims on minerals and other resources on Indian reserves within the province?

Mr. Williams: I do not believe so. Perhaps Mr. Riley could answer that question.

The Acting Chairman: What is your position, Mr. Riley? Is it Director of Research, Union of Ontario Indians?

Mr. Delbert Riley, Director of Research, Union of Ontario Indians: That is right. I am not exactly sure how I should answer this, but the picture of reserves in Ontario is quite unclear, especially in the areas within our organization. We have a sort of division. In one area the minerals and oil and gas are reserved for the Indians themselves. in another part of the province they made an agreement with the Dominion to split up the minerals within the reserves. This was in the 1924 land agreement, which I understand is undergoing revision at the present time.

Senator Williams: I would like to continue my question. Is there any band or reserve presently involved in minerals or the mining of minerals in Ontario?

Mr. Riley: There are many. I will just name you one. That is Whitefish River.

Senator Williams: And does the province claim any royalties whatsoever?

Mr. Riley: No, because this area is in the Robinson-Huron treaty area, where the mineral rights were reserved for the band specifically.

The Acting Chairman: Gentlemen, I think I should draw to your attention a communication that was received just a few minutes ago from the Chief and council of the Enoch Indian Band. It is a CN-CP telecommunication addressed to the honourable Senator Hayden from Winterburn, Alberta. The telegram reads as follows:

> Honourable Senator Hayden
> House of Senate Ottawa Ont
> The Enoch Indian Band Stony Plain Indian
> Reserve NBR 135 Province of Alberta express our gratitude and support in the passing of Bill C-15 respecting oil and gas in Indian lands.
> This bill will provide for more band control of the mineral resources and give the oil and gas producing reserves the maximum benefits of their depleting resource.
> The views of the National Indian Brotherhood are not the views expressed by the majority of Indian people and should not be seriously considered in a matter that pertains to a depleting resource on individual band land.
>
> Chief and Council Enoch
> Indian Band.

The purpose of reading this communication is not to embarrass anyone, but it is a dilemma that the committee has to face. While you are here, I was wondering whether or not you wanted to make any comments on that.

Mr. Riley: Mr.Chairman, I believe Ontario probably holds a similar view to that communication you have just received. Our views also are not necessarily represented by the National Indian Brotherhood. I believe this is the reason why we are here.

Senator Buckwold: As I interpret that telegram—and I may not have heard it properly—this is in complete support of the bill as it stands.

The Acting Chairman: Exactly.

Senator Buckwold: Are you suggesting, then, that you are also in complete support of the bill? You have indicated that your views are similar to those expressed in the telegram.

Mr. Riley: Our views are similar in the respect that . . .

Senator Flynn: As far as the essence of the bill is concerned?

Mr. Riley: That is right. Our major concern is that we have been consulted in Ontario in any aspect of the bill until just recently, when we had the third reading.

Senator Everett: Is not your real problem, Mr. Riley, to determine whether or not this act would have some effect or jurisdiction over the Indian lands that were reserved to the Indians themselves by the Indians at the time they made a surrender to the Crown?

Mr. Riley: This would be one of the concerns. However, we have various categories of reserve lands within our jurisdiction, but we would be concerned with all aspects of it.

Senator Everett: Your other concern, though, is that in the future you should be consulted—is that not so?

Mr. Riley: This is our primary concern. We wish to be consulted.

Senator Flynn: Mr. Williams mentioned lands reserved at the time of the treaty, or proclamation, but which do not come under the Indian Act. Did you not say that?

Mr. Williams: That is reserves. They are not reserved under that Indian Act.

Senator Flynn: These lands would not be affected.

Senator Everett: As I understand it, in most cases the entire land was surrendered to the Crown and then the Crown ceded back the reservation lands in some way.

Senator Flynn: They created a reserve.

Senator Everett: They created a reserve, I should say. In certain Ontario lands the lands were never surrendered, or certain mineral rights were never surrendered. The Indians retained those, and I assume, their claim is that those do not come under the jurisdiction of the Department of Indian Affairs. Your concern is that the definition of "Indian Lands" in section 2 might act to bring these reserves under the act. I would like to go through this with you because, as I read it, I just do not see how they could be affected at all.

Senator Flynn: That is my point, too.

Mr. Williams: This is a very minor point. The major points that I would like to bring out are, first of all, the amendment to section 4, to the effect that there should be approval by the band or the bands affected, and I am sure that Ontario would be amenable to that. It would be an easy mechanism to have these regulations apply through a resolution of the band council. That would be a flexible mechanism, and would ensure that there would be not just consultation, but there would also be some respecting of the wishes of the Indian people.

We are not alleging that the department has at any time been negligent in its functions, or that it has not acted in the best interests of the Indian people. That is merely a safeguard, just as section 7 is a safeguard, that these regulations should apply to a band and to its interests, only if that band, through its band council, and through a resolution, would approve of these regulations applying.

There are certain bands which do not wish mineral exploitation to take place on their reserve, even though they may have substantial mineral resources, and adding the word . . .

Senator Everett: Is that true?

Mr. Williams: That is true, yes.

Senator Buckwold: Has the department respected that wish in the past?

Mr. Williams: Up to now, it has, yes. I am not saying the department did not ever respect that wish; but merely as a safeguard we would like to see words added to section 4 to the effect that the Governor-in-Council may make regulations that would apply to Indian lands, subject to approval through resolution by the councils of the bands affected.

Senator Cook: Would you not agree that that request would have a good deal more force and effect if in fact there was some evidence of the department having flouted the wishes of the bands? If there is no evidence of that, it would seem to me that perhaps Section 7.(1) goes far enough.

Mr. Williams: Well, as evidence of that the only thing I can think of at the present moment is that Ontario was not consulted in any way when this act was drawn up.

Senator Cook: This is only enabling legislation. In my view the consultation would come afterwards, pursuant to Section 7.(1).

Senator Laird: Mr. Williams, if you do not mind my interrupting, I must say that the point you are trying to make somehow or other reminds me of the establishment of an airport. If you had to have the approval by resolution of the people around an airport, you would never have an airport. In other words, there is always going to be some unhappiness about that sort of thing. Therefore it does seem to me, with respect, that to put that kind of a mechanical obstacle in the way of any change is more likely to create ill-will, and all the rest of it, than simply leaving it to section 7.(1), that is, the consultative process. That is the impression I get.

Senator Buckwold: I must admit, you know, that once you changed your stand and brought it down to the band council, I could see something constructive in that. When you had it expressed in such a way that everybody had to vote on every regulation, it seemed to me that in that kind of situation the whole thing becomes a nightmare.

Senator Flynn: It would be clumsy.

Senator Buckwold: I am prepared to listen to this, and see how it would work mechanically, and whether it would really be in the interests of the band. Very often, however, these things have to be done fairly quickly. It occurs to me to compare it—and of course, it is not an exact compari-

son—to the situation in which, in the Province of Saskatchewan, where I come from, the government decides to put out for bids the oil exploration rights for a large area of the province. They will take a block and say to the oil companies and those people who are interested in oil rights, "You give us your bids on what you will pay per acre for the oil minerals rights for this area." Now, they do not ask the people in the area. They do not come to all the farmers who are involved, who do not have the mineral rights, but who are farming on those lands, and ask them whether they are in favour or otherwise. The government of my province, Saskatchewan, or of Alberta, for that matter, and I presume of most provinces, just put them up, and say, "That area is going to be opened for exploration." Now, that seems to work. We are not that adverse to what you are suggesting, but if we were to carry it to its extreme, I suppose everybody affected anywhere by a permit for development of any mineral or oil resource should have a say in whether in fact it goes forward. Again, this would become a very difficult thing.

Mr. Williams: That is not quite what I am saying. The basis of this act was that the Indian people, who theoretically own the oil and gas resources in their lands, would be able legally, without interference from oil companies in court or otherwise, to obtain the royalties. The situation with the Indian people owning the resources in their lands is unlike the provincial situation, in which the Crown owns the resources.

Senator Buckwold: The people in the province own the resources. The government is only the representative of the people.

Mr. Williams: Well, the band council is the representative of the Indian people.

Senator Buckwold: As a matter of fact, the people in Saskatchewan participate right now. The government gets the royalties and they are passed back to the people in one way or another, just as is the case with the band council, although I must grant that it is a much more obtuse process. I am just saying that if we want to carry the suggestion to its ultimate, then everybody should have the opportunity to have his say, and, I repeat, this could lead to a breakdown in the whole process.

Senator Flynn: Are you suggesting any other amendments, outside this one, Mr. Williams?

Mr. Williams: I would suggest one other amendment, honourable senators. For the sake of clarity, instead of having this as a separate act, instead of having this become an act respecting oil and gas in Indian lands, it should become an act to amend the Indian Act and should become section 57, subsections (2) to (8). In that way the safeguards in the Indian Act would remain safeguards, and, moreover, the government, which has promised not to amend the Indian Act without the approval of the Indian people, would not be able to pass an act which would effectively do what section 57(c) of the Indian Act does now, which is provide for the disposition of surrendered mines and minerals underlying lands in a reserve. In other words, the government, through this act, is doing indirectly what it has promised not to do directly.

The Acting Chairman: You see the dilemma that the committee is in, Mr. Williams: we have this communication from the other Indian bands. In their telegram they say that the bill will provide for more band control.

Mr. Williams: And that is exactly what the amendment we are proposing would do; it would provide for more band control.

Senator Buckwold: But they are satisfied that that is in the act now.

Senator Flynn: I would like to get the comments of the officials of the department on these things, Mr. Chairman.

The Acting Chairman: Have you anything else to add, Mr. Williams?

Mr. Williams: I would like to reiterate the two basic amendments. First, in section 4 the words should be changed to "Governor in Council may make regulations subject to the approval of the bands affected by resolution of their band councils," and, second, that Bill C-15 be made an act to amend the Indian Act and be placed under section 57 to become section 57, subsection (2), and whatever the technicalities would be, (a), (b), (c), (d), (e), and that where in this act it says "act," one would replace the word "act" by "section" or "subsection." Those are the two basic amendments we propose.

Senator Buckwold: You are using the word "bands" rather than "Indian bands." You say that is the way it is described in the Indian Act, but when I look at section 7.(1) I see that it refers to the representatives of the "Indian bands." The language is "Indian bands."

Senator Laird: Would you have any objection to it being "Indian bands" as opposed to "band"?

Mr. Williams: No, it would not matter.

Senator Williams: Mr. Chairman, certain aspects of this legislation bring to mind a point which has always bothered me. The process of surrender has been a matter of deep concern to me for several years. I believe it is section 37 of the Indian Act which governs the process for a surrender. In order for an Indian band to surrender to the Crown certain lands, it is required that a majority meeting of the band members be held. The point that bothers me is that if there is a failure to have a majority meeting, the Governor in Council or the representatives of the government can then post a 30-day notice for a second meeting. According to the interpretation I received of this section many years ago—and I do not believe this particular section has been changed—there is a great danger inherent in it, in that regardless of the number of members who attend the second meeting, be it two, half a dozen or ten, the members present at the second meeting will perform the surrender. As you can see, that is a most dangerous factor. I have always been a firm believer in a majority meeting of the band members in order to execute a satisfactory surrender on behalf of the particular band concerned.

So that particular phase of the act is extremely dangerous. Although I cannot prove it by giving names, I am told that there were one or two cases in British Columbia some years back where this actually happened. So you can see the dangers inherent in that situation where the lands of a band, whether it be a large or small band, may be surrendered to the Crown by a small number of members of the band at a time when most of the band members are away on job locations or are out of the country or are simply, for some reason, not available for a meeting.

My many years of thinking on this line lead me to the conclusion that in all cases of surrender of lands there must be a majority surrender by the band.

Senator Flynn: What you are actually criticizing, senator, is the Indian Act itself.

Senator Williams: That is right.

Senator Flynn: But there is only a reference to that act in this bill. What you want would require an amendment to the Indian Act itself.

Senator Williams: But in the case of these witnesses, their oil reserves are unexploited in Ontario, and I am thinking of the future, when a surrender of this type can take place.

The Acting Chairman: Honourable senators, before recalling Mr. Meredith of the Indian department, I should like to thank Mr. Seymour, Mr. Williams and Mr. Riley for making the real physical effort to be here for the hearing this morning. We thank you for the interesting ideas you have put forward and we will certainly consider them most carefully.

Senator Everett: Could Mr. Seymour and his associates be left subject to recall, Mr. Chairman, just in case?

The Acting Chairman: Certainly. Mr. Meredith, you have heard the discussion this morning. Would you care to make any comment?

Mr. Meredith: If I may, Mr. Chairman and honourable senators, the point was made—and this was made by other Indian groups as well—that no one was consulted about the bill itself. It is my understanding that consultation on the make-up of a bill is just not done publicly. The consultation took place, in depth, in the establishment of regulations, with Indian groups and individual bands, but no one was consulted on the wording of the bill.

To address myself to the proposed change, the attitude of the people who would administer the bill under the change would be that the involvement of consultation, subject to the approval of tha bands affected through band council resolutions, would be a most difficult process to administer. My personal feeling is that it could inhibit the receipt of money or our activity, on the part of some bands, while we consulted with others who may not have the degree of interest or the financial involvement with oil and gas processing on the reserves.

Senator Cook: But does this bill not merely make law of the present practice?

Mr. Meredith: Yes, senator.

Senator Cook: There is no change in the practice, and any change would be effected by regulation.

Mr. Meredith: The change would be effected by the regulations, and the make-up of the regulations would be part of the regulatory process.

Senator Flynn: In the same vein as the objection raised by Senator Williams, the act does not change the practice directly.

Mr. Meredith: No, it is an Indian Act problem, Mr. Chairman. Senator Williams is absolutely correct in what he says.

The Acting Chairman: We have heard considerable criticism with regard to the Indian Act. Is anything being done about it?

Mr. Meredith: The position taken by the government and the department with respect to the Indian Act is to do nothing about it until the suggested changes and requirements are established by the National Indian Brotherhood, in concert with the Indian bands and associations throughout the country.

Senator Flynn: I hope that you will take into consideration the point raised by Senator Williams when there is a revision of the Indian Act.

Mr. Meredith: I would hope that the associations and bands concerned would raise that point, senator. The number of people who turn out to a second vote is not within the control of the department.

Senator Flynn: Yes, I know that, but you could establish a quorum under the Indian Act in relation to the decisions.

Mr. Meredith: If it were considered to be beneficial to the Indian associations concerned, I am sure it would be considered as part of the act.

Senator Buckwold: Mr. Meredith, I wish to return to the question of the process of approval being given by band councils on reservations which are affected. You have put a sort of "no-no" on it from an administrative point of view.

Mr. Meredith: It would be very difficult to administer.

Senator Buckwold: Why?

Mr. Meredith: It would involve the passing of the regulations by the affected band councils, reaching agreement among them that the regulations were acceptable, and reaching a cohesive decision.

Senator Buckwold: Are you suggesting that the regulations would apply in toto to all bands?

Mr. Meredith: Yes, I am.

Senator Buckwold: And that one could vote against it?

Mr. Meredith: Yes, that is right. Then we have an exception for that particular band, for whatever reason they wish to take exception to the regulation. So it would really break the regulation-making process down into many different streams.

Senator Cook: Or create many different sets of regulations.

Mr. Meredith: Yes, very much so.

Senator Buckwold: I am endeavouring to accommodate these people, because I recognize their right to their self-determination as much as possible and that in those matters which directly affect a band they should have a say, not just consultation. If, for example, a reservation is involved in a lease being granted for the carrying out of exploration which does not affect any other band, but is confined to that particular area, is it possible to provide in the act for the right of these people to make that decision?

Mr. Meredith: That would be part of the surrender process. The surrender process would indicate their requirements in terms of what they wanted or did not want to take place as part of that leasing operation. They would draw the criteria as to what form the lease would take, the payment for it, the access and whatever physical involvement would take place.

Senator Buckwold: Therefore, in those regulations which would affect the band directly on an individual basis they are part of the decision-making process.

Mr. Meredith: They may see fit not to lease their land, which some do now.

Senator Buckwold: And that could not be overruled by the department?

Mr. Meredith: No.

Senator Everett: That is the lease of land, not the granting of mineral or gas rights.

Senator Flynn: The surrender of the land is the procedure criticized by Senator Williams.

Senator Everett: But for all practical purposes the land we are dealing with has been surrendered. This act applies to lands which have been surrendered. Is that right?

Mr. Meredith: Yes, senator, that is correct. Surrendered for the purposes of this act.

Senator Everett: Let us assume that instead of an Indian reservation we were dealing with a Hutterite colony. Would any agency of government make arrangements for them? Probably the fact is that I am naive on this subject. Why are you making regulations for Indian bands?

Mr. Meredith: The regulations that we are making are those that attempt to, or do make a possibility of exploration and extraction attractive to the industry without jeopardizing the position of the Indians and in concert with the Indians' wishes to acquire the use and benefit of the resources which underlie their reserves. We work very closely with the oil industry and are attempting to tread the fine line between being oppressive and discouraging to the industry in terms of being too difficult to get along with, or making it too difficult for oil companies to get on to Indian land.

In addition to that, we are attempting, to foster, on the part of those Indians who have this type of resource under them, a more direct relationship between themselves and the oil industry. We have attempted to establish a broader set of ground rules through which the occupants of the Indian reserves themselves can enter into direct negotiation with the oil industry. The department would, essentially, stand in the wings, if you will, making sure there is consistency of treatment and that both the industry and the Indian bands concerned achieve the best possible results.

Senator Everett: Could the department under this act make a regulation that would require an Indian band to enter into an oil or gas lease?

Mr. Meredith: No, senator; it would not be a good idea.

Senator Everett: I am not saying whether it is a good idea. I am just asking whether the act would permit the department to enter into a lease.

Mr. Meredith: It would have to be surrendered land.

Senator Everett: According to this, the Indian lands are lands that are surrendered.

Mr. Meredith: That is correct.

Senator Everett: I will pose my question once more: Can the department make a lease of oil and gas?

Mr. Meredith: Only within the context of the terms of surrender, which are dictated by the band.

Senator Everett: But the lands are surrendered.

Senator Cook: Are they already surrendered?

Mr. Meredith: No. If they are surrendered it would be in order to enter into a lease with an oil company to do exploration work whatever.

Senator Everett: To what are you referring?

Mr. J. Barrett, Administrator in Indian Minerals Program, Department of Indian and Northern Affairs: The present standard of most of the lands we are discussing is that there have been surrenders made in the past and they remain in a surrendered category.

Senator Everett: In respect of those lands, which are the majority of the lands, the department can go ahead and make a deal to lease the mineral rights.

Mr. Barrett: It could.

Senator Everett: It not only "could"; it can and it does.

Mr. Barrett: Not without . . .

The Chairman: Consultation.

Mr. Barrett: The approval of the band concerned.

Senator Everett: Where is "approval" mentioned?

The Acting Chairman: Section 7.

Senator Everett: Section 7 is consultation.

Mr. Barrett: This is how it has been as a matter of policy.

Senator Everett: But you would agree to approval of such a lease. You see, I am intrigued by Senator Buckwold's point of view. While we would not wish to impose anything on the operation of this act that made it almost impossible to achieve agreement in a case of a band being directly affected, such as they are in making the lease itself, as I listen to the argument I think it is worthwhile getting their approval, and you say that, in fact, in practice that is what is done.

Mr. Barrett: As related to each individual lease, but not in respect of over-all changes of regulation.

Senator Buckwold: Is there any way this could be worded—I am paraphrasing Senator Everett now—that in those matters which are of direct or exclusive concern to a band council on a particular reservation, approval could be received as part of the act? Here I am not talking of a generalized regulation that would affect every band everywhere in the country, but in an exclusive relationship which would be, in fact, the kind of thing we were talking about a few moments ago.

Senator Flynn: What about section 5.(2)?

Senator Buckwold: That says that:

> (2) The Minister may, with the approval of the council of the band concerned, enter into a special agreement with any person . . .

Mr. Meredith: But that is just addressing itself to royalties, senator.

Senator Flynn: But this is where you would depart from the rules applicable to all bands.

The Acting Chairman: Gentlemen, may I suggest that if we have had sufficient questioning we might now continue our meeting *in camera* to discuss the pro and cons.

Senator Williams: Just one other question, Mr. Chairman. In regard to the matter of surface rights, does the depth of surface rights vary from province to province? I believe it is six inches in British Columbia.

Mr. Meredith: Mr. Barrett informs me that surface rights are consistent from province to province.

The Acting Chairman: Would some one care to move that we now proceed *in camera*?

Senator Everett: I so move, Mr. Chairman.

Hon Senators: Agreed.

The committee continued its proceedings *in camera* and then adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT

1974

THE SENATE OF CANADA

PROCEEDINGS
OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 17

TUESDAY, DECEMBER 17, 1974
WEDNESDAY, DECEMBER 18, 1974

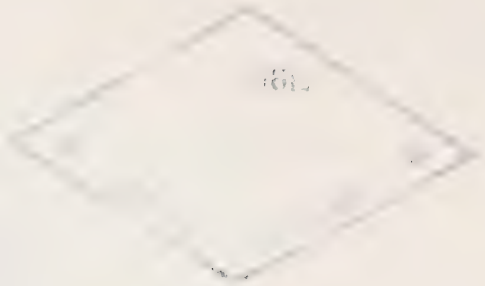
Complete Proceedings on Bill C-14 intituled:

"An Act to incorporate the Federal Business Development Bank"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

28545—1



THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, December 17, 1974.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Godfrey, seconded by the Honourable Senator Riley, for the second reading of the Bill C-14, intituled: "An Act to incorporate the Federal Business Development Bank".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Langlois, moved, seconded by the Honourable Senator Hayden, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

28545 -1½

Minutes of Proceedings

Tuesday, December 17, 1974
(21)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 5:00 p.m. to consider the following:

Bill C-14, "An Act to incorporate the Federal Business Development Bank"

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Blois, Cook, Everett, Lang, McIlraith and Perrault. (8)

Present, not of the Committee: The Honourable Senator Hicks. (1)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

WITNESSES:

Department of Industry, Trade and Commerce

Mr. E. Ritchie Clark, Chief, General Manager, Industrial Development Bank; and

Mr. A. E. Horton, Special Advisor to the Deputy Minister.

Federated Council of Sales Finance Companies

Mr. Carne H. Bray, Executive Vice-President.

Following discussion, the Committee deferred further consideration of the said Bill until 9:30 a.m., December 18, 1974.

Wednesday, December 18, 1974
(22)

Pursuant to adjournment and notice, the Committee *resumed* its consideration of Bill C-14 at 9:30 a.m. this day.

Following discussion and upon motion of the Honourable Senator Cook, it was *Resolved* to report the said Bill without amendment.

At 9:40 a.m. the Committee proceeded to the next order of business.

Frank A. Jackson
Clerk of the Committee

Report of the Committee

Wednesday, December 18, 1974

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-14 intituled: "An Act to incorporate the Federal Business Development Bank" has, in obedience to the order of reference of Tuesday, December 17, 1974, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Tuesday, December 17, 1974

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-14, to incorporate the Federal Business Development Bank, met this day at 5 p.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, I think we got a little fouled up over whether the meeting was going to be when the Senate adjourned or whether it was going to be this evening, but now having a quorum I think we should proceed. We do not have much time at our disposal, so we should use every minute of it.

The bill before us is Bill C-14. Those appearing for the Department of Industry, Trade and Commerce are Mr. E. Ritchie Clark, Chief General Manager, Industrial Development Bank, and Mr. A. E. Horton, Special Advisor to the Deputy Minister. From the Department of Justice we have Mr. R. L. du Plessis of the Legislation Section. We also have one other group who will be appearing, and that is the Federated Council of Sales Finance Companies. We will hear them later. If we do not get to them before the proper time to adjourn we will hear them this evening, because I committed myself to hearing them if they wish to be heard. Having said that by way of introduction, have you anything you would like to say, Mr. Clark, in connection with this bill, any general statement?

Mr. E. Ritchie Clark, Chief General Manager, Industrial Development Bank: If you do not mind my general statement being quite brief, Mr. Chairman—

The Chairman: No. We never have that objection.

Mr. Clark: The bill does three things, really. In the first place, it sets up a new organization, and it gives that organization two areas of responsibility. The first area of responsibility is, in effect, a continuation basically of the financing activities conducted by the Industrial Development Bank, with certain variations, which I will speak of in a moment. In the second place, it gives the new organization responsibilities which the Industrial Development Bank does not now have in the area of providing counselling and other management services to small business.

Returning to the financing responsibilities, the one area in which these are enlarged is in giving the new bank the power to make arrangements for leasing, which the Industrial Development Bank does not now have.

The Chairman: I believe that is quite an area of operation.

Mr. Clark: Leasing is, yes.

The Chairman: Where companies may want to acquire an aeroplane and they do it by way of leasing arrangements.

Mr. Clark: If we were to do that now we would do it by way of loan, but under the new act the new organization would be able to do that sort of thing by way of leasing.

In addition to that, though, I think it is the expectation that the new bank will be more outgoing, and show perhaps more initiative than the IDB has shown in the area of equity financing. The IDB has done a certain amount of equity financing. In fact, we have probably been involved in equity financing in 60 or 70 transactions. Usually this has been in association with a loan, as a form of consideration for the loan. I believe it is the expectation that the new organization will be more active in finding opportunities for equity investment to assist small and new businesses to develop.

On the counselling side, the major feature is, of course, the providing of consultancy services to small business, which the IDB does not do and does not have the power to do. It is the case, I think, that for our borrowers and those who come to us for loans, a considerable degree of counselling is given incidental to our dealings with their search for financing. The new responsibility will be of a direct character, specifically providing counselling for small businesses. In addition to the counselling, the management services activity will embrace seminars for small businessmen, which we now do; it will include educational programs, which we do not now really do; and other activities of this sort in the management services field.

That, I think, is the general nature of the legislation. Since there was mention in the debate of the name, perhaps I might just conclude by speaking to that.

The Chairman: Before you do that, looking at some of the investment powers that you have, is there likely to be any conflict between these investment powers, and the extent to which you use them, and what is the Canada Development Corporation?

Mr. Clark: I do not think so, because the Canada Development Corporation operates in very large sums of money, on a very large scale, whereas our average loan is $44,000, and half our loans are under $25,000.

The Chairman: That is where you have been operating?

Mr. Clark: Yes. Even on the equity financing side, while it might be at that level I would be very surprised

if the new organization were to be involved in financing of a magnitude that would be of interest to the Canada Development Corporation.

The Chairman: In the field of small businesses, what percentage of your activity and loaning has been in that area?

Mr. Clark: In the larger area?

The Chairman: No, in small businesses.

Mr. Clark: As I say, half our loans are under $25,000, and 75 per cent of our loans will be under $50,000.

The Chairman: Under this bill that is likely to change.

Mr. Clark: I should not think so.

Senator Cook: Inflation will change it anyhow.

Mr. Clark: Even in spite of inflation the average size of our financing involvement has been steadily declining. At one time it was a $50,000 to $60,000 average, but each year it is one or two thousand dollars less in spite of inflation. During the past year I think it was still in the $40,000 range in spite of inflation, which means, of course, I think, that in a physical sense our programs are catering more and more to smaller businesses.

The Chairman: If you are going to use the larger amount of money that will be at your disposal you are going to have to increase tremendously the volume of your business in that area.

Mr. Clark: I do not know, sir. One would expect the financing provided in the new bill for the new organization to provide it with funds for some period of years. In the other committee they asked me how long that would last, and I said something like four or five years, I think. But that all depends on the volume, and our volume might actually decline. The number of authorizations has recently been declining. How long that would last depends on that.

The Chairman: Have you any rules or guidelines in connection with the increased investment authority that you are getting under this bill, as to what the limitations or restrictions would be on equity financing?

Mr. Clark: No. It would just depend upon what we discover is the need. The need may be greater than we have yet discovered, because the IDB is not really known as a source of equity financing, and we would have to establish some image of that sort. There are many other sources for venture capital and equity financing that were not in existence, say, ten years ago.

The Chairman: So you will not be pushing other people who are engaged in private venture capital?

Mr. Clark: No, I would not think so. I think the new bill still does provide—although there was comment in the chamber to the contrary—for laying upon the new organization the responsibility of extending financing only where it is of the opinion that it would not otherwise be available on reasonable terms and conditions.

The Chairman: That is in clause 20.

Mr. Clark: We would still be guided by that.

The Chairman: You were going to say something about the name.

Mr. Clark: I think the explanation of the English name is understandable. I believe the word "Federal" is intended to identify the nature of the institution. "Business" is intended to convey a broader view than our present name does, although under our prseent act, as amended a number of times, we can actually extend financing to any kind of business. While we have the word "industrial" in our title, this does not restrict our operations.

I believe the word "business" was intended to indicate a broader responsibility, not only in the area of financing but also in the area of these management services which the organization has provided.

When we came to translate that into French, the French language is much more precise than the English language, you have to say what you mean, and the words you use must explain exactly what you have in mind. By the time you run off the exact meaning, quite apart from the problem of finding a new word for "business," which is quite a difficult thing, the name is very long and awkward. So those on the French language side who were involved in these discussions felt that even though the name would not be an exact translation of the English, it should be reduced to "Banque fédérale de développement."

There was some question by some of the French-speaking members in the other committee about this, because they felt that the word "développement" in the French usage required some sort of elaboration or illumination: What kind of development do you mean? But we explained to them that there are in the world a great number of development banks. A development bank is a new kind of financial institution and they are all around the world now. In French-speaking countries, many, many of them have adopted the title adopted for this particular bank.

The Chairman: Are there any questions?

Senator Everett: What is the French name of your present bank?

Mr. Clark: "Banque d'expansion industrielle."

Senator Everett: Could you tell me what the position of the bank is in respect of other lenders? Does the bank consider itself to be a lender of last resort?

Mr. Clark: I do not think we really consider ourselves strictly as being a lender of last resort, although this is the phraseology often used. It is possible some of our own people use it rather loosely, but a lender of last resort would imply that the borrower had gone down every possible alley and line before coming to ourselves, and might have gone through a number of interest rate possibilities and so on. What the act says is that we must be of the opinion that the funds would not be available elsewhere on reasonable terms and conditions, and this will still be a restraint laid upon the new bank.

Senator Everett: What is your borrowing rate at the present time?

Mr. Clark: We borrow our money by selling our debentures to the Bank of Canada at the government rate for the same maturities plus a fraction of 1 per cent. I think our present rate would be somewhere between 8 and 8½ per cent. It varies.

Senator Everett: So you are presently borrowing at between 8 and 9 per cent.

Mr. Clark: A year and a half ago we were paying over 9½ per cent.

Senator Everett: So it is somewhere between 8 and 9 per cent now. What is your lending rate at this juncture?

Mr. Clark: At present we lend at from 12 to 13 per cent, or more. I have to say "13 per cent or more," because the higher rates are applicable to the larger loans and at present we are not able to make any large loans. For a small loan our rate would be 12 per cent.

Senator Everett: Twelve per cent?

Mr. Clark: Twelve per cent, then 12½ per cent, and 13 per cent.

Senator Everett: Who would your competitors be?

Mr. Clark: I guess the other alternative sources are the chartered banks and the sales finance companies.

Senator Cook: Does a would-be borrower have to show some evidence that he shopped elsewhere without success?

Mr. Clark: Whether he brought evidence would depend on how large an amount he was asking for, what the nature of his program was, where he was situated and what his financial position was. In the case of every application, we contact the man's chartered bank branch and we explain the proposal to the bank and ask them for their views of it, and whether they think it is a good loan, a good program, and what they think of the man. This, of course, means that we present every application received to the particular chartered bank concerned.

Senator Cook: Which could lend the money if it wanted to.

Mr. Clark: Certainly, the chartered bank could lend the money if it wanted to, particularly since the last amendment to the Bank Act.

For larger amounts we would then expect the borrower to give us evidence, usually in the form of letters, of his having been unable to obtain the financing from perhaps two or three other sources. In between those there would be an area where it would likely depend upon the judgment of our people in the field. Having regard to the nature of the program, the location of the program, the type of securities, his financial position and so on, it would depend on the judgment of the man in the field whether he should go and obtain a specific refusal from someone else.

Senator Everett: What sources would you take into account? Would they be sales finance companies?

Mr. Clark: Do you mean as alternative sources?

Senator Everett: You say that the prospective borrower has to write you a letter saying he has approached two or three other sources.

Mr. Clark: No, he does not do that in every case. For the larger amounts he would probably have to bring us letters to him from some alternative source saying, "We cannot grant you this loan."

Senator Everett: Right. On the average now, what rates would be charged by the sales finance companies and venture capital firms?

Mr. Clark: Venture capital firms would not likely be involved in what we are now speaking of. They would be involved in the IDB, I assume. We are now speaking of homes. Venture capital companies would not really be involved. The rates of the sales finance companies would be higher than ours, I think. I do not know what the rates are now, but they would be higher than ours.

Senator Everett: Is rate part of your criteria, then? If I went to a sales finance company and said I wanted to borrow money between 12 and 13 per cent, I would be turned down. Would that be a sufficient criterion for me to come to you and say, "I have been turned down by two finance companies and I want to borrow from you?" In other words, it seems to me that what is important in determining your position in the economy is whether rate is a factor. If rate is a factor, you get all the business you want and there really are no criteria at all other than what you want or do not want.

Mr. Clark: If someone came to us and said he could get it from the sales finance company and pay an extra per cent more than we charge, we would say, "Oh, well, get it from the sales finance company."

Senator Everett: But they do not say that, do they?

Mr. Clark: Oh, yes. Yes, they quite often say that, because they want to explain why they cannot get them from the sales finance company.

The Chairman: If the only alternative source was one where the rate might be 14 or 15 per cent, would you then look at the proposal of the person applying to you to see whether he could carry that kind of burden?

Mr. Clark: One might do that. Rarely can I recall a case where we have ruled that other firms were unreasonable by reason of their interest rates.

The Chairman: By reason of the rate?

Mr. Clark: Yes. It would be very rare. I would not want to exclude the possibility, because my memory might fail me. I can remember one case where the person was going to get the money for 22 per cent. I think in that case we felt that that was unreasonable, but that was quite a while ago.

Senator Everett: If the rates were at normal finance company levels you would not take the rates into account as part of your criteria for lending or not lending?

Mr. Clark: No. One factor that might be considered would be his ability to repay. If he was able to get the financing at "X" per cent, and it was the normal market

rate for the kind of person he was going to, then the rate of interest would not be a factor. But if he was going to have to pay it back in say five or six years, and one were satisfied he could not pay it back in less than 15, then we might consider that as a case where we would consider an application.

Senator Everett: How would that relate to rate?

Mr. Clark: It would not relate to rate at all.

Senator Everett: It would relate more to term.

Mr. Clark: It would relate more to term, yes.

Senator Cook: Broadly speaking, this bill will not restrict any of the powers which the Industrial Development Bank has at the moment.

Mr. Clark: No. I do not think so.

Senator Cook: The reason I say that is because in my province, Newfoundland, I know of several instances in which the Industrial Development Bank provides this service. I would not like to think the powers of this bank would be restricted to the point that they were less than the powers of the IDB. But they will not be restricted, will they? They will be enlarged, if anything?

Mr. Clark: They will be enlarged, in the sense that we will have additional financial resources, and we will have these additional responsibilities.

Senator Cook: It will go into leasing.

Mr. Clark: Yes, into leasing, and we will also offer these additional management services.

Senator Barrow: Mr. Clark, what is the reason for going into leasing?

Mr. Clark: Well, when you say "going into leasing," I assume you mean, "What is the reason for putting it into the bill?" The reason for putting it into the bill is that it is about the only aspect of financing for which we do not presently have powers; but whether we will find many opportunities for leasing, we really do not know. There are many other companies providing leasing, and they have come into existence in the last seven or eight years or so. RoyNat has leasing services, and several other companies are leasing quite actively. Whether we would find many opportunities for leasing activity, we do not know.

Senator Barrow: Are there not a lot of American companies that have recently come into the leasing business in Canada?

Mr. Clark: There are quite a lot of sources of leasing financing.

Senator Barrow: Rather a large number, in fact.

Mr. Clark: Yes.

Senator Cook: Would you sometimes have a proposal of which leasing was only a part? In other words, they may want some money from you, and only a part of it would be for leasing, and part would be with regard to a capital loan?

Mr. Clark: It might be. We have really had no approaches made to us for leasing, because we have had no power for it. In the area of leasing, therefore, we will have to become aware of the other sources of leasing. It might be that a person could come to us to build a building and to lease equipment, but he could lease equipment from another source.

Senator Cook: He could not do that from you at the present time?

Mr. Clark: He might, but it would depend on whether it was available to him elsewhere.

Senator Everett: If rate is not a criterion, what is your experience, then, vis-à-vis the normal experience, say, of the sales finance companies, or other people in that area?

Mr. Clark: What experience?

Senator Everett: Well, your loan experience.

Mr. Clark: Loss experience?

Senator Everett: Yes.

Mr. Clark: Our loss experience is difficult to deduce from our financial statements because if you relate our write-offs to some easily available figure such as our outstandings, or disbursements, you do not allow for two factors, which would give you a false impression of our loss experience.

In the first place, our loans have been growing very rapidly in the last four or five years. A loan usually gets into trouble to the point of a write-off only after some years, so you would be expressing your loss experience partly on the basis of loans which are not yet old enough to be in trouble. Also, you are not taking into account the length of time during which we exercise patience, as we feel, with a delinquent borrower over a few years, to see if he can make his way out of it. We postpone payments, and so on. But if you were to relate our actual write-offs, going back some years, to what one might regard as a reasonable base—authorizations or disbursements up to some years ago—I should think our loss experience might run around one-and-a-half to one-and-a-quarter per cent.

Senator Everett: How would that compare to other people in your business? Would you have any idea?

Mr. Clark: No, I would have no idea.

Senator Everett: Would it be markedly higher, or lower, or what?

Mr. Clark: I do not know.

Senator Cook: You have operated at a profit, have you not?

Mr. Clark: Yes. Sometimes small, but we have always operated at a profit.

Senator Everett: It would be interesting to ask the witness if he could find out.

Mr. Clark: I could try to find out, but I do not know whether I could. The question of reserves and losses is

usually treated by a private lending company as a matter of some importance and some confidence. One could not really go to somebody and ask, "What has been your loss experience?"

Senator Everett: I am having difficulty grasping just what it is that you offer that other people cannot offer too, except at the lower rate.

Mr. Clark: Well, this was a question, I think, that occurred to many people when the bank was first set up.

Senator Everett: I am sure it did.

Mr. Clark: Since then we have made 55,000 loans to something over 40,000 businesses. We have loaned, I guess, close to $2 billion. I think, therefore, one would have to conclude that in spite of what one might have thought, there was actually a large volume of small businessmen and a large number of small businesses which had not previously had available to them term debenture financing such as a large corporation could obtain in the marketplace, and such as we have been able to provide to them.

We only make a loan if we think it is a good loan for the borrower and a good loan for the bank; but many of their balance sheets are not that impressive, nor is their operating record, although at first glance they might be impressive. Perhaps, also, they are able to find with us an understanding assessment of their position which they might not find elsewhere.

The Chairman: How do you protect yourself? Do you follow the operations more closely than most lenders might?

Mr. Clark: Well, we receive periodical financial statements. We get audited statements yearly, and interim statements more frequently. Quite a lot of our borrowers get into trouble at one time or another. I would say, on the whole, 20 to 25 per cent are in financial difficulty at some time. Then, of course, we follow their progress fairly closely. If an account gives no difficulty, we do not follow it so closely, apart from the audited financial statements. In some parts of the country, at some periods, the proportion of loans getting into trouble might rise as high as 35 or 40 per cent. Then, of course, we follow fairly closely.

The Chairman: They have to be nursed along?

Mr. Clark: Yes. We call on them and discuss what can be done to help them. We might postpone the payments on our loan, for example. We might consider even an additional loan, if the problem was that they were having problems with regard to working capital, or something of that nature.

The Chairman: Are there any other questions?

In your group, Mr. Clark, are Mr. Horton and Mr. du Plessis. Do you have anything you want to add to what Mr. Clark has said, Mr. Horton?

Mr. A. E. Horton, Special Adviser to the Deputy Minister, Department of Industry, Trade and Commerce: Mr. Chairman, I do not think there is anything in particular to add. Mr. Clark summed up the intentions of the new bill in a very adequate fashion, I thought. I am sure honourable senators have read Mr. Gillespie's speech, which set out the whole matter in much greater detail, so I do not have anything to add to that at the moment.

The Chairman: Are there any questions you want to ask Mr. Horton? If not, I think for the moment I will ask these gentlemen to stand down.

Is the committee ready to sit for a little while longer and hear Mr. Bray of the Federated Council of Sales Finance Companies, or would you prefer to adjourn until eight o'clock? I find that the best thing to do when you start is to continue for as long as you can.

Mr. Bray, would you come forward? Would you make your opening statement, and tell the committee why you are here, what the points are you want to make, and what your objections to the bill, if any, would be?

Mr. Carne H. Bray, Executive Vice-President, Federated Council of Sales Finance Companies: Mr. Chairman, in one way I apologize to you for being here and for taking up your time. As the chairman indicated earlier, he had committed himself to hear us if we had objections, if we were here on time.

We do have something to say, we feel, and therefore I beg your indulgence and ask you to hear my remarks. The words in the brief that has been distributed to you were gone over by my executive committee on Monday afternoon of this week, in detail. Therefore I am not here alone. In fact I am here representing J. S. Land, President of IAC, J. K. Galbraith, Executive Vice-President of Canadian Acceptance Corporation, T. A. McLaren, President of General Motors Acceptance Corporation of Canada Limited, R. W. Crecelius, Vice-President of Transamerica Financial Corporation, and R. B. McLure, Vice-President and General Manager of Genelcan which used to be the Canadian General Electric Credit Corporation.

I am also here representing those persons and members who are not on the executive committee, because this brief has been rendered in essence before it, and has been approved by the total membership of the federated council. Therefore I ask you to hear my words.

First of all, we are addressing ourselves entirely to the portion of this bill related to the credit granting function of the new bank. We have no comment to make with respect to its management consultant aspect and role, except to say that we would endorse this function. Dun and Bradstreet records that most business failures result from lack of management expertise and perhaps the consulting capacity of the new bank will be much more important to the business community that it serves than financing.

Secondly, we are not really against the notion of the new bank, just as we were not against the IDB, in the sense that if there is a gap in the capital market, then it should be filled. But we question whether the same gap in the capital market occurs today as occurred when the IDB was first formed in the late war years—1944. Since that time there has been a substantial increase in the number of sales finance companies and other types of financial intermediaries responding to the same gap which caused Parliament to create the IDB in the first instance.

The Chairman: Well, Mr. Bray, what you are really saying in parts of your brief is that you are a financing organization with quite a number of members in the private sector, and you deal substantially with the small business area.

Mr. Bray: Yes, sir.

The Chairman: That is in the loans you make. And you think that the government should not be in competition with you, using in part some of the taxes you pay to take care of the operation of such competition.

Mr. Bray: Can I put it this way, sir? When the IDB first started it had $25 million in capitalization. Surely the interface between the $25 million organization and the private sector should respond. But now we are talking in terms of a $2.2 billion organization—a twenty-two hundred million dollar organization. The interface between that organization and the private sector must necessarily be larger than before, yet at no place in this new bill is it suggested that the management of that interface between the government agency, the new bank, and the private sector be different from what it was before. The companies that I represent feel at risk with the IDB. In the sense that we represent something like $5 billion worth of assets, why should we feel at risk? If Mr. Clark is correct, if the new bank is going to double in the next five years, where is that market going to come from if it is not from the $5 billion of assets that my companies represent? Where is this new market going to come from if, as Mr. Clark properly said, the new bank is going to operate at below our rates?

We are not operating at unreasonable rates. I challenge you, if we were operating at unreasonable rates in the sales finance industry, to find the results of those unreasonable rates in one of three ways. One, we would be raising money and paying too much for it in our fund-raising function; or else we are inefficient in our operations and wasteful; or else we are making super profits. And the case cannot be made for any one of these three reasons.

Our rates are dictated by the amount we have to pay for our supplies, for our raw material, and if the situation goes much further we will be able to borrow from the IDB and make money at its 12 per cent rate. Their lending rates are only slightly above our borrowing rates. Our rates in the market now for similar terms and conditions as the IDB would be about 15 or 16 per cent in the sales financing sense or in the commercial lending sense. On the other hand, if it were a lease contract, we would be in the market for about 10 per cent because of the effect of capital cost allowances. That is the only place where we have an edge on the IDB now. With their low rate of 12 per cent, if we are talking the leasing business, we can compete with them on rate. We always have been, we believe, competing with them on term.

Now they want leasing, too. So, on behalf of the members, I have to be a little antagonistic to the notion that the IDB would have a doubling of its capitalization with a four- or five-year plan for the utilization of those funds. I ask you to consider whether or not they would make the sales finance industry unviable. If that should be the case, the new bank will not be filling a gap in the capital market; it will be creating one.

We believe there should be some precautions and some parliamentary guidance to assist this new bank, or even to direct the bank, on how it should interface with existing private sector finance institutions, not just the sales finance companies, but the others as well. Since this interface is so much larger now, there should be some parliamentary guidance given to the new bank on how it should manage its affairs with the private sector. Right now the only phrase that relates thereto and the operative phrase is, "when the customer cannot get funds elsewhere on reasonable terms and conditions." But the phrase "terms and conditions" is open to so much interpretation that it is exceedingly difficult, and so we make three suggestions in our brief.

The first is that the bank should be given guidance, with appropriate wording, that the bank will participate with private sector financial institutions instead of paying them off and instead of grabbing all the assets of the customers for themselves and precluding the entrance of the private sector financial institutions after the fact. If they were to operate on a subordinated loan basis—which is expanded on in the brief—then their dollars would go to twice as many companies, in the sense that the private sector companies would be able to look at the subordinated funds of the new bank as quasi-entry funds, and they would be a magnet to more funds for the business. Instead of that, we feel and we interpret it as a function of the bank now, to take all the security available to it. It is almost a protective device to preclude the entrance and participation of private sector financial institutions even after the loan has been made. They even deal with after-acquired property in their security arrangements. This might be fine for the growth and expansion of the IDB, and it will be fine for the growth and expansion of the Federal Business Development Bank, but it will not help the private sector one little bit. So far as my companies are concerned, we feel under a threat and we feel there should be guidance in the act to provide for the proper interrelationship between the new bank and the private institutions. Otherwise, as I have said, you may be creating a gap instead of filling it.

The Chairman: You are talking about the gap and the new bank, but clause 28 says:

> 28.(1) The Minister of Finance, at the request of the Corporation, may, from time to time out of the Consolidated Revenue Fund, authorize payment to the Corporation of amounts not exceeding a total of two hundred million dollars less—

Mr. Bray: Yes, sir.

The Chairman: "Less" is the amount that was paid to the Bank of Canada pursuant to section 52. That relates to the reimbursement to the Industrial Development Bank of certain investments that they have. Is that not what section 52 deals with, an amount equal to the par value of outstanding shares of the Industrial Development Bank held by the Bank of Canada at the time, so that is the deduction from the $200 million?

Mr. Bray: Yes, sir.

The Chairman: Whatever shares of the Industrial Development Bank that are then held by the Bank of

Canada. Then I see also the amount of the retained cranings in the Industrial Development Bank, then the amount of the retained earnings of the corporation. Then there is power in the minister to loan money. That loaning power is provided by section 31 and shall not at any time exceed ten times the capital of the corporation. That is the scope of the source of money that this bank may have. How would you relate that amount of capital to the amount of capital in the private sector that is available for this kind of business?

Mr. Bray: Each year the federated council conducts a survey of the ten largest sales finance companies in Canada and it is from those data that this table attached to the brief is drawn. However, that is volume data, as opposed to relating to the question you asked, senator. The total assets of the ten largest sales finance companies at the end of 1972 was $4.1 billion. So you are talking roughly half the potential. That is about half of our total industry, because the companies left out of the ten largest tend to be relatively small and regional.

The Chairman: This could be termed to be the potential capital, or the maximum that might be available to the Industrial Development Bank?

Mr. Bray: Yes, sir.

The Chairman: It is the $200 million less these deductions and a limitation on loans to ten times the capital.

Mr. Bray: You are perhaps referring to my reference to $2.2 billion being high.

The Chairman: Yes.

Mr. Bray: I may be high. I think I am using words that were uttered in the committee in the other house by representatives of the bank. I believe they said something in the order of $2.2 billion would be the maximum, and I used those numbers. If I am wrong, Mr. Chairman, I cannot be too far wrong.

The Chairman: If it is available. That does not necessarily mean this will all be paid out at once, but it can be drawn on from time to time. The phrase is not that they can draw on it, but they may if the minister sees fit to recognize their position and their requirement, and, I suppose, considering the finances of the government they could advance up to this maximum amount.

Mr. Bray: How soon might we expect that? As stated in the brief, they increased their outstandings by 270 per cent between the beginning of 1963 and the end of 1972. I did not have their latest financial statements when I wrote those words. In contrast to that, fighting and competing vigorously, the ten largest sales finance companies have increased 134 per cent, just half the growth rate. So now, with new capitalization amounting to over $1 billion, what might we hope for in the future, except a drop in our market?

The Chairman: The conclusion I draw from that is that during the period the Industrial Development Bank and your sales finance companies have been operating, the competition, if we can term it competition between the two organizations, has not been such as to restrict the development and increased earnings of your sales finance companies.

Mr. Bray: Oh, I would not say that, sir.

The Chairman: Well, tell me where it has not.

Mr. Bray: We have grown in assets in spite of the Industrial Development Bank, and so has the market.

The Chairman: But you only grow, whether you say it is in spite of or on account of, because I expect you operate either on a larger margin or a larger market.

Mr. Bray: With respect to margin, sir, I calculated on the basis of the 1973 annual report of the IDB that their average cost of capital, as a weighted average, is something in the order of 7.2 per cent. Our funds come in at a rate of approximately 10 per cent. If they are charging 12 per cent, you will recognize that there is a 5-point spread between their cost of capital and their lending rate, and if we have the same 5-point spread—

The Chairman: If I may rephrase my statement to you: Then, in spite of what appear to be disadvantages that you endure, your companies have been able to go forward.

Mr. Bray: Yes, at a much slower rate than the IDB.

The Chairman: You may have a slower growth rate.

Mr. Bray: Yes.

The Chairman: But you are still going forward comfortably.

Mr. Bray: Yes.

The Chairman: Are you concerned that the changes made in the availability of more money to the bank and the inspection of its investment provisions might seriously and adversely affect the operations of these sales finance companies?

Mr. Bray: Yes, sir. That is why I am here taking your time. We are concerned.

The Chairman: Well, your salesmanship up to the present time has been pretty good.

Mr. Bray: Thank you, sir.

The Chairman: Is that not correct?

Mr. Bray: Well, in the market we are trying our best and we are doing our best.

The Chairman: If you assume that the market will not remain static, in other words, the volume and the demand for funds of this type in the marketplace increase, then we can presume that on past performance you will obtain your share of it.

Mr. Bray: We have not done so in the past, sir.

The Chairman: You have been getting some of it.

Mr. Bray: Some of it, but not our share.

The Chairman: It depends on your definition of your share.

Mr. Bray: The growth of the chartered banks has been increasing; the growth of some 63 leasing companies has increased in the last two or three years; the growth of the IDB grossly exceeds our growth rate. We have not been getting our share.

The Chairman: If the new bank expands into the area of equity financing, et cetera, would that represent an area which you occupy to any considerable extent?

Mr. Bray: No, sir; on the contrary, we would welcome the IDB going into equity financing.

The Chairman: I would think so; it would tie up more money, would it not?

Mr. Bray: Well, more than that, sir, it would increase the borrowing base of the customer, and by that vehicle the business that needs the assistance of the IDB would attract more funds from the private sector, which would be extremely worthwhile. You will notice that Mr. Clark said that they had 60 or 70 equity involvements. I point out that that is 60 or 70 out of some 9,700, which is approximately three-quarters of one per cent in equity. If that doubled, or increased, it would be our pleasure. That is part of our suggestions to you, that there be participation arrangements made between the two, rather than competition.

The Chairman: If you were to follow the adage of the shoemaker sticking to his last and just stuck to your last in the lines of business in that area and the new bank went into the other areas which they are now seeking to enter, that is equity, capital, development, all those things would use up substantial amounts of money.

Mr. Bray: I hope so, sir.

The Chairman: Well, I would expect they would. If this is to be worthwhile, one would expect it.

Mr. Bray: Our group has no objection to that. It is the loans that represent in excess of 99 per cent of their operations in number. If they are also to continue at the present rate and use up an extra $1 billion worth of capital in four or five years, then we feel threatened, and, in my opinion, properly so.

The Chairman: Would you say that the market in small loans is limited to the extent that the new bank would devote all its money there?

Mr. Bray: The intention of the new bank is to assist in small business areas.

The Chairman: That is one of the objects.

Mr. Bray: I took it as a principal object. I do not wish to argue with that.

The Chairman: We have not been so told.

Mr. Bray: I believe so.

The Chairman: I thought Mr. Clark was emphasizing equity, investment and development.

Mr. Bray: I am going from the testimony given before the committee of the other house and also the remarks of the minister in the House of Commons with respect to the principal purpose. I could quote from the record—the principal purpose being to assist small and medium-sized businesses.

The Chairman: Maybe that statement made it an attractive political situation or field to be in.

Mr. Bray: Mr. Clark has said that 50 per cent of his loans are under $25,000 and 75 per cent are under $50,000. Apparently the IDB has been assisting small businesses. I am not contesting that.

The Chairman: You are mistaking the point I was trying to make. I was saying that if the new bank is emphasizing other fields of investment, if they do not go into those other fields of investment but stay only in this area in which they are chiefly operating now, is there room for your companies and for the new bank?

Mr. Bray: I do not want to misunderstand your question again. Our average transaction in the commercial industrial area is under $8,000. This would exclude certain very large leasing transactions such as railroad cars for the CNR, but excluding the very large ticket items. With the few of those that there are, our average industrial and commercial investment is under $8,000. In contrast to that, the IDB has been loaning $44,000, $45,000 as an average loan size. There is still room for us to pick up the crumbs. I suggest there could still be some room for us after the bank is completed. I do not want to draw too heavy a curtain, but we wonder what businessman would not want to go to the IDB first, with their preferable rates.

We have no examples in recent history, among the 15 companies on our board of directors, of a request for a letter of refusal from a sales company by a customer approaching the IDB. We have not one example among our 15 members of the board of directors where a situation was referred by the IDB to a sales finance company. With this expanded accommodation, it behooves you to give some guidance to the new bank on how it will interface with the private sector financial institutions, if we are not to be damaged.

Senator Lang: I would like to refer the witness to Mr. Clark's surmise that their loss rate was approximately 1.5 per cent. I am not sure whether they were allocations or loans outstanding. The question was asked if he could give a comparable figure for the private sector. Can you assist us here?

Mr. Bray: As Mr. Clark also said, it is very difficult to work out a reliable ratio. There are several things that come into the situation. In 1972, the bad debt expense of the 10 largest sales finance companies was $9.8 million on working assets of $3.4 billion.

Senator Lang: What is that in terms of percentages?

Mr. Bray: I would estimate it to be about one per cent.

Senator Lang: We are talking about pretty close to the same loss experienced in the IDB and the private sector?

Mr. Bray: That is right. This is one of the things we have drawn. I remind you that this $9.8 million would also be up on consumer transactions as well as commercial and industrial. It is a combined figure for both

types of portfolio in the companies. The general notion within the industry is that the IDB has default ratios and experience comparable with the private sector. This was put to the committee of the other place.

Senator Lang: I would assume that if IDB was performing its intended function under the legislation, it should have a much higher loss ratio than the private sector.

Mr. Bray: We would assume that too. But apparently their operations lead to that. There is another point, on Mr. Clark's behalf. The IDB could be nurturing their losses to a longer degree than is the private sector. They are not operating under the onus of making a reasonable profit or return on investment. They pay less for their funds and they pay no taxes. So they have some cushion there which we do not have.

I believe that our companies act responsibly in the nurturing of our customers. If it was operating under the notion of a lender of last resort, even without being that precisely, it should have a higher loss ratio than it has and a higher loss ratio than the private sector.

Senator Barrow: A president of one of the largest banks in Canada has said that the real threat to the banking system in Canada today was not from the incorporation of new banks in Canada but rather from the American banks which were entering into the leasing business in Canada today in large numbers. If that is so, is it not possible that the present financing and leasing companies are not filling the bill in Canada today and someone else should enter into it?

Mr. Bray: That is a good question, sir. I think you will find that the rise, which has been pretty steep, of the "suitcase leasing companies" of the U.S. banks is going to fall off just as quickly. But it is there, even yet. My companies are, of course, in competition with those banking operations, but we cannot compete on price. Their lease rates are generally lower than Canadian companies.

The Chairman: Are they taking losses because of that?

Mr. Bray: We have not had a long enough history to show that. The leasing rates they are charging are below our rates and the IDB rates, and below the rates the new bank will possibly be able to charge. They have been using favourable capital cost allowance treatment given them by their own government in the United States.

The Chairman: I understand that the chartered banks are not prepared to engage in this field.

Mr. Bray: That is right, under the Bank Act.

The Chairman: We have to assume that this is an area which might come forward in the next revision of the Bank Act. If we assume that we are going to have chartered banks in this field, and the new industrial bank in the private sector in your area, someone is going to suffer in lower income and earnings.

Mr. Bray: One might ask who needs the new bank. I agree with that, sir. Does that answer your question, senator?

Senator Everett: Mr. Clark made the point that the differential in interest rates is not the criterion on which they would lend money. The dilemma with which I am faced is that if your three restrictions were incorporated in this bill, most especially one of them, it would have the effect of confining a number of borrowers who could borrow at around 12 to 14 per cent to borrowing at a rate around 16 to 18 per cent. How can we reasonably suggest that we should put into this legislation a restriction which would have that effect?

Mr. Bray: First of all, senator, that would not be the case. If there was participation, part of the funds would be coming at the preferred rate of the IDB and part at the private capital market rate. For that reason, the average of their costs would not be the higher rates which the finance companies charge.

Senator Everett: That is the margin, depending on the amount the IDB puts in. The difficulty is the way in which this restriction would affect the small business community. I find it hard to believe that the rate is not the criterion. Perhaps that is not the case as far as the IDB is concerned, but it is certainly the case as far as the borrower is concerned.

Mr. Bray: Our experience, senator, is that the application is made in two ways at once; that is, an application is made to a finance copany for speed of accommodation while a loan is being negotiated with the IDB. After the IDB loan is approved, the position of the private sector is paid out. That has been our experience over the years.

With respect to your other question, I think it comes down to a basic belief of whether you are going to rely upon the private sector to allocate the resources of the capital market, or whether that is going to be done by the government.

Senator Everett: I am sympathetic to that argument. The difficulty is that what we would be saying, in effect, is that large businesses can borrow at a preferential rate while small businesses have to pay a premium. That premium may not necessarily be related to risk, but purely to size, although I imagine that risk would have to enter into it. It would depend on how much security is taken and how good that security is. I do not know what arrangements are made by the sales finance companies or the IDB.

As sympathetic as we might be to the private sector argument, having established the IDB and having seen it grow to a billion dollar size, how could we now come along and say, "No, from now on everybody is going to have to pay the additional spread"? I believe you said that spread was 5 per cent.

Mr. Bray: The spread between the cost of money and the lending rate?

Senator Everett: I am talking about the spread between the cost of money to the IDB and the cost of money to sales finance companies, or between the borrowing rate of the IDB and the borrowing rate of sales finance companies, which, I gather, is about 5 per cent?

Mr. Bray: No, it is 3 per cent.

Senator Everett: I thought you said the spread between the costs of borrowing was about 5 per cent.

Mr. Bray: The differential between the cost of borrowing of the two organizations and the lending rates of the two organizations is about the same. That attests to the efficiency of the operations. Our rates are about 3 point higher. We borrow at 3 points higher, and our lending rate is about 3 points higher.

Senator Everett: What you are saying, then, is that you maintain the same spread all the way?

Mr. Bray: Yes.

Senator Everett: So, there is no greater efficiency in your operation than there is in the operation of the IDB?

Mr. Bray: Or no lesser efficiency, to put it another way. To get back to your point, senator, the sales finance transaction would arise on the purchase of a piece of equipment, such as an earth grader, lumbering equipment, service station material, farm equipment, or even the installation of a kitchen in a hotel. It is the piece of equipment which would comprise the chattel. The piece of equipment would be taken as the security for the advancement of funds when we purchase a conditional sales contract which has been consummated between the dealer and the purchaser. That allows our transaction to be substantially lower than the IDB. The IDB would go in with a larger amount, an average of $45,000, and cover all the assets.

You were saying that this restriction would force the customers to pay the higher rate. That is true, but it is on a smaller portion. When it comes to financing of equipment, and things of that order, we should be, I feel, permitted to operate and allocate our capital resources according to the capital market disciplines.

Senator Everett: That is not entirely true. In item 30 of your brief, you say:

> ...the Act should be amended so as to require the new bank to notify an approved list of *term lenders,* not just chartered banks, that it intends to advance funds to a specific business and that a period of time, say 30 days, is available to the term lenders to accommodate the requirements of the customer, at the end of which time, if suitable alternative arrangements have not been made, the bank would be free to complete its loan transaction with the customer.

If interest rates are not a criterion, then you are forcing the customer to the higher interest rate.

Mr. Bray: What I am trying to represent in those words, senator, and in the paragraph preceding it, are two detailed changes in the bill which could be made. What I am really representing in all the preceding paragraphs of the brief is a change of attitude as between a complementary new bank and a competing new bank. Given that change of attitude, we would not even need these clauses in the bill. So, please keep that in perspective. In other words, if there was a change of attitude vis-à-vis competition, if there was an accommodation of the private sector in the bank's operation as opposed to just a displacement of the private sector and a holding out of the private sector, then you would not need these two items. These are represented as means by which the bill could be changed in order to give direction and force in that regard.

Senator Everett: But we cannot legislate a change in attitude.

Mr. Bray: I appreciate that.

Senator Everett: As I said, I am sympathetic to your argument from the free enterprise point of view. I am, however, perturbed about item 30, which would effectively increase the cost of borrowing of those people who are forced into that higher maret by virtue of their size. That is where I have my difficulty. The change of attitude does not bother me at all, but that is something which we really cannot do anything about.

Mr. Bray: Taken to its extreme, senator, it is a question of whether you want the private sector in the capital market to survive—particularly, whether you want the sales fiinance industry to survive. Is the sales finance industry serving a useful function, or is it not? It certainly is. We are not banks. We are not paying measly rates for our money; we are paying in the commercial paper market for our funds.

We have been serving, and still do, a substantial part of the Canadian market. We work hard and vigorously to innovate new types of services; new accommodations for our customers, according to their particular requirements. We tailor our services and our terms to the needs of our customers and their requirements and abilities to repay—no less than any other responsible and prudent credit grantor. However, with the rise of lower than market rates of this size on the horizon, we have to be perturbed at what we can accomplish in the marketplace in future years and how successful we will be in continuing to raise funds for our business. About nine out of ten of our total dollars are borrowed dollars, and if we cannot show a healthy prospect for the future, we will not be able to raise funds in the market, even at today's higher rates.

The Chairman: Mr. Bray, I think we have really shaken this thoroughly. We are now aware of the points you wish to put before us, and we have a better understanding of the bill in relation to the points you have raised. What I was going to suggest to the committee is that we hold another meeting to consider our report. We meet in the morning anyway. We might have a discussion at that time about what we are going to do in the way of a report. Would that meet the wish of the committee?

I do not think the committee has any more questions to ask you Mr. Clark or Mr. Bray, unless you think there is something more you want to add at this time. I think we have an appreciation of the situation vis-à-vis the new bank and the private sector.

Mr. Horton: Will you wish to see the minister tomorrow? Do you think it will be necessary to ask the minister to come?

The Chairman: Does the committee think we need any more evidence at this stage? Am I missing some point in the bill, or some point in Mr. Bray's presentation, or have we got the substantial part of the problem before us?

Senator Everett: I suppose the only point Mr. Bray raised was the question of what he called a change in attitude.

The Chairman: It is like saying, "We are good neighbours."

Senator Everett: That is right. I do not know what you do about that.

The Chairman: When Mr. Bray was talking about it being complementary rather than competitive, I was thinking that we are devoting quite a lot of our time right now to the question of how important competition is if you are to keep out of trouble with certain departments of government. If you are going to substitute "complementary" for "competition" we might be flying in the face of some provisions of that bill. This is only intended to be a facetious remark.

Shall we adjourn until tomorrow morning?

Hon. Senators: Agreed.

The Chairman: For our purpose, I do not think we need the witnesses back again. We have to do our own thinking about what we are going to do in the way of a report. If we feel we want more evidence, we will call on you; otherwise we will deal with it in the morning.

The committee adjourned.

Ottawa, Wednesday, December 18, 1974.

The Committee met at 9.30 a.m.

The Chairman: Honourable senators, we were dealing yesterday with Bill C-14 and we heard representations from the sales and finance companies. Does the committee wish to give further consideration to this matter or shall we report the bill without amendment?

Senator Cook: Mr. Chairman, I move that we report the bill without amendment.

The Chairman: Is that the wish of the committee?

Hon. Senators: Agreed.

The committee proceeded to consider other business.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 18

WEDNESDAY, DECEMBER 18, 1974

Ninth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)



THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, December 18, 1974
(23)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:40 a.m. to *further* consider the following:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Blois, Buckwold, Cook, Flynn, Laird and Lang. (8)

In Attendance: Mr. John F. Lewis, C.A., Advisor.

WITNESSES:

Association of Canadian Advertisers

Mr. Tom Blakely, President;

Mr. Wayne McCracken, Legal Counsel, Campbell, Godfrey & Lewtas; and

Mr. Ralph Davis, Chairman of the Board and Vice-President Advertising, Kellogg Salada Canada Limited.

The Canadian Institute of Chartered Accountants

Mr. Robert W. V. Dickerson, F.C.A.; Farris, Vaughan, Wills & Murphy; and

Mr. Michael G. Mallin, Communications Officer.

Consumers Association of Canada

Professor Jacob Ziegal, representing the Association; and

Professor David McQueen, representing the Association.

At 12:35 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, December 18, 1974.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, there are three groups appearing before us this morning: the Association of Canadian Advertisers Incorporated, the Canadian Institute of Chartered Accountants, and the Consumers' Association of Canada.

Appearing for the Association of Canadian Advertisers are Mr. T. Blakely, President, Mr. K. W. McCracken, legal counsel, and Mr. R. Davis, chairman of the board and Vice-President, Advertising, Kellogg-Salada Canada Limited.

I understand that Mr. Blakely will make the opening statement.

Mr. T. Blakely, president, Association of Canadian Advertisers Incorporated): Mr. Chairman, honourable senators, I should like to introduce our representatives. My name is Tom Blakely. It is my privilege to be the President of the Association of Canadian Advertisers. That is an appointed post. I have with me this morning, on my extreme right, the elected head of the Association of Canadian Advertisers, Mr. Ralph Davis. He is also Vice-President, Advertising, of Kellogg-Salada Canada Limited. Then our legal counsel, Mr. Wayne McCracken, who is undergoing a bit of a trauma this morning in that his first offspring in the process of being born in Toronto. We thank you for providing the Association of Canadian Advertisers with this opportunity to appear before you.

We wish to outline certain concerns we have with Bill C-2. First of all, our association is composed of some 215 corporations which produce and sell goods and services in Canada. They represent approximately 75 per cent of all national advertising placed in this country. That is about $400 million. Our members in some cases prepare and place paid advertising directly in the mass communications media. In other cases our members place paid advertising in those media through their advertising agencies. In fact, that is the way most of it is placed.

To begin with, honourable senators, we wish to acknowledge that we are extremely pleased with the deletion of section 34(4)(a). That had been a matter of concern to us. We provided you with information concerning our thoughts on that, but that is no longer pertinent, I gather.

We continue, however, to have certain problems with the bill. Although some of them are referred to in the material we have already provided, we wish to elaborate on some matters not contained in that submission. The matters we will now raise we feel are critical to us, and our position is now somewhat different from that reflected in our earlier submissions. These points are: first, we would like to talk about association activities of the kind that promote observance of and adherence to advertising laws; second, we would like to deal with the point of strict liability; third, we would also like to talk about the "credulous man"; and, fourth, certain words and phrases appearing in the bill, the meaning of which we feel should be clarified.

Speaking to the first point, on association activities, I would like to say that the association of Canadian Advertisers feels that in the advertising industry, industry associations have a positive and valuable contribution to make in promoting the advertising policy of Bill C-2.

ACA works to assist its member companies to honour the intent of advertising. Now, to that end, ACA, together with the Institute of Canadian Advertisers, that is the advertising agency association, and various other media associations such as the Canadian Daily Newspaper Publishing Association and the Canadian Association of Broadcasters, jointly have created and supported the work of the Canadian advertising board in the development of and adherence to advertising guidelines. These guidelines are intended to augment legislation and encourage advertisers, their agencies and the media to work within not just the letter of the law, but the law's intent. We will provide the clerk of your committee with copies of the 1973-1974 annual report of the Canadian Advertising Advisory Board which is created by ACA and ICA, which will outline those activities. We have also included copies of several of the industry's guidelines for your information.

The work of CAAB hass been commended by many government groups, including the Department of Consumer and Corporate Affairs, for the rapidity with which it can identify and act upon problems in advertising as they arise, and deal with them before criminal law action is necessary. In short, the Canadian Advertising Advisory Board endeavours to prevent problems within advertising.

Within CAAB, however, there is a further body called the Advertising Standards Council, and the standards council's work is described in detail again in the annual report of the CAAB, where certain advertising is reviewed. The standards council determines whether advertising meets the industry's guidelines. The council has on it not only representatives of advertising, but of the Consumers Association of Canada, and in some cases the Canadian Radio and Television Commission. ACA suggests that it would be advantageous for section 32 of the bill to clearly and expressly permit associations to promote adherence to the law through self-regulation.

The next point of concern to us is strict liability, and here what preoccupies us is the fact that the misleading advertising provisions of the bill impose strict liability on an accused. This places an advertiser in a virtually impos-

sible position. No matter what steps the advertiser takes to assure that his advertisements are accurate and within the law, if there is an inaccuracy the advertiser has no defence. We suggest, as we understand others have suggested, that a defence based upon due diligence be provided for in the act and made applicable to each of the sections 36 to 37.2, inclusive.

Speaking to the point of the credulous man, we are concerned, in the area of misleading advertising, with court judgments which have applied the standards of the "credulous man" in determining whether or not advertisements are deceptive or misleading. We do not feel that that standard is workable, and we feel that a reasonable standard should be expressed in the bill. It is virtually impossible to prepare an advertisement which we could be certain would not deceive a credulous man. It becomes even more difficult to determine what might be the general impression of an advertisement to a credulous man. All we are asking for in this regard is a fair standard set out in the bill by which to determine whether an advertisement is deceptive or misleading. In that regard we submit that that standard should be whether or not a reasonable member of the target audience would be deceived or misled by the advertisement.

Senator Laird: How about an incredulous man as a test?

Mr. K. W. McCracken, Legal Counsel, Association of Canadian Advertisers Incorporated: That may be better.

Senator Laird: Mr. McCracken says that may be better.

The Chairman: I would not think a credulous man is a good measure.

Mr. Blakely: He is a difficult measure. He is one which we are most fearful of. We cannot find him. There is too much fog around him.

The Chairman: I think we did have some representations here that the impression should not be a measure, and I am very doubtful whether that is the right approach. I think you should be able to look at the advertisement and not only come to a decision as to whether it is correct, but I think you also have to look at it on the basis of: Over all, are the form, the presentation, the language, and the arrangement of the advertisement such as rightly to create an impression?

Mr. McCracken: Our point in this regard is, an impression to whom? Our problem is the credulous man, if that is the standard.

The Chairman: Well, the word "reasonably" would take care of that, would it not?

Mr. McCracken: No question about that, yes.

The Chairman: Go ahead, Mr. Blakely.

Mr. Blakely: In section 37.1 of the bill there is a prohibition. The section prohibits a person who has advertised a product for sale from supplying that product at a price that is higher than the price advertised. We feel that the section is referring to the retail level of trade, and accordingly suggest that the word "person" be changed to the word "retailer". Also we suggest that the words "to a consumer" should be added after the words "supply the product." Perhaps an elaboration of our thinking on that would be desirable.

The Chairman: Yes.

Mr. Blakely: Mr. McCracken?

Mr. McCracken: Our problem with this section derives from the fact that with the ACA, for example, certain of its members are engaged in the business of retailing as well as wholesaling and manufacturing. Advertisements or representations may well be made, for example, to retailers who are customers of an ACA member, that the product is available for sale at such and such a price. That same company may well be selling at retail, and the sales price that it sets at retail may be considerably higher than the price at which he sells to the retailer.

The Chairman: There are occasions where a manufacturer or processor may sell directly to the retail trade.

Mr. McCracken: And sell at retail, and sell to consumers.

The Chairman: That is right.

Mr. McCracken: And without some more distinctive or accurate delineation of the word "person", and the words "supply a product to whom", the company that does sell to consumers, and also sells to retailers, and maybe even to wholesalers, is put in a difficult position. We are just suggesting a clarification of the section. We feel it drives at, or is intended to drive at the retail level of trade, and, if so, I think it would be preferable . . .

The Chairman: Well, the retail level can occur through a number of action by different levels of trade. I mean, the manufacturer can sell at retail, and if in his advertising, where some question is raised of a promotional contest, he enters into that. If you change "person" to "retailer", you are limiting the area, are you not?

Mr. McCracken: We are not talking about promotional contests. This is sale above advertised price. To the extent that a manufacturer is also a retailer, I would think that he would clearly be subject to that provision with the change we suggest, in his capacity as a retailer. Let us take Esso, for example. If Esso gas stations advertise a price, with the change we suggest they could not sell at retail, that is, to consumers, at a higher price. However, Esso clearly sells not only through its stations to you and me, but also sells to stations which are not owned by Esso. This is our concern. We recognize that the government or the minister has recommended an amendment, but I do not think that that amendment solves this problem.

The Chairman: Is there anything more that you want to add? You have considered the amendment as proposed by the minister?

Mr. McCracken: Yes, sir.

The Chairman: And you do not think that it covers the situation?

Mr. McCracken: I think it leaves the question open. And the reason I think that is that the word "market" is not defined. The amendment I assume you are talking about is subsection (4) as proposed by the minister. Is that correct?

The Chairman: Yes.

Mr. McCracken: I think that, on examination, this amendment will not solve the problem. In any event, we call it to your attention for your consideration. Obviously the minister was endeavouring to solve this problem, but I do not think he succeeded.

The Chairman: The section may be intended to deal with any advertising in the marketplace where you might expect to find these products offered for sale. That marketplace may be contributed to by different levels of trade, and if you put in the word "retailer" in place of "person", then you are only limiting the application of the section to any advertising by the retailer himself.

Mr. McCracken: I agree with that, but failure to interrelate or to dovetail the person who advertises the product for sale with the supplier of the product could lead to the situation where sales at different levels of the distribution chain would have to be at the same price. That is the problem. We thought that the section was a retailer-oriented section. If we are correct in that, then we still think that the problem exists.

The Chairman: All I am pointing out is that the retailer may not be the one doing the advertising and the manufacturer who sells for retail may be doing the advertising, and the retailer just carries on from there with his usual markup. So if we limit "person" to "retailer" we are limiting the application of the section.

Mr. McCracken: Failure to redefine or to redraft in some fashion or other could lead to the situation where, upon advertising a price to a level of the trade, then if you sell lower down the chain you cannot sell at a higher price. This is what we are saying.

Mr. Blakely: The company that sells to a wholesaler would then not be able to sell at a different price to a retailer or to the consumer.

The Chairman: Well, all I am pointing out is that the change that you have suggested, the substitution of "retailer" for "person", limits the application of the section and leaves an area that is not covered by the section. So, recognizing that, is there any change that you would suggest that would meet the point of view and not at the same time accomplish the purpose that I have indicated by limiting the area to which the section would be applicable?

Mr. McCracken: I think a change which might be considered without limiting it to the retail trade would be as follows:

> No person who advertises a product to purchasers for sale or rent in a market . . .

And I guess "purchasers", because of the words "for sale or rent", would have to be changed to "purchasers or lessees".

The Chairman: It could be "purchasers or users".

Mr. McCracken: Well, the section talks about a "person who advertises a product for sale or rent" and I am trying to parallel the words. The amendment that one might consider is as follows:

> No person who advertises a product to purchasers or lessees for sale or rent—

And here we are maintaining the parallel construction.

> —in a market shall, during the period and in the market to which the advertisement relates, supply the product to those purchasers or leesees at a price that is higher than the price advertised.

In that way it becomes more discreet and an advertisement to wholesalers would not require a company so advertising to sell to consumers at the same price that it has advertised the product as being available to those wholesalers.

The Chairman: Well, this section in the form in which it occurs in the bill may not be ideally worded, and it may be confusing because in these days of rapidly changing and increasing prices the question is how do you interpret that in relation to the prohibition in this bill?

Mr. McCracken: There is a very substantive difficulty with this section.

The Chairman: There is, and yet you say that where you have rapidly increasing prices at the supply level, if an article has to be manufactured or processed, then there is the acquisition of the materials going into that article. Those prices have been going up rather rapidly in many lines, so if they do go up rather rapidly and you follow down the line you get a reaction of increases in price, and the advertising, so far as the question of timing is concerned, may not catch up with the increase in price.

Mr. McCracken: It is particularly difficult in the case of an advertisement in a monthly periodical or a trade magazine which has a life of a month or two months.

The Chairman: How you adapt language to that event is something that we will give some thought to, but all I was asking you was whether you had developed some language that might cover that.

Mr. McCracken: I do believe that the relation by inserting the words I have suggested to you about an advertisement to supply the product to a purchaser or leessee solves our particular problem with section 37.1. The problem you refer to is very, very difficult, if not impossible, to overcome without an escalation provision.

The Chairman: Well, you might have to put a time limit on your advertising. You might have to say something like, "This is effective for this weekend," and then put the date. I have seen some advertisements like that in American periodicals.

Mr. McCracken: I have seen menus with that kind of thing.

The Chairman: And you may be driven to that. You may have to say, "This price is effective for only three days," or words to that effect.

Mr. McCracken: The alternative would be to state a price and add the word "maybe" after.

Mr. Blakely: In the case of a retailer that might work quite well, but in the case of a national advertiser in a magazine who might have a considerable length of time between preparing the material and the publication of the advertisement there might be difficulties.

Mr. Ralph Davis, Association of Canadian Advertisers Incorporated: But he will be aware of that problem when designing the advertisement, so he will know whether to include a price or not.

The Chairman: Are there any further questions on that?

Mr. Blakely: As I indicated in our four steps, we have some problems with the meanings of certain words and phrases in some sections of the bill. The phrase "any person" in section 38.(4) of the bill is a problem to us. Perhaps I should put these in the order in which you will find them in the bill.

First, we would like some clarification of the meaning of the word "published" used throughout section 36.1. Secondly, the phrases "approximate value" and "affects materially" in section 37.2(1) cause us concern. The word "value" has many meanings, as is the case with the phrase "affects materially". Finally, in section 38(4) we have the words "any person", which I mentioned originally If that phrase is not interpreted literally, we feel it would pose a great, if not impossible burden to meet. Would you like to discuss these in any detail?

The Chairman: I would like you to be a little more particular in your objection.

Mr. Blakely: Thank you, sir.

Mr. Davis: With respect to our first point, in connection with section 36.1, the word "published" in our opinion has many meanings, or could have many meanings. If it only means published to the marketplace through consumer media, it would present some problems with certain research studies which just are not always published in that manner. If, on the other hand, it means published in the broadest sense, that it can apply to an item that is published by a research company and paid for by, for instance, the Kellogg company, we have been given copies of research to substantiate a claim. We have that available to present as evidence. We are seeking clarification of the word "published".

The Chairman: You are not satisfied with the amendment proposed in section 37.1(4), which reads:

> For the purpose of this section, the market to which an advertisement relates shall be deemed to be the market to which the advertisement could reasonably be expected to reach, unless the advertisement defines the market more narrowly by reference to a geographical area, store, department of a store, sale by catalogue or otherwise.

Mr. McCracken: We spoke to three sections and the word "published" presents difficulties to us in section 36.1 of the bill. It appears in paragraphs (c) and (d). The requirement is that if a representation is made to the public that a test as to the performance, et cetera, has been made by any person, the representation must have been either previously made or published by the person by whom the test was made.

The word "published" in our view is not so clear as, for example, to include a research foundation carrying out an independent test for, as Mr. Davis hypothesized, the Kellogg company. We acknowledge the consent provision in paragraph (d) of that section, but we also recognize that the word "published" in law has in various contexts been given various meanings. The meaning in the law of libel, for example, is much narrower, as you know, than in the law of copyright.

Senator Laird: That is for sure; I found out the hard way.

The Chairman: I am not sure. In the law of libel and slander I would think if I dictated a letter to my secretary that would be publication.

Mr. McCracken: It is in the law of libel. In the law of copyright, however, the word "published" is considerably broader.

The Chairman: That is correct.

Mr. Davis: That is as far as one has to go to recognize our particular problem, which is a narrow, legal problem, namely that we have at least two lines of cases in different areas giving quite different meanings to the word "published."

The Chairman: It must be interpreted in the light of the context in which it is used.

Mr. McCracken: We completely agree, Mr. Chairman. I cannot say with any certainty and perhaps you can assist me in that regard, which of those two meanings, for example, might apply in this context.

Is a test "published" when an independent research foundation, for example, sends a copy of a report to its client? Or is the word "published" in this case indicative, for example, of having been published in a scientific publication? I do not know.

Senator Buckwold: Mr. Chairman, I may be a little confused, but as I read the act it says "made or published". As long as the test is made, I do not know how important the "published" end is in that context. Someone has to make it, then it says "or published". So, as long as it is "made" and under the amendment it is not edited by the company which makes the product, then the act would apply. I may be oversimplifying the problem.

The Chairman: No, publication can be orally. I am not sure that is what is meant here.

Mr. McCracken: That is our problem, we are not sure. I acknowledge your point, senator.

Senator Buckwold: I am saying that as far as a thing is "made", there has to be actually a physical test made. It says "made or published". So long as the test takes place, which I presume it should, I do not find it that confusing, Mr. Chairman.

Mr. J. F. Lewis (C.A., Advisor to the Committee): Mr. Chairman, I have one question on this point: It appears from reading the amendment to 36.1(f) that it is the general exception from what we are discussing. First of all it provides "no person shall . . . make a representation" and so on. We then find the exception:

> . . . except where he can establish that the representation or testimonial was previously made or published . . .

It is not the test that was "made or published"; it is the representation about the test, and this is the exception. I do not understand Mr. McCracken's viewpoint in this respect, that it makes it narrower. The use of the word "published" in addition to the word "made" extends the exception and does not restrict it. We are talking of a general exception—that is, if the representation were made or published by the person making the test it does not fall within the charging provision of section 36.1.

Mr. McCracken: There is no question about that point. When we apply facts to the section I would appreciate your view as to the legal result. It we can continue to use the hypothesis of the Kellogg company as an example, and it retains a research foundation, a scientist, or whomever, to perform a particular test in relation to a product and that foundation or person reports the results of the test to the Kellogg company, is it your view that, under the section, reports, whether they be oral or in writing, which they usually are, may be used in advertising by Kellogg to state

that a test has shown certain results? I concur with you as to the wording of the section; there is very little question about that. It is when one applies facts to it that the questions arise.

The Chairman: I would say that the intent of the section is rather clear.

Mr. McCracken: Yes, sir.

The Chairman: You cannot make use of tests or testimonials, although the person who made the test or gave the testimonial has already published the results.

Mr. McCracken: Precisely. Does the reporting by scientist "A" to the Kellogg company constitute publishing? Without belaboring the point, it is a question that we raise and it is something that we feel perhaps needs clarification. We do feel, in the hypothetical example that I described, that it should constitute publishing if the word is not going to be elaborated.

The Chairman: I am not sure whether the intent of this subsection we are discussing is that the test/or testimonial must be published in the area in which a person who is going to sell the product subsequently is going to offer the product for sale and quote the test. It is quite possible that the area in which one is offering a product for sale may not be an area where the person who did the test or testimonial published the effect of it. That could be one of the interpretations.

It may be there are some words of limitation, but I think the intent is that if you are going to make use of tests and testimonials which you have not conducted yourself, you come into collision with this subsection, unless the public has already become aware of the test and testimonial through some advertisement by the person who did the test.

Mr. McCracken: Or through some publication by that person. If that is an accurate reading of the section, I think it becomes somewhat unusual. I can cite one example in the steel industry—precoated steel, which is steel which is prepainted and used for exterior application on buildings. Substantiating tests for durability have been published in scientific journals in the United States and in a book which is a metallurgical and engineers' text book in college. I would be highly surprised if the public, or any but an extremely narrow segment of the public, are aware of those tests having been published.

Senator Cook: Is there not a difference between "test" and "testimonial"? A test is something which one conducts, and a testimonial is an expression of opinion. A test is a different matter altogether from a testimonial.

Mr. McCracken: Yes.

The Chairman: The point is that if you are advertising products for sale and you support them by quoting or making reference in the advertising to a test to show the superiority of the product, or a testimonial where someone else has spoken of the goodness of the product, you cannot use that unless the person who made the test or issued the testimonial has already published it.

Senator Cook: I do not read that the test has to be published, but that the test was made. The testimonial has to be published.

The Chairman: Previously made or published.

Senator Cook: It refers to making representation that a test or testimonial has been made or published. The word is "or". If you say that a certain product contains so much iron, that is a test. All you have to show is that the test was made. If you say, "In my opinion, this is the best building material you can get," that is a testimonial.

The Chairman: We can meet Mr. McCracken's point if we define what "made" or "published" include.

Mr. McCraken: I appreciate that point. I think part of the problem derives from the fact that tests and testimonials are dealt with in the same section. One then has the problem of interrelating words like "made" and "published" to the appropriate words referred to. Is it "test made or testimonial published"? Is that the interrelationship, or is it "test published and testimonial made"?

The point that we put to you in the first instance was for clarification. I would think that a discrete dealing with test in a subsection and then with testimonial, rather than tying the whole thing up and thereby creating what I think you will agree is some question, would be a better way of dealing with it. It would be clearer. I have heard at least three views—my own, the chairman's and honourable senators,—as to how these words interrelate, which I think indicates a problem in the draft legislation.

Mr. Lewis: I think the drafters have presumed that a test has been made, although the section does not indicate that a test has been made. We have to assume that. You do not have to produce any proof that a test has been made. You have to be able to provide proof that the testimonial has been made and published about the test.

The Chairman: The test or the testimonial.

Mr. Lewis: No, Mr. Chairman.

The Chairman: The section includes the words "by whom the test was made or the testimonial was given, as the case may be."

Mr. Lewis: I think it says "the representation or testimonial was previously made or published". There is no reference, that I can see, requiring any disclosure that a test has been made—merely the disclosure of the testimonial.

Senator Cook: That is how I read it. Perhaps the best way of dealing with it would be to split it up and make one section for "test" and another for "testimonial".

Senator Buckwold: If I were in the advertising business, the aspect of this section that would worry me most would be the very strict regulation as to the editing of these tests. They are saying that representation or publishing of a testimonial cannot be done in a way of selective editing of the testimonial in order to change its meaning. That is the big challenge of the act.

The Chairman: I would think that if you were interpreting this section you would look at the language of the whole section. In subsection (*a*) at the top of page 33, the first thing they say is that it is an offence to:

> (*a*) make a representation to the public that a test as to the performance, efficacy or length of life of the product has been made by an person,

When representation occurs in the exception, I assume that is the kind of representation they are referring to. There-

fore there must be involved some publication in some form by the person who made the test or who has given the testimonial antecedent to the ability of the person who is now offering it in connection with his sale of the product, or is offering for sale, before he can make use of the exception in 36.1(1).

The fact that we all have different views on what the interpretation might be may be the strongest evidence that some clarification is needed. Exactly what it shall be is something that we shall have to determine. We recognize the point. We are not clear, in the form in which it now stands, as to what you have to do or how far you have to go. What is the next point?

Mr. Blakely: Promotional contests, which is section 371. The problem concerns two phrases, "approximate value" and "affects materially."

Senator Cook: It is section 37.2(1).

Mr. Blakely: Perhaps Mr. Davis could speak to the word "value".

Mr. Davis: The phrase "approximate value" can be obtained by either taking the determination from th current market value, which can fluctuate dramatically from day to day, or by taking the suggested retail price, which is a more constant known value. On the other hand, the suggested retail price does not represent the current market value. The product could have an inflated value, but the suggested retail price could be the value you could pinpoint as being a value you knew at the time. The market value can fluctuate daily, and certainly fluctuates on items offered as promotional prizes from locality to locality across the country.

The Chairman: Section 37.2(1)(*a*), as proposed in the amendments to Bill C-2, meets your problem to some extent, does it not?

Mr. McCracken: If I may speak to that for a moment, Mr. Chairman, the word "approximate" assists, but does not meet the problem, in our view, which Mr. Davis raised, because the word "value" remains. You have to bear in mind that in promotional contests, it is usually the case that the prize or prizes are products not manufactured by the promoter of the contest. For example, the 7-Up company may offer dishwashers; the Kellogg company may offer a house or a car. It becomes more difficult, therefore, for the 7-Up company or the Kellogg company, using those hypothetical examples, to state the value of the prizes offered. Also, we again get into the question which you raised earlier in another context, Mr. Chairman, of changing prices over a period of time, unless we know what we are supposed to state as to the value, or approximate value, of the items.

Senator Cook: In that case, would it not be the value to the winner at the time the advertisement is inserted? In other words, the 7-Up company may have purchased 100 dishwashers as prizes in a promotional contest for which they paid $100 each, whereas the value of each of those dishwashers to the winners might be $200. Surely, the value would be the value to the winner at the time the ad was inserted.

Mr. McCracken: You are interpreting it, then, as being the market price.

Senator Cook: Yes.

Mr. Davis: But the market price may differ across the country. That dishwasher may have a market value in Toronto of $200, a market value in Vancouver of $270, and a market value in Halifax of $230. The suggested retail value of those dishwashers may be $290 each.

The Chairman: Is it feasible for you to limit your representation to approximate value in a particular area or areas?

Mr. Davis: Not in a national contest, Mr. Chairman.

The Chairman: But in a national contest, the value may be a variable.

Mr. Davis: If the word "approximate" is interpreted broadly enough, then I think we will have room to move. We do not want to end up making a representation tha will be judged as being misleading.

The Chairman: Do you feel a national advertising program in connection with a particular promotion would be ineffective if you were to state the approximate value as being such-and-such an amount in a specific area? Do you feel you could have a national advertising program with that kind of limitation?

Mr. McCraken: I think we could, Mr. Chairman, if that would satisfy the relevant section of the legislation.

The Chairman: Well, the proposed section 37.2(1)(a) states:

> ... there is adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that affects materially the chances of winning.

If you were to state the approximate value in Toronto or Montreal, say, in a national advertising program, do you think that would destroy the effectiveness of that program?

Mr. McCraken: Not at all, Mr. Chairman. Our concern would be whether that would comply with the relevant section. Frankly, I am not able to say that it would not.

Senator Cook: How could you be challenged if the statement you make is a true statement? In other words, if you give the approximate value of a dishwasher in Montreal as being $200 and that same dishwasher has a value of $250 in St. John's, how could I complain? Your statement is a true statement.

Mr. McCracken: I would hope, senator, you would not complain.

Senator Cook: I probably would, but what recourse would I have?

Mr. Blakely: One additional point, Mr. Chairman. In the case of a national advertising program on network television, it would take most of the time to give the approximate values across the country.

Senator Cook: But you would not have to give the values across the country. You could simply give the approximate value in a given area.

Senator Laird: Mr. Chairman, if I were in the position of these gentlemen, I would be more worried about the last few words of the proposed amendment commencing, "... of

any fact within the knowledge of the advertiser that affects materially the chances of winning."

Mr. McCraken: That is a point that has been raised in connection with this section, senator. The phrase "affects materially" gives us some difficulty, particularly the word "materially".

Senator Laird: What do you propose in that respect?

The Chairman: Perhaps I could read the minister's comment to support the amendment we are discussing. The comment states:

> The expression "chances of winning" created difficulties because if the interpretation ultimately given required anything approaching mathematical precision, the contest promoter might well be in an impossible position. It appears to be not unreasonable to leave to participants in the contest, the estimation of their chances of winning, provided there is adequate disclosure of the number and value of the prizes, and of any area or areas to which they relate, and of any other relevant fact.

The comment does not address itself to the last part of the proposed amendment, which states, "... of any fact within the knowledge of the advertiser that affects materially the chances of winning." I do not know whether that means by way of increasing the chances or lessening the chances of winning. I think that is the only part of the proposed amendment that we need look at.

Senator Cook: If there are no facts within the knowledge of the advertiser, there is nothing to worry about. However, if there are such facts, then those facts should be disclosed.

Mr. McCracken: I agree with that proposal. One fact that obviously does affect the chances of winning is that the more people who enter the contest, assuming the prizes are limited in number, the fewer chances there are of winning. Presumably, the advertiser would have to point that out.

Senator Laird: Exactly. Also, are you going to be required to state that the chances of winning are a million to one?

Senator Cook: Everyone knows that the chances of winning would relate to the number of people entering.

Mr. McCracken: But the legislation does not state that we need not disclose facts which everyone knows.

The Chairman: I suppose it would be proper and satisfactory disclosure if you simply stated that the chances of winning would depend substantially on the number entering the contest.

Mr. McCracken: I think we would have less difficulty with this section if the word "materially," which is a weaselly word in law, as is the case with the word "publish", were deleted. It has a very narrow meaning, as we know, in the area of securities law, and a very broad meaning in the area of insurance law. Perhaps that wording could be changed to "affects significantly."

The Chairman: Or "substantially"?

Mr. McCracken: Yes, that is an alternative, there is no question about that, rather than the word "materially," which suggests different meanings in one area. In securities it means any fact, very detailed fact; in the area of insurance it means facts which go to the very root of the risk.

Senator Cook: I read that to mean any fact solely within the knowledge of the advertiser. That is how I interpret it. It must be some fact which is peculiar to him, and which he knows is the way in which he is going to conduct the contest. I agree we are all supposed to know mathematically that the more people who enter the contest the less chance there is to win a prize.

Mr. McCraken: The credulous man may not know that.

Mr. Lewis: I think the drafters had in mind this type of material fact, or fact material to the chances of winning; if in a particular area all the prizes allocated to the area had already been won, then that should be disclosed.

Mr. McCracken: Sure.

Mr. Lewis: There have been cases of that problem.

Mr. McCracken: We recognize that.

Senator Cook: That is whatI mean. That is a fact solely within the knowledge of the advertiser. The contestant in Newfoundland would not know if half the prizes allocated to Newfoundland had already been won.

Mr. McCracken: I think the word the chairman suggested, "substantially," without wishing to pun, would substantially relieve our problem on this wording.

The Chairman: We have noted that. What is the next point?

Mr. Blakely: I think our final point concerns the phrase "any person" in section 38(4). In our discussions we have said that if this phrase is interpreted literally it would impose a virtually impossible burden.

Senator Laird: What do you suggest?

The Chairman: The aim of this is addressed to resale price maintenance. The question is whether, if a manufacturer or wholesaler indicates a suggested resale price, that is really a direction or is unnecessarily influencing the retailer to sell at that price.

Mr. McCracken: Yes.

The Chairman: Surely where you put in a suggested price you can use language which would indicate that you can buy the goods whether or not you sell then at the suggested price.

Mr. McCracken: We agree with that. We are not sure that language could be developed that could be reasonably certain to make it clear to "any person" to whose attention that language came that the goods could be sold at a lower price. It is the word "any", which I think reasonably denotes each and every person to whose attention the ad comes. As we said when we were addressing ourselves to the "credulous man" we are quite satisfied that no ad can, with any certainty, be prepared which will be clear and understandable to every person in society. What causes us difficulty is whether it could be clear to "any person".

The Chairman: You could avoid the impact of subsection (4) by adding some words, saying it is only a suggested price and is not intended to influence in any way the sale price so far as the purchaser of the article is concerned.

Mr. McCracken: Possibly. I do not know that one could say that would be a clear statement to any person, as to the thrust of the thing. I think one solution that might be developed would be to delete the phrase "any person into whose hands the product comes."

The Chairman: Or define "any person" a little more broadly.

Mr. McCracken: That would be an alternative solution. We would be happy, I think, to throw ourselves on the court's good judgment of that phrase, to make it clear that "that the product may be sold at a lower price" does not mean to make it clear to each and every person, including the credulous man.

The Chairman: The point here is whether the suggested price is an attempt to influence upwards the selling price of any person into whose hands the product comes for resale, so "any person" where it is used later must mean a person into whose hands the product comes for resale. It is limiting it to persons who may be buyers of the product for resale.

Mr. McCracken: The words are not to make it clear to that person, but rather to make it clear to "any person" to whose attention the advertisement comes. I am not driven by that language to say that the person they are talking about is the person—

The Chairman: You could simplify that by saying "to any such person."

Mr. McCracken: Precisely.

The Chairman: Are there any other points?

Mr. Blakely: There is one more point. It relates to our comments concerning procedural matters. We feel that the civil clause of Action contained in section 31.1 is not appropriate in a criminal statute. We also feel that an accused corporation should have the option of being tried in the Federal Court, and should not be forced to be tried in that forum.

The Chairman: We have had a lot of representations on both those points, even with suggested forms of amendment to deal with it. I think on civil damages the point was that before you could proceed by way of civil damages there would have to be a conviction. With respect to the Federal Court, we have had a lot of representations that the customary and usual place for the conduct of criminal charges of this kind is the superior courts in the various provinces, who have an experience, a jurisprudence and a way of dealing with the administration of criminal law. The Federal Court is not accustomed to that type of case. I recall that even prosecutions under th Income Tax Act, conspiracy charges and so on, are proceeded with in the superior courts of the provinces.

Senator Laird: That is right.

The Chairman: We have not been offered any reason at all why the change is made in this bill. We are fully aware of the problem.

Mr. McCracken: We certainly agree with the earlier submissions.

Senator Cook: The only reason we have had is that it is for the convenience of the department, is it not?

The Chairman: I am not sure how far that goes, because the Federal Court does move from place to place. If it moves from place to place, what is the advantage of requiring proceeding in the Federal Court as against a provincial court? There is more availability of courts in the provinces, and more judges too, than in the Federal Court. I think here possibly the convenience of the person who is charged is more consistent with our customary approach to protecting the rights of an accused person, so that he has every reasonable opportunity to defend himself. He may feel that in the superior courts of the province he has a better opportunity. He is appearing before more knowledgeable judges in the field of criminal law.

Senator Cook: And in the place where his character might stand him in good stead.

The Chairman: Yes, and I think the individual under the law in the Combines Investigation Act is entitled to a jury trial, if he wants it. The corporations, of course, do not have that opportunity under the law.

Are those all the submissions, Mr. Blakely?

Mr. Blakely: Yes, Mr. Chairman. Thank you very much.

The Chairman: The next group is the Canadian Institute of Chartered Accountants. We have with us Mr. Robert Dickerson, Mr. Michael Mallin, Communications Officer, and Mr. John F. Lewis, who happens to be at my left side at the moment in his capacity as advisor to the committee. I might tell you that Mr. Dickerson has an added ability to speak on a subject matter of this kind, because he is not only a chartered accountant but is also a lawyer.

Senator Laird: That is quite a combination.

The Chairman: Oh, yes. It is almost a fatal combination, isn't it, if it is on the other side?

Senator Laird: That's right.

The Chairman: Mr. Dickerson, will you make the opening statement?

Mr. Robert W. V. Dickerson, Canadian Institute of Chartered Accountants: Thank you, Mr. Chairman. As you have indicated, Mr. Mallin of the CICA staff is with me.

Honourable senators, I do not propose to take up your time by reading the brief which was submitted to you. I just want to highlight some of the points we made in it.

I am also sure I need not go into an elaborate description of what the Canadian Institute of Chartered Accountants is or what the accounting profession is. I am sure honourable senators are familiar with that profession in a general enough way.

Perhaps I should point out first that we are not at all concerned with or objecting to the principle that services and, in particular, professional services should be brought within the ambit of the combines law. There may be arguments against that, but we are not proposing to argue for any kind of blanket exemption for professions generally or for the accounting profession in particular, but there are one or two things which we thing we should bring to your attention.

The Chairman: You mean that you are not arguing the point that the profession described by the letters "C.A."

should receive a blanket exemption under this bill if they engage in businesses and services that are contemplated by the bill?

Mr. Dickerson: That is correct.

The Chairman: But *qua* the profession of chartered accountants, is a chartered accountant subject to any regulation in the provinces in relation to fees or to any disciplines in the provinces?

Mr. Dickerson: Yes. Perhaps I should first of all point out for those who might not be aware of it that the accounting profession is different in many ways and, in particular, it is different from most other professions in one very fundamental way. That is to say it is not a closed profession. In other words, one can practise accounting in many provinces in Canada without being a member of the Canadian Institute of Chartered Accountants. This is unlike either the medical profession or the legal profession, with respect to which, generally speaking, there is only one professional organization in those professions. That is generally not true in the accounting profession. Anyone, without any qualifications of any kind at all, or without any training, can hang out a shingle and practise accounting.

The Chairman: But he does not call himself a C.A.

Mr. Dickerson: But that is the only thing he cannot do. He cannot call himself a C.A.

The general point we want to make here today, honourable senators, is that there are two or three things about professions in particular which mean, we submit, that those sorts of services cannot be looked at just like any other product or any other service. There are some unique features about it that we would like you, honourable senators, to appreciate before this new concept of bringing in services in merely adopted.

A second major category of problem we have some fears about is the conflict, or potential conflict, between our obligations under this new law and our obligations under provincial law, in that, in common with most other professions, the accounting profession exists by virtue of provincial statute under which an organization is created, and given the authority to impose examination standards on people entering its disciplinary authority and so on—the common things which exist in most professions. We have some concern about that. Perhaps our largest concern is getting into a clash between statutes, between federal and provincial laws, on some of these matters. We would probably not be terribly concerned about which particular law we had to observe, so long as we could be certain that in observing that we were not getting into trouble with another law. As honourable senators know, this kind of issue has been coming up in other contexts recently in Canada more and more often. We are most anxious not to get pinched in that sort of trap ourselves.

The Chairman: This provincial statute gives authority to provincially-incorporated companies—such as the Canadian Institute of Chartered Accountants—to pass on those who may be admitted to membership and to provide the examinations, et cetera, which, in their opinion, are necessary to test the qualifications of those entering.

Mr. Dickerson: That is right, sir.

The Chairman: That is all in the public interest.

Mr. Dickerson: We certainly hope so, senator, yes.

The Chairman: In such a governing statute does the provincial authority itself have to respond to direction or control from any department of government in the provinces?

Mr. Dickerson: Normally, except for Quebec—perhaps Mr. Lewis will want to correct me on statements I make with respect to Quebec, because he is more aware of recent changes than I am. Generaly speaking, though, in other provinces—and perhaps still in Quebec—the professional organization, be it the Law Society or Medical Society, accountants or whoever, is incorporated under an enabling statute and is almost entirely left alone. I know of no occasion where the provincial government in any province has actually taken steps to police what the professional organization does under its legislation.

The Chairman: Is there any reporting provided for?

Mr. Dickerson: I have never known of any, senator, no.

Mr. Lewis: I might interject, Mr. Chairman, that so far as the education system is concerned for chartered accountants, it is uniform across Canada. That is, there is a uniform exam which is the same in each province so that, while, say, the Quebec organization is now called the Order of Chartered Accountants—

Senator Buckwold: Do you get a medal, if you join the Order?

Mr. Lewis: Not yet, Senator Buckwold, but that might come, though.

As I was saying, whereas the organization in Quebec was previously called the Institute of Chartered Accountants, it is now called the Order of Chartered Accountants. That Quebec standard is an exclusive standard in the Province of Quebec, but they have exactly the same examination. It is exactly the same examination all across Canada so that our standards are the same, even though in some provinces there is no regulation or exclusive regulation of the profession. In Quebec it is an exclusive title. That is, no one else in the Province of Quebec can practise accounting, with a few exceptions, which is a sort of "grandfather" clause.

In Ontario there is a licensing board for accountants, which is a little different from the Province of Quebec. In Ontario there are chartered accountants and there are other accountants.

The Chairman: There are public accountants.

Mr. Lewis: Yes, there are public accountants.

The Chairman: The public accountants, I believe, are also incorporated. I do not know whether they have a more direct responsibility to the province or not. It is something that we could quite easily ascertain.

Senator Cook: There are such things as cost accountants too, are there not?

Mr. Dickerson: There is an organization all across Canada, senator. I think they are called the registered industrial accountants, who are essentially what you call cost accountants. They are similarly organized under a statute. There are groups called certified general accountants in some or all of the provinces. There are, several different bodies of people calling themselves accountants with varying titles.

Senator Cook: All of different standards.

Mr. Dickerson: Well, they are all broadly the same by this time, I think. The variations have probably been narrowed quite substantially in recent years.

Mr. Michael G. Mallin, Communications Officer, Canadian Institute of Chartered Accountants: But I think it is fair to say that the different organizations have different emphases. The CA organization, although by no means all its members are in public practice, is oriented towards public practice. This would include auditing, and similar functions. The registered industrial accountants, generally speaking, do not have an interest in public practice as such. There are other generally smaller organizations of accountants in various provinces, I think, and their interest in public accounting varies from province to province. In some provinces—I believe in five provinces—in Canada, and I think you will find the figures in the brief, there is no restriction, as Mr. Dickerson said, on who may practise public accounting. In the remaining provinces there is some restriction. In several provinces, in practice, only chartered accountants may engage in public accounting. In other provinces the net is cast a bit wider than that.

Senator Laird: At one time, was there not some sort of taking in, if I recall correctly, of the CGAs into—?

Mr. Dickerson: In Ontario. I believe that happened quite some time ago in Ontario. As a prelude, I believe, to the present situation under which I think there are now two or three groups of accountants there; but the profession is closed by another statute regulating the practice of accounting as such, and it is only members of those two or three groups presently in existence in Ontario which are licensed to practice.

The Chairman: I have here a copy of the regulations and code of professional ethics for public accountants in Ontario, and it appears that there is a public accountancy act in Ontario. I suppose you could call the public accountants' council for Ontario the regulatory body. In order to practise as a public accountant you have to have a licence under the public accountancy act.

Mr. Dickerson: Yes.

The Chairman: I take it that only applies to those who are public accountants, and not to chartered accountants.

Mr. Dickerson: Well, I think it works this way, Mr. Chairman: I think chartered accountants—and there would be one or two similar bodies in Ontario—would be entitled almost as a right, if not as a right, to a licence under that act. Others may apply, and there are perhaps standards there under which they also can get a licence.

The Chairman: Yes, but as I say, the chartered accountants in Ontario have their own statute.

Mr. Dickerson: Oh, yes.

The Chairman: And they do not require to secure a licence under the public accountancy act.

Senator Barrow: I am sorry, Mr. Chairman. They do require to be licensed under the act.

The Chairman: In Ontario?

Senator Barrow: Yes, and it is the same in a number of other provinces.

You do not remember me, Mr. Dickerson? Irvine Barrow.

Mr. Dickerson: Yes, Mr. Barrow, I do. You instructed me on the Nova Scotia experience, I remember, many years ago. But things have changed again down there since I investigated this matter.

The Chairman: What is the answer then? Even a chartered accountant in Ontario who is qualified under the act of incorporation governing the functioning of that group still has to have a licence under the public accountancy act?

Mr. Mallin: That is correct, for everyone who practises public accounting in Ontario. Under the act there is a seven-member board, five of the members, by virtue of the act, are chartered accountants, and the practice of the board is to admit to public practice anyone with a chartered accountant's designation. Others, as Mr. Dickerson said, may also be admitted to public practice, but it would be relatively rare.

The Chairman: Yes. And you are not permitted to use the word "licensed" in the description of your occupation.

Mr. Dickerson: That is something in that Ontario statute, is it?

The Chairman: Yes. Now, is there a scale, or schedule, of fees that appears either in the statute governing the public accountants, or the one governing the chartered accountants, in the respective organizations?

Mr. Dickerson: There is no tariff of fees at all in any province, as far as I know. I have never heard of one. The accountants have never been interested in one, and no one has ever thought it would be possible to draw one up. That has never been a problem to us until very recently, with the new legislation—the new general professional legislation—in Quebec, in which they have established a general governing body, I understand, which is to police all professions, in a way, and I have a copy of the Quebec statutes, known as the Professional Code Statute. It is interesting that in one section, section 12 (u), this board that has been set up, among its other duties, is to suggest for approval to the lieutenant governor in council, after consultation with the corporation—that will be the professional organization in question, and the Quebec bodies concerned—a tariff of professional fees for services rendered by members of the corporation. In Quebec, at any rate, a tariff of fees is now potentially on the horizon, it would seem. It may well be that this new body in Quebec may promulgate a tariff of fees for the accounting profession perhaps along the lines of the customary tariffs we are familiar with in the legal and medical professions, we do not know yet; but it does, for the first time, raise this problem for us, that we may have a tariff imposed on us—on the members in one province—which is again leading to a potential conflict with this act. In other words, would it be an offence under this act in four members, being required to do so by Quebec law, are operating under a tariff promulgated under that law? We have this clash again between statutes, which represents a problem we would like not to have.

Senator Buckwold: It is my understanding that the tariff that is suggested by the legal profession, where they ususally have a scale of charges published, is only a guideline. There is nothing to prevent anyone from charging less.

Senator Flynn: No, it is the contrary: you cannot charge less; you can charge more.

Senator Buckwold: I know that my legal adviser certainly does not charge me the tariff laid down. He has the right to charge any tariff he wants.

Senator Flynn: You may be right as far as Saskatchewan is concerned, but in Quebec it is the minimum that is provided in the tariff. You cannot charge less. It is the same thing for professional engineers in Quebec. The professional engineer cannot charge less than a certain percentage. I think it is the same thing for architects, too.

The Chairman: Since you are knowledgeable on this point, I assume you will not mind a question. Can a client who engages the services of a lawyer, and thinks th - bill, which may be the minimum charge under the statute in Quebec, is too high, make a contest in the courts and challenge that amount?

Senator Flynn: He certainly can. There are provisions, for instance, under the regulations of the bar whereby you can submit your grievance to an official of the bar. You can then go into court if you wish after that. If the lawyer has charged the minimum provided in the approved tariff, however,—

Senator Cook: The onus is then on the client.

Senator Flynn: Well, the client will lose his case. There is no doubt about that. As far as contesting a bill which may be too high is concerned, there is no doubt that there are provisions for that.

The Chairman: Well, we have that in Ontario, except that the courts are more directly involved in the tariffs and the establishment of tariffs.

Senator Cook: In Newfoundland you are not supposed to bargain for less than the minimum. After you have done the job, if you do not want to charge him at all, you may do so. At that point you can do what you like. But you should not make a bargain.

Senator Flynn: Yes. If I send my bill and my client comes to me and says, "I have no money", I say, "Just forget about it, or give me less;" but you cannot, as Senator Cook has mentioned, contract for less than the tariff.

The Chairman: Yes.

Senator Barrow: Is there not a taxing master also in the legal profession?

The Chairman: In the law, yes. There is a taxing master.

Senator Barrow: Which is a system which does not exist in the other professions.

The Chairman: This is provided in Ontario under the Judicature Act, and there is a committee of judges plus certain lay members of the profession to regulate the scales on a party and party basis and on a solicitor and client basis. The client can always contest the bill. The usual ground, of course, being that the bill is too high. But if the bill is in accordance with the tariff and does not exceed that, then the chances of success for a particular client would not be very great; I would say it would be just about hopeless.

Senator Cook: But there are other factors. You might have searched a title and then the sale falls through, and then again two weeks later the sale goes through and you would not charge twice for searching the same title.

The Chairman: Well, in Toronto the scale of fees for acting on real estate transactions is established by the York Law Association. But there is nothing in that scale of fees which says you must charge a particular amount. If the scale is on the basis of the dollar amount of the sale price, then if you are acting for the purchaser there is a certain percentage and if you are acting for the vendor there is a percentage which is less because acting for a purchaser involves more work. But there is nothing to compel a lawyer to charge according to the sale of fees, and I would say there is nothing to prevent him from charging in excess of that scale. But if he were to charge in excess of the scale, then the client could go to court and the question would be resolved on a *quantum meruit* basis. The same thing applies in other proceedings. The same thing would apply even in surrogate court work where there is a scale of charges for different services, for compensation, et cetera. The judge before whom the accounts are being passed may grant a larger counsel fee, for example, and that is within his discretion. If he does not want to exercise that discretion, then he may refer the matter together with his views on the scale of compensation to another judge for determination.

Senator Flynn: You have the same thing in the Bankruptcy Act.

The Chairman: While, so far as the York Law Association is concerned, it might be suggested that the lawyers are getting together—because this is an unincorporated body and only lawyers are members—and they are settling the scale of fees and the tariffs, but they are not settling it as a compulsory scale of fees, simply as a guideline or if I may borrow from the words of the statute I would say, "a suggested quantity of fees."

Senator Buckwold: A suggested retail price.

Senator Laird: And this is done county by county.

Mr. Lewis: If I may interject here, Mr. Chairman, on the subject of suggested fee scales, the experience throughout the world shows that suggested fees scales eventually become a sort of accepted standard and the client would not wish to pay more than that. This is a maximum so far as the client is concerned, while it is really a suggested scale. This might appear to be in the interests of the consumer—the consumer being, perhaps a corporation in this case and not the individual who buys at retail. In New Zealand they had and still do have a scale of fees, and this has worked to the detriment of our profession. In Canada, in every province it is required that a member shall have a university baccalaureate degree. This is standard throughout Canada and the United States for what is called the CPA. However, the effect of the fee scale in New Zealand is now so low that they have resisted this university requirement; they do not require this and the standards therefore of the students, trainees and staff is not of a university level. It is much lower so it is doubtful if they will ever really be able to have the profession in New Zealand on the same basis as it is in Canada. Here the standard is higher. The profession here generally would resist, if they could, a fee schedule.

In our profession fees are generally set on a per diem or hourly basis, and this in turn depends on the salaries paid to the university staff and to other staff, and with rampant inflation as we have today this is naturally the only way it could work. Otherwise, if there was a set fee schedule, it would be impossible to carry on the profession. It would be

impossible to attract the required staff and university graduates into our profession. They would go, obviously, to some other profession.

The Chairman: I think the only purpose in discussing this is that there are regulatory standards and in most of the situations, in fact, in all the situations in Ontario you have the scales of fees none of which is compulsory and in all instances the client can make a contest in relation to court proceedings at cetera by going to a taxing officer, or otherwise make a contest on a *quantum meruit* basis. Where an association in a province has established a tariff rate, that can be challenged.

Senator Cook: Following on this very interesting discussion, is it not the case that under the Quebec statute which sets up governing bodies for all professions, those governing bodies are not composed solely, for example, of lawyers or doctors or chartered accountants, but will also have representatives of the public at large?

Mr. Dickerson: I believe that is true, senator, yes.

Senator Cook: In other words, the self-governing professions are rapidly going out of fashion. They have had a great deal of regard to the public good, but they also have had a great deal of regard for the private purse.

Mr. Lewis: Under the professional code it is necessary for each profession to have a representative of the public. In our case, the Order of Chartered Accountants, we have on our professional council an engineer. It works out very well and he makes a significant contribution, I think, to the conduct of business, and he gives that outside viewpoint. I think that is one aspect.

Another aspect of the revision of the code is to have an outside, independent group in charge of the disciplinary procedures, investigational procedures in the case of a complaint against a member. Previously and in other provinces it has been entirely up to the council of the institutes to carry out the investigation and hear the case against a member, who will be judged by his peers, after the laying of a charge by a member.

The Chairman: Of course, that situation exists in the law profession in Ontario in the form of the Benchers, who have a disciplinary committee.

Senator Flynn: In Quebec, however, all professions are under the control of a commission of professions. All by-laws adopted, including those governing fees, must be approved, or at least could be set aside by that commission.

Senator Cook: In my opinion it is a good move.

Senator Flynn: How can this be provided in this bill? Should we exempt all these activities which are regulated by provincial jurisdiction?

The Chairman: In cases of the existence of provincial regulation under which clients have the right of protest, there is just no place for such provisions in this bill, otherwise a conflict of law would be created immediately.

Senator Flynn: If there were such provision included in the legislation, however, it should not apply to those professions regulated under provincial legislation.

Senator Cook: The proper course, in my opinion, would be to adopt that followed in the Province of Quebec and, eventually, place such matters under that legislation rather than provide for it in this bill.

Mr. Lewis: The commentary which was issued in connection with Bill C-7, which is the same as Bill C-2, was more or less to the effect that it is admitted that the provinces have prior jurisdiction in these matters. However, in the original bill, C-256, the Competition Act, a specific exemption under certain conditions for professions which were governed was included with respect to certain matters.

It is our opinion as a profession that there should be a specific exemption for professions or professional bodies which are under provincial jurisdiction to make certain that instead of having this obvious ambiguity as to which law prevails and to avoid a conflict of confusion between laws.

The Chairman: Will you continue please, Mr. Dickerson?

Mr. Dickerson: To sum up with respect to this point of fee tariffs, allow me to reiterate that we do not have one. The accounting profession, I do not believe, ever have had a tariff and we do not desire one. We may have one imposed on us in the Province of Quebec. That is the only area in which we believe we will face problems, at least which we can foresee at the moment.

A similar problem is the whole matter of admission standards, which I suppose are monopolistic inherently, in the sense that they are designed to keep certain people out and allow others in according to standards. There really could not be a profession without this, yet, once more, there is the possibility—I do not find it easy to believe there would be a real problem here—nevertheless, if the profession excludes people, and one would hope they would only do it properly, on the basis of examination standards, on the face of it at any rate that is a potential offence under the proposed amendments, because we would be limiting the supply of a service. That would be an absurd result, obviously, but it is another example of a kind of clash which, I submit, should not be allowed to take place, even in a hypothetical sense, on the face of the law. It is not good enough to be told by the government, or those who administer this type of legislation, that they would never proceed. That is a common answer given by bad draftsmen and in my opinion it is just not satisfactory.

The Chairman: I notice a reference in your brief to page 27. I take it that is page 27 of the proposals in connection with competition policy?

Mr. Dickerson: That is correct, Mr. Chairman.

The Chairman: I notice on page 29 it states as follows:

> Many of the professions enjoy extensive powers of self regulation under Provincial statutes, particularly in matters affecting professional standards such as entry requirements. The proposed amendments would not affect those arrangements.

In your brief you express concern that they might.

Mr. Dickerson: Yes, I do not think there is any question about it. There is a direct clash in the statement that this would not affect it. It means that the administrators would not proceed against a profession on that ground but, as I say, I do not believe that is a good enough answer.

The Chairman: If the department makes an admission of that nature, the bill should be clarified in a manner which would indicate that it is not intended to relate to such matters as entry requirements and standards.

Mr. Dickerson: Precisely. The next point we have is the matter of competitive bidding. Our profession has long had an ethical rule under which its members are forbidden to engage in competitive bidding for engagements. I do not believe this is probably common to other professions. In any case, we believe that rule to be sound, that competitive bidding in a professional type of engagement, however appropriate it may be elsewhere, places undue emphasis on the fee. As is pointed out in our brief, we believe that the distinguishing feature about professional services as opposed to other goods and services is that the fee, generally speaking, is not terribly vital. It is the nature of the service which is to be supplied. The client normally does not really know what he needs and relies on the professional to diagnose the situation and satisfy the need. The importance of that is critical. This is why integrity is so important in professions. We think if we are forced to bid competitively or, at any rate, if our present ethical rule against competitive bidding is held to be illegal under this bill, it would lead to an undesirable result over-all in our profession and, probably, in others. That is another point, therefore, which leads us to believe that there is something unique about the profession and that such a principle, which may be very satisfactory everywhere else in the economy, should not apply to professional services.

The Chairman: For instance, the point is developed in your brief of refusal to deal. Very often a chartered accountant or lawyer will refuse to accept a retainer because of being engaged in relation to other clients in a matter in which there may be a conflict of relationships.

Mr. Dickerson: There is the conflict, yes. There is an even more important reason, in our opinion, at least in the accounting profession, that makes us speak up on this point of refusing to deal. A public accountant, almost uniquely amongst professionals, produces a product which is not primarily or solely for the use of his client, but is to be published to the outside world, as it were. A person who will make the principal use of an audited set of financial statements is not so much the client, but the client's banker, any creditor, or investors. In other words, there are third parties who are very important, including income tax departments. Because of this, accountants frequently find themselves under pressure from their clients to produce a particular result, for instance, a good-looking financial statement, or, in the case perhaps of income tax statements, a pessimistic one. Accountants are uniquely under that pressure. Because accounting and auditing work has to depend to some fair degree on the honesty of the client himself in supplying the company with complete and accurate information, the accountant's only weapon, when he is being pressured by a client to produce or tilt a result, is to say, "I will not do your work!" In other words, the accountant, in particular the auditor, must have the right to say to a client "No, I do not want to do your work"—thus forcing the client therefore to probably straighten himself out.

We had a case of this some years ago. The accountants of a large public company resigned. The allegations were that the people in the company were trying to produce a distorted or misleading result. Great pressure was put on the accountants to go along with this, and upon other accountants, when the first ones resigned, to take up the job and go along with this.

The ideal result in a situation like that is for that kind of client not to be able to find an accountant at all. Particularly in a public company situation, this will come out. The management who are trying to do things like this would be forced out, I should think, by the shareholders.

Anything that prevents or impedes this independence would be more critical, I submit, in the accounting profession than in any other profession. Independence in producing a fair result, without any concern, whether it is good or bad in the client's eyes, is important, and it would be very dangerous to jeopardize that. It goes to the heart of the matter.

Senator Cook: How would the bill jeopardize it?

Mr. Dickerson: Because it makes it an offence, or allows this commission to say, if one has refused to deal that he can be ordered to deal, or someone in the market can be ordered to provide services. We think that auditing services are sufficiently unique—

Senator Cook: I appreciate your point, but the commission would have a hard job ordering someone to deal unless it had very good grounds.

Mr. Dickerson: Our members would prefer not to have to worry about that pressure, as well as others. Nevertheless, that is the bill as it stands. One can be ordered to supply a service.

Senator Cook: You would not be able to supply a service to a crook. That is what comes down to.

Mr. Mallin: The issues involved are issues of professional standards.

Senator Cook: We know that.

Mr. Mallin: We are reluctant to see decisions on the issue of refusal to deal thrown onto a commission which has in the forefront of its mind the issue of competition. That is what this commission is supposed to be concerned with. Our concern is in maintaining the standards and integrity of the profession. We do not want those decisions to be cast on a body which has substantially different concerns.

Senator Laird: Do you think that all professions should be eliminated from the purview of this act?

Mr. Dickerson: I would not want to go that far. My criticism of the original competition bill was that the exemption for professions was too wide. It was wider than it should have been. In respect of the kinds of matters I have mentioned, professional associations to be named perhaps in regulations to the bill could be exempt from those particular three or four provisions I mentioned. That would be going far enough and would be a sensible solution to the problem, particularly this clash of jurisdiction problem, without giving a wholesale blanket licence to professionals to do all sorts of things they should not be allowed to do.

Senator Laird: At least it would be satisfactory to your institute. You would not know about the other professions, except the law.

Senator Flynn: You would have to define the kind of authority to exempt. You cannot say that by regulation you could exempt any one. You would have to establish the rule under which the exemptions would be granted.

Mr. Dickerson: There would have to be some qualitative assessment of the professional bodies.

Senator Flynn: In the act itself—and it is not easy.

The Chairman: It is not easy. I think it would be easier in the legal and accounting professions. I am thinking, for instance, of the medical profession. If we exempt a doctor who refuses to treat a case, there would have to be special circumstances. Where a lawyer refuses a client, a conflict of interest might develop.

Senator Flynn: In the case of doctors, they have their own standards with regard to refusal to treat.

The Chairman: The exemption will have to be carefully thought out.

Mr. Dickerson: My final point touches the accounting profession only indirectly, but we think it is important. That is the issue of tied selling, in particular section 31.4, subsection (4)(c) of the bill, which has now been amended, I am told, or an amendment has been proposed, by the government.

This is the provision under which banks—indeed, anyone lending money, but obviously the banks principally— can engage in tied selling to an extent, about which we are concerned, to force borrowers to use the bank's accounting service. Banks are getting interested in supplying data processing services. We are not asking that the banks not be allowed to provide those services. We are not asking for monopoly for the accounting profession. Let the banks provide those services, by all means. But we think it dangerous for banks to have this leverage to force those kind of services on a borrower which the borrower might not want, or the services might not be the most suitable for his needs, and so on.

We are concerned that the exemption for banks in respect of tied selling is wider than we think it needs to be. Although we have not had much time to consider the proposed amendment, I think you can safely say that we are fairly content with that . . .

The Chairman: We have had some discussion on this point. The proposed amendment is:

> (c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by him . . .

They add:

> . . . and is reasonably necessary for such purpose.

It would mean that the service that a bank may offer may not be reasonably necessary for the purpose of having the bank lend money. It may be that the customer wants to retain those services. The only defence that the bank, or the lender of money, would have would be to say, "Well, the customer asked me to provide that service." Can you then say that it is reasonably necessary?

Mr. Dickerson: I have not thought of it from that point of view. Obviously if the customer wanted it, we would not want the bank to be prevented from offering it. I would have thought on principle that would not be tied selling. I contemplate tied selling in terms of the vendor forcing the product or goods on the customer. Your example would be a question of the customer himself asking for it.

The Chairman: Here is the comment supporting this change. It says:

> Concern has been expressed that as it stands in the Bill, sub-paragraph 31.4(4)(c) is too wide in the exemption it affords, because it would enable a bank to require a customer to buy pay-roll services for example from the bank, which are not reasonably related to his loan or to security in respect of such loan . . .

That is only one aspect of it. It seems to me that the language "is reasonably necessary for such purposes" is not the proper way of limiting the exemption afforded a lender of money.

Mr. Dickerson: It is a very difficult drafting task to do that, Mr. Chairman, and I would not purport to offer some language which would cure all these problems. I think the point has certainly been grasped by the government and by this committee, probably from both points of view; that is, the bank's freedom to offer these services without worrying about being in breach of the law and, equally, the point that the banks should not be put in the position where they can force these services on unwilling purchasers by virtue of their leverage through bank loans. That was our concern, Mr. Chairman, but I agree that the other concern is equally valid.

The Chairman: There should be coupled with that something to deal with the situation that where it is related to the lending of money, the lender requires the borrower to accept such services.

Mr. Dickerson: That is the point at issue, really.

The Chairman: Yes.

Mr. Mallin: Surely that comes within the definition of "tied selling". The definition of "tied selling" is the practice whereby a supplier requires the customer to do certain things.

The Chairman: There are cases where the provision of such services may be necessary to the lending of the money. The lender may want to keep a close touch on the borrower, and he may be able to do so by providing services to him.

Mr. Dickerson: There could well be cases of that nature.

The Chairman: I think both factors should be covered. Where the service is necessary in connection with the loan, there would be a good defence. However, if such services are required in any event by the borrower, and are not related to the securing of a loan, then that would not be a good defence.

Mr. Dickerson: I think what Mr. Mallin is saying is that your second branch does not fall within the definition of tied selling, because it is something that the borrower is requesting rather than something which is being forced upon him by the bank.

The Chairman: Well, it is a term of the borrowing that the lender is imposing. If the lender imposes the requirement of such services simply to get more business, and such services are not necessarily incidental to the making of the loan, then the tied selling prohibition would cover it.

Mr. Dickerson: Yes.

Mr. Lewis: Mr. Chairman, I think there are two examples of what the drafters meant by "tied selling" in connection with lending institutions. One example was mentioned in a previous meeting of this committee, that being the requirement of compensating balances. A bank, for example, makes a loan of $1 million at the rate of 10 per

cent, but at the same time requires a compensating balance to be carried in the current account of the borrower without interest being paid thereon by the bank. A compensating balance of $100,000 would mean that the effective rate of interest is on $900,000. This, I think, would be an allowed type of tied selling, because the loan of $1 million would not have been made unless the condition of a compensated balance was met. The compensating balance also provides extra security against the loan.

Another example—and probably this is more in line with what the drafters had in mind—would be the case of a lending institution—not necessarily a bank, and probably not a bank—which hand an affiliated company, as defined by the act, which the lending institution required the borrower to patronize. In other words, the lending institution might have an affiliated company which produces stationery, and so on, and would require the borrower to purchase all his stationery supplies from that company. This, I think, would be within the act; that is, as I read the act, with the proposed amendments, it would not be permitted.

The Chairman: Surely the lender can impose terms. In other words, the lender would agree to make the loan on certain terms.

Senator Flynn: When the bank rate of interest was frozen at 6 per cent, they used the device just mentioned by Mr. Lewis to compensate for that rate, which they felt was inadequate. Under the present circumstances, the rate of interest can float.

The Chairman: Surely the bank can refuse to make the loan if the borrower does not provide a compensating balance and does not agree to take the other services which the bank provides.

Senator Buckwold: What about the situation where a car dealer, in making a sale to the purchaser, forces the purchaser, as is often the case, from what I understand, to deal with a given finance company? To me, that would be a form of restriction. Would that be considered lending money?

The Chairman: Yes.

Senator Flynn: If you are looking at it from the vendor's point of view, it is not the same thing.

The Chairman: Well, the financing is really done by the purchaser of the car.

Senator Flynn: The case which Senator Buckwold has in mind, I think, is where the purchaser is forced to use a certain lending institution. In that case, you might have tied selling.

Senator Cook: The more volume the vendor gets, the greater the kickback he gets.

Mr. Lewis: In answering Senator Buckwold's question, I would say that this was not contemplated in this draft. It is the reverse, in effect, of what is contemplated, although I think the question is well taken. If the automobile dealership was a subsidiary of the lending institution, I would think it could be inferred that, indirectly, it is the company whose business is the lending of money which is, in effect, requiring such services indirectly through its affiliated automobile dealership.

Senator Flynn: I think it has to be the other way.

The Chairman: The language of the exception does not read on what you are now explaining, does it?

Mr. Lewis: Exactly, Mr. Chairman.

The Chairman: Is there anything further?

Mr. Dickerson: That is all, Mr. Chairman. Thank you very much.

The Chairman: Thank you, gentlemen. We have one more delegation this morning, the Consumers' Association of Canada. Appearing on behalf of the Consumers' Association of Canada we have Professor Jacob Ziegel and Professor David McQueen. Professor McQueen, I understand, will make the opening statement.

Professor Jacob Ziegel, Consumers' Association of Canada: Mr. Chairman, we wish to make it clear that we are not here in any capacity related to the Consumer Advocacy Committee. I do not know who supplied you with that information, but it is quite erroneous. We are not appearing in that capacity at all.

The Chairman: Professor McQueen will make the opening statement. He is sitting immediately on my right. He will describe in what capacity he is appearing, and also introduce the other member of the panel.

Professor David McQueen, Consumers' Association of Canada: Mr. Chairman, honourable senators, Professor Ziegel and I are two academics appearing on behalf of the Consumers' Association of Canada, which, as you may know, is a countrywide organization with more than 110,000 members. We are what is called in academic circles a multi-disciplinary delegation. Professor Ziegel is an Osgoode Hall lawyer and I am an economist. It may surprise you to learn that we seem to be able to understand each other most of the time, despite the strange and peculiar languages that are spoken in each of our respective disciplines. I guess that is because over some years of working together on consumer problems he has taught me about things like *mens rea* and natural justice, while I have taught him about things like marginal costs, oligopoly and conscious parallelism.

You have the CAC brief before you, and I thought the best thing to do would be to make some short introductory remarks, touching on, among other things, a few highlights of the brief, and then let you question either of us or both of us, as you please. Bill C-2 is, in our view, a very important piece of legislation. It is important for consumers, because everything in the economy comes down in the end to two kinds of people, consumers and taxpayers. Even the effects of less obvious things, seemingly far upstream in the economic system, like corporate mergers, refusals to sell between manufacturers and wholesalers, price fixing, cartels, bid rigging—these effects come down the line eventually to the little people at the end. But this legislation is also important for the Canadian economy at large. A distinguished British economist, Sir John Hicks, once said that the best of all monopoly profits is a quiet life. But a quiet life is not in the long run the best way to get the Canadian economy in good shape for the strenuous tests that I think it faces in the world of today. Competition is like exercise; it is not always precisely enjoyable at the time, but it has some very good effects later on.

Competition legislation is necessarily pretty complicated, even arcane stuff. But it also relates, I point out to you, to some immediate pressing concerns of the Canadian

people, such as inflation. I think the average Canadian today is very much on the qui vive for what is called in the parlance of our time the rip-off—being charged more than he should be charged, being charged too high a price by this body and that body. Because of this, this inflationary situation that we face, where people are very conscious of and worried about high prices and other things of this nature, such as misleading advertising, I suggest to you that the credibility of the private enterprise system and the market process is at stake. There are rather too many people in Canada, I think, ready to believe that competition does not really work any more, and that the economy is pretty well dominated by monopolies and cartels. The CAC does not believe this. We think it still does and can work. However, it also seems to us that a competition policy is the last best hope of private enterprise and the market system. It is significant, I think, that there is no competition policy beind the Iron Curtain. Where you find competition policy is notably in Canada, the United States and countries of the European Common Market, which has its own very interesting competition statute and means of enforcement.

The Chairman: They compete behind some walls.

Professor McQueen: To some extent, sir.

Professor Ziegel: So do we.

Professor McQueen: The Treaty of Rome has some very interesting provisions in it about cartels and things like that.

I think when we are looking at this whole competition thing and considering this problem of the credibility of the market system and competition in Canada, we have to consider very carefully the alternatives, alternatives to which we may be driven if consumers feel they are being imposed upon too much, if the people of Canada feel that way—alternatives like nationalization or continuous direct regulation of the kind we have, for example, in our telephone system, which has a regulatory body, so that you cannot do anything about the price until you get their permission, and so on.

Contrasted with that, something like the combines act is an area where the government gets in, tries to produce a remedy and then gets out again. That is good. It seems to us that government has enough to do in other parts of the economy where its presence is genuinely required on a more continuing basis.

I would urge you, Mr. Chairman and your committee, to watch those loopholes. We have read with interest some extremely ably prepared briefs by leading corporate counsel. We noted that some of them, if they were followed to the letter—I do not suppose that is really expected—would not leave much of substance in the existing combines act, let alone the proposed one. This might not be obvious at once, but those who know a bit about this legislation could confidently predict that that sort of result would happen if you let the loopholes be too wide. I have heard it said that the major duty of a corporate counsel is to keep his client out of court. That's fine, and some briefs we have seen would most certainly have that effect as far as the combines act is concerned.

The Chairman: It is a legitimate occupation.

Professor McQueen: It is indeed, sir, but I hope that your committee will also keep in mind certain other considerations, broader considerations of the national interest, considerations of millions of individuals in this country who are not corporate persons but just ordinary persons like you and me.

I believe and hope you have had this brief for a couple of weeks, but let me run quickly over some of the highlights of it. It states that in our view a better competition policy in Canada is more relevant than ever today in these troubled times that we find ourselves in. The Consumers Association on the whole wants some improvements, and welcomes very much the general thrust. We like the extension to services, which is long overdue. We like the appearance in our competition law in this country of civil law. We do not even have an offence unless an order has been disobeyed. We like the flexibility of civil law; we think it is more appropriate to some of the business practices that are dealt with here. It is more appropriate than criminal law, even though you have to keep the criminal law in some areas. We would emphasize very much the importance of stage two of the government's new competition policy. This is only stage one.

The Chairman: Now professor, our terms of reference relate only to this bill, and therefore only to stage one.

Professor McQueen: All right, sir. I have said it and I will shut up. But it is on our minds. We would urge you to do your best not to let the basic thrust of this stage one be compromised by modifying provincial legislation.

Our brief also includes some specific suggestions for improving the refusal to sell and misleading advertising provisions in the bill.

Finally, another thing I would draw your attention to is our urging that the commission be able to issue certain interim orders to ensure that the patient does not die by a bankruptcy while treatment is still in progress.

[*Translation*]

Mr. Chairman, Honourable Senators, this legislation is extremely important for all consumers in this country, especially at the present time, where ordinary people are seriously fighting inflation. There are those who ask why a consumers' organization is poking its nose into a piece of legislation which is as complicated, even as specialized as the Combines Investigation Act. Is this Act not of primary concern to experts, lawyers, and important businessmen only? No. It is also for the little people, because everything changes in our economy and finally affects them. Economists say that there really is no such thing as a free lunch. Someone always has to pay. Basically, at the final stage of any economic process it is we, the consumers and taxpayers, who have to pay.

I therefore urge you to think of us. Please encourage the Honourable Mr. Ouellet to think of our interests in this legislation, because, basically, all things in our Canadian economy, including this legislation, concern us.

[*English*]

Mr. Chairman, honourable senators, we wish you and the Minister of Consumer and Corporate Affairs well in your consideration of this important bill. We hope that both of you will give it the close and careful study that it merits. You have it in your power to make the market enterprise system of this country work more efficiently and effectively in the interests of consumers and of us all. Good luck to you in your task.

The Chairman: Well, professor, you were present this morning when we were dealing with the other two groups. I would like to feel that the probing we did in our examination of those people—whether or not you approve of the direction in which the probing went—at least indicates that we are applying ourselves seriously to the problem.

Professor McQueen: Quite so.

The Chairman: Then, in what way can you offer help? You spoke about the possibility of modification of some of the provisions of the bill. Did I understand you right?

Professor McQueen: That is right, sir. Where would you like to start? I know you were doing quite a bit on misleading advertising this morning. Professor Ziegel could certainly accommodate you to some extent on that point, because it is his specialty.

The Chairman: Certainly misleading advertising has been the subject of numerous submissions. If you have anything to add on that, either for the bill in the form in which it deals with misleading advertisng or by way of some change, we would like to hear it.

Professor Ziegel: Thank you, Mr. Chairman. Perhaps I might address myself to this particular aspect of Bill C-2. If I may, I will break down my remarks into two parts: first of all I would like to indicate the kind of changes that the CAC would like to see in the bill; secondly, I would like to deal with some of the difficulties that were raised by earlier witnesses in this morning's proceedings.

Mr. Chairman, as my colleague indicated, we warmly welcome the general thrust of Bill C-2. In particular we support the provisions dealing with misleading advertising and related activities as useful and constructive. However, we also feel that it did not go far enough. Just as in the general competition sphere we feel the time is ripe for phase two with respect to the regulation of the misleading advertising type of activities, we feel that this new initiative is particularly opportune in the light of recent federal legislative developments.

Mr. Chairman, the federal government first entered the misleading advertising field in 1960 as a result of the adoption of section 33(c), as it then was, of the Combines Investigation Act. In 1969 the federal government further extended the scope of its intervention through the transfer of what was then section 306 of the Criminal Code to the Combines Investigation Act. That section now appears as section 37. During the sixties and early seventies there was general disinterest on the part of the provinces in regulating advertising activities. As a result, the area was more or less exclusively left to the federal government. The federal government, in fact, had to fill the void and did so, and I think did so with considerable success. Thanks to the efforts of the federal government I think it is true to say today that large members of the business community are very much more conscious of the importance of honesty and accurate advertising than they were 10 or 15 years ago.

Another beneficial by-product of federal intervention has been that members themselves are exercising greater internal scrutiny with respect to advertisements; and trade associations, as reflected by the Canadian Advertising Advisory Board, are much more responsive in monitoring their own advertisements and exercising voluntary forms of restraint.

All this is excellent, Mr. Chairman. However, there are also important weaknesses, both in the current legislation and in the amendments as proposed in Bill C-2. We regret very much this exclusive emphasis on the criminal law route as a means of disciplining and restraining advertising. We say this for a number of reasons.

First, there are the expense, the delay and the uncertainties which are inexorably wedded to the criminal law process.

Secondly, the record shows that the penalties imposed for misleading advertisements are often inadequate. My colleague Krohn at McGill University, some time ago made a study of the average fines imposed. When he started his studies the fine came to just over $200. It has grown since then, but I think I am correct in saying that the fine is still only of the order of $500. As a result, the conviction is often not a real deterrent for the wilful offender. On the other hand, it may be too much of a deterrent for the inadvertent transgressor who finds himself running afoul of the law.

Thirdly, the judges who are presently entrusted with the hearing of these criminal law cases are not always the most qualified for the task. Some have taken an unduly narrow view of the misleading advertising provisions, and some have not always understood the purposes and objects of the legislation.

Finally, but not least, Mr. Chairman, an important weakness of the existing provisions is that they provide no civil redress at all for aggrieved consumers. It is all very well to find a convicted offender $500, or even $1,000; but this provides little balm to the thousands of consumers who may have been misled in making a purchase because they were led to believe that the product was being sold at less than its regular price. As a result, we believe and recommend, Mr. Chairman, that the federal government should be equipped with a much broader range of powers and remedies, more carefully calibrated to the needs and exigencies of particular circumstances, to enable the federal government to accomplish its agreed goals.

Specifically we would recommend the addition to Bill C-2 of provisions dealing with the following types of remedies and powers:

First, the federal government should be empowered to seek an assurance of voluntary compliance. This is a well established American procedure which has now been copied in the British Columbia Trade Practices Act, and is about to be copied in Bill 55, the Ontario Business Practices Act, and may well be covered by other provinces in the foreseeable future.

Secondly, in addition to the federal government's—

The Chairman: Excuse me, professor. When you talk of voluntary compliance procedures, are you talking about the situation where the person who is charged enters a plea that he is unwilling to contest the issue?

Professor Ziegel: No, It assures voluntary compliance with the procedures regularly used by the federal Trade Practices Commission. Where they believe that a respondent is violating the law they advise him of the fact and they say, "Look, if you are willing to give us an undertaking in writing on agreed terms that you will cease and desist, we are willing to let the matter drop."

The Chairman: That is a "cease and desist" order.

Professor Ziegel: No, it is not. The commission does not make an order. It enters into a written agreement with the respondent, but the written agreement is equivalent to a

judgment by consent to the extent that if the respondent breaches his undertaking, then the administrative body is in a position to proceed further.

The Chairman: Where do you suggest this might be provided for in this bill?

Professor Ziegel: Before section 36 or just before section 46. I do not think the precise place matters terribly as long as the power is there.

The Chairman: You mean that would avoid a proceeding under section 36?

Professor Ziegel: It would indeed.

The Chairman: Regarding misleading advertising.

Professor Ziegel: Surely. Let me give you an aillustration taken from recent British Columbia events in which the assurance of voluntary compliance order has been very successful. In one case the director of trade practices complained that a car leasing company was guilty of misleading advertising and charging young drivers more than they should. I think the company agreed to stop its advertising and also agreed to make a refund to the young drivers of the excessive amounts charged. As a result of that agreement the comapany also wrote letters to each of the young drivers concerned and enclosed a refund of the excess charged.

The Chairman: Was that a proceeding under the B.C. consumer protection legislation rather than under the Combines Investigation Act?

Professor Ziegel: I did not suggest that. I said this is a power exercised under the recently enacted B.C. Trade Practices Act.

The Chairman: I read that case. It was a case where proceedings were instituted under the British Columbia provincial statute.

Professor Ziegel: We are asking in effect, Mr. Chairman, for parallel power at the federal level, and we are concerned, you know, that you may create discrepancies and anomalies if the federal powers are less or less effective than the powers under the provincial legislation. We would like to see the two levels of government moving in parallel directions to achieve the same objectives.

The Chairman: But why do you suggest duplication of legislation?

Professor Ziegel: The provinces' sphere of jurisdiction is restricted to intra-provincial jurisdiction and activities. They have no jurisdiction over interprovincial activities and, indeed, some of the provinces have shown no interest in regulating misleading advertising. In fact, the majority have not.

The Chairman: You are missing my point. My point is that if in some of the provinces you have consumer protection legislation, and then you propose to duplicate that in a federal statute, should there not be an exemption? Otherwise you are going to have a conflict in jurisdiction as between the provinces that have this legislation and the federal legislation.

Professor Ziegel: Well, historically, as I tried to indicate a moment ago, Mr. Chairman, the federal government entered into the misleading advertising field well before the provinces, and even at the present time the majority of the provinces have not attempted to regulate misleading advertising. I would, of course, entirely agree that a duplication of effort should be avoided to the maximum possible extent, and this is a matter that would have to be worked out as between the federal and provincial authorities. But I think I can state fairly confidently that up to now the problem has not been a significant one in the misleading advertising area. The situation in Canada could change in the future, in which event, of course, I entirely agree that the two levels of government should co-operate.

The Chairman: I do not believe you have quite grasped my point. I am not saying that the federal authority should not deal with misleading advertising, but that where there is a conflict in cases with which the provinces have dealt, whether recently or sometime ago, in the same area, how can we forestall action by both bodies against the same person in respect of misleading advertising? Should there not be provision in the federal legislation that in cases in which consumer protection legislation exists in a province dealing with this subject matter the action under the federal statute should be stayed?

Professor Ziegel: No, I think that would be a regressive measure, because it would be no guarantee that anyone would act under the provincial legislation. A good deal of provincial legislation exists in the consumer field, much of which is not enforced or is not regularly enforced.

The Chairman: I would disagree with that. However, that is my view and you have stated yours. Would it not be true that under the provisions of this bill the federal authority would proceed?

Professor Ziegel: That is perfectly correct, but we do not suggest that either the provincial or federal hand should be stayed. In my opinion this is something that the two parties can and, I am confident, will work out between themselves, as they have done in many other areas. The problem of concurrent jurisdiction, as I know you are aware, Mr. Chairman, is not novel. It has long existed with respect to highway offences, and there have been important decisions by the Supreme Court of Canada involving concurrency of federal and provincial powers. The message has been clearly given by the Supreme Court of Canada that the parties must learn to live together, one with another. In my opinion, they will. However, it would give the wrong impression to suggest that we are even remotely close to the stage at which we would find both the federal and provincial athorities rushing in to prosecute or otherwise discipline the same respondent. I am not aware of a single case in which it has happened, and out devout hope is that the two levels of government will co-ordinate their efforts in the future to ensure that it will not happen.

The Chairman: It occurs to me that possibly more is needed than a pious with that the province would not act. What if the province were to act first?

Professor Ziegel: Then I think you would probably find the federal government would stay its hand.

The Chairman: But there is nothing to require them to do so.

Professor Ziegel: But you will find that we also have doctrines of *res judicata, autrefois convict* and *autrefois acquit* and that this is not a novel problem in the common law jurisdiction.

The Chairman: Except that the provincial statute is not criminal law.

Professor Ziegel: Yes, it is in part; to a certain extent it is. Both the British Columbia Trade Practices Act and Bill 55 which is currently before the legislature in Ontario, contain provisions making violation of the act a criminal offence.

The Chairman: I am simply saying that the provinces cannot enact criminal law, as such.

Professor Ziegel: I do not think the law is quite that clear. In my opinion, they can certainly introduce provisions similar to other provisions, and have done so frequently. The cases I mentioned earlier, such as the Mann case, which went to the Supreme Court of Canada was, in fact, an instance in which a person was convicted under provincial law for driving without due care and attention. The question arose whether this was *ultra vires* provincial legislation, and the Supreme Court of Canada held that it was not.

An important thrust in our brief, Mr. Chairman, is that we are anxious that the federal government should place less emphasis on the criminal law route and considerably more on the administrative and civil law routes. We feel that these alternative routes may often be as effective and possibly more so in accomplishing the desired goal than exclusive reliance on the criminal law route.

The Chairman: The point we have been talking about, misleading advertising, is criminal law in this bill.

Professor Ziegel: There is no reason why it should stay there. The federal government has already indicated that in dealing with restrictive practices under Part IV (1), they are going to adopt the administrative route and not the criminal route. We strongly welcome this departure from the judicial approach. We think it can be usefully adopted and expanded to these other areas.

The Chairman: Do you suggest that the provision, such as that in section 36, referring to misleading advertising, and some of the other provisions, should be transferred to Part IV and not be part of the criminal law, Part V?

Professor Ziegel: I do not think you have to do that.

The Chairman: I was not saying you have to do it. Are you suggesting it should be done?

Professor Ziegel: No. We have a different approach. We suggest that, first, the act set forth types of behaviour prescribed by the act—i.e. false or misleading representation—and will spell out the consequences and alternative remedies that are available either to the government or the consumer. That will give both a range of remedies. The federal government might prefer simply to ask for an assurance of voluntary compliance, they may go for a cease and desist order, or alternatively they might decide to go for a regular conviction with a possible imposition of a fine.

We are suggesting, in the light of experience in other jurisdictions, that a broad range of remedies is desirable in order to achieve a measure of flexibility and, as it were, to cut the cloth to fit the coat.

As I said, by expanding the scope of the remedies, the federal government will be moving along a parallel course with the provincial government so that both will have at their disposal roughly the same range of remedies; and hopefully they will decide how they can best divide the sphere of operations between themselves to avoid any overlapping—something which you mentioned earlier.

I would add also, Mr. Chairman, that under the heading of additional remedies I would very much like to see a rule-making power added to the present bill. This is important for the following reasons. Section 36 is very broad in its language. It does not attempt to define common advertising terms. Much of the time in court is taken up in attempting to define terms such as "sale price," "regular price," "bargain price," "rust proof," and so on.

The Chairman: That does not arise under section 36.

Professor Ziegel: It could arise and it has risen.

The Chairman: I do not think so. Misleading advertising?

Professor Ziegel: Yes.

The Chairman: Under section 36, if the advertising is false, there is a conviction.

Professor Ziegel: With respect, I think we are talking about different things.

The Chairman: There was a decision in the courts when Tamblyn's was sued for misleading advertising. The company advertised that a person would get one free roll of film if he brought in a roll of film to be processed. The charge was $7.50. An investigator from the department in Ottawa made a purchase on that basis. Another investigator went in later, presented a roll of film to be processed, and when handed a roll of unused film said, "I don't want it; I don't need it." What happened then was that the clerk charged him $6, whereas the other man had been charged $7.50. The construction put on that was that it amounted to false advertising because, in fact, they were charging for the "free" roll of film.

The appelate court of Ontario acquitted Tamblyn's and, on the basis of the statute, quite improperly acquitted. Because of the difference in price between the $6 and the $7.50, it would appear that they were charging for the roll of film and, therefore, it was not free, as advertised, with the processing of a roll of film. If you read that decision of the Court of Appeal, it states that this provision is one of strict liability. In other words, if you do it, regardless of the circumstances, you are guilty and must be convicted. The only stage where you could offer any reasonable explanation as to why it occurred would be with respect to mitigration of sentence.

Professor Ziegel: With respect, Mr. Chairman, I think we are talking about different things. I am not talking about the offences of absolute prohibition.

The Chairman: But the offence under section 36 is one of strict liability.

Professor Ziegel: I am not disputing that. I am addressing myself to an entirely different problem; that is, that there are important advertising terms that are used every day in thousands of advertisements, the meanings of which have not been clearly established. As a result, we have become involved in a great deal of litigation to determine the meanings of those terms. The case you just cited, which is a well-known case, is an example of the doubt concerning the meaning of the word "free." Also, there are many areas where the courts have given conflicting decisions. The annual report of the Director of Combines Investiga-

tion for the past year, Mr. Chairman, lists six or more cases in which the courts have reached conflicting decisions concerning the meaning of regularly used advertising terms, or the interpretation of the language of the act.

What we are suggesting, for the benefit of everyone, is that it would be helpful if the Governor in Council were given the power, in Bill C-2, to define the meaning of common advertising terms. If, for example, the word "free" is used, it would be defined in the regulations. If the Governor in Council were given the power to make regulations, such regulations would be very helpful in providing suitable guidelines.

Another problem which arises is the question of when a sale ceases to be a sale. There was a celebrated case a couple of years ago involving Eaton's in which this question arose. There is nothing in the act, as presently drafted, with respect to this particular problem.

The Chairman: There is no provision in this bill for the enactment of regulations.

Professor Ziegel: I appreciate that, Mr. Chairman. That is why we are recommending that there be a provision for the enactment of regulations. There is amply precedent in other federal legislation. Most of the Food and Drugs Act operates in terms of regulations. The regulations occupy a couple of hundred pages of text, whereas the act itself comprises only several sections.

The Chairman: There are many federal statutes which provide for the enactment of regulations. The Hazardous Products Act is one. In the enforcement of such acts, things happen so quickly that if the authorities had to wait for Parliament to adopt a change in the application of law, the dangers may already have been suffered.

Professor Ziegel: I entirely agree with you, Mr. Chairman.

The Chairman: At the time we dealt with that particular legislation there was great debate on the question of regulating in that area. We did approve it, so we are not hidebound one way or the other. Following whay you have said, there is another place that I am surprised you did not mention; that is in Part IV, section 31.2, where they use the expression "the usual trade terms". Certainly that should be defined; it should be defined in the bill.

Professor Ziegel: If my recollection is correct, there is an amendment; in the amendments to the bill they have provided for this.

The Chairman: I do not think there is an amendment.

Professor Ziegel: My recollection is that there is. It is on page 7, adding a new subsection (3).

The Chairman: We have had discussion on that. It means in respect of payments, units of purchase and reasonable and technical servicing requirements. The question is whether it is an adequate definition or not. There is an attempt to define it.

Professor Ziegel: At least a person who is puzzled about the meaning of trade terms is not potentially guilty of committing an offence. At best the Trade Practices Commission will tell him whether they think his case applies in the proceedings before the commission, whereas under the existing law an advertiser who misinterprets the meaning of an advertising term may be found retroactively guilty of having committed an advertising offence. It is in order to avoid this very important area of ambiguity—

The Chairman: We come to the point right away that we are not opposed to anything that will clarify, whether it is done by regulation or done right in the bill. Quite naturally, the department will be concerned whether it is limiting the scope of the application of that particular section by that definition. This is something we have to face up to, but we are not opposed to clarifying and removing confusion and vagueness. I would say in many areas there appears to be a fair amount of that. The fact that you mention it would indicate that you must think so too.

Professor Ziegel: We are going a step further. We are strongly recommending the addition of such a regulation for the purpose indicated, perhaps hoping that your committee will see the problem in the same light as we do.

I have some more pages of comments. Unfortunately, the subject is so vast and the issues so numerous. Perhaps I should ask you how much time there is at our disposal.

The Chairman: You can assume, first, that we have read your brief, and that our staff has read your brief and furnished us with some analysis of the points you have developed. As to time, we usually like to adjourn around 12.30, but do not feel that yon are hemmed in.

Senator Buckwold: May I suggest, Mr. Chairman, that if possible we go to one o'clock? These are very interesting witnesses and, I think, very important ones.

The Chairman: If the committee is prepared to.

Professor Ziegel: Mr. Chairman, I am going to take a quantum jump, because I could not possibly go through all of the points that have been suggested, but I would like to say something about the jurisdiction of the Federal Court, which appears to attract a considerable amount of adverse comment. our association supports the proposed amendments to section 46 conferring more extended jurisdiction on the Federal Court of Canada, for the reason that the government has given on earlier occasions, namely, that it may be desirable in important cases that we should develop a core of expertise in this area at the judicial level.

I must confess, with great respect, that I cannot accept the argument that the provincial courts have an exclusive expertise in this area. It is not necessarily true by any means. There are many judges who are apppointed to provincial high courts who have no particular background of criminal law litigation, and yet they adapt and meet the tests readily and with considerable success. This is particularly true at the appeal level. I would think that 50 per cent of the members of the appellate tribunals in our provincial courts have very little experience in the criminal law area before they are appointed to the bench, yet this has never prevented them from rendering excellent judgments when criminal questions are referred to them.

The same thing is true of the Supreme Court of Canada, which is the ultimate appellate tribunal in Canada. Certainly, the present chief justice, to the best of my knowledge, has no history of criminal law litigation. I think the same is true of at least 50 per cent of the members of that court. So I think it would be unfortunate if the impression got afoot that in order to be appointed to a court or to hear certain cases, you must show that you have a background of substantial experience. Moreover, on at least one recent occasion a judge sitting on a provincial bench has expressed his dismay at being confronted with a very

difficult competition case. I am referring to the Irving newspaper company case, Mr. Chairman, where the New Brunswick judge states at the beginning of his judgment that this was the most difficult case he had ever had in 20 or more years of sitting on the Queen's Bench. At the beginning of the hearings he had asked counsel if he could be relieved of the case because of its immense difficulties and its technical nature, but they had requested that he proceed. I think this illustrates that judges at all levels, federal or provincial occasionally experience difficulties, and have been confronted with an entirely novel area of the law, or a novel problem in an established area of the law, and that this,*per se,* is not a sufficient reason for denying the Federal Court's jurisdiction in this area.

Perhaps I might deal quickly with a number of points that were made by witnesses this morning. I would like to deal first with the submissions made on behalf of the Association of Canadian Advertisers. They are concerned about the imposition of strict liability under the misleading advertising provisions. Our association is on record as having a measure of sympathy for this point of view, and we have in fact recommended that Bill C-2 be amended along the lines of section 28 of the British Fair Trading Act, so as to allow a defence by means of which the accused can show that he exercised all reasonable care in order to avoid infringing act.

As far as the "credulous man" test is concerned, Mr. Chairman, I think there appears to be considerable confusion as to what exactly the present state of the law is. I do not believe it is correct to say that in the Imperial Tobacco case the Alberta court said, or meant to say, that in every case you take the most credulous person among the Canadian community and then apply that standard to the advertisement in question. My reading of the trial judgment in that case is that you must look at the reading or listening public to whom the advertisement is directed, and if they include a broad spectrum of the community, then this is a relevant factor in determining whether a person reading that advertisement, or listening to it, could have been misled by it. In addition, I think the witnesses this morning overlooked the fact that section 36 is not only concerned with whether the advertisement is misleading in character, but also with whether it is false. Therefore, you could still have a situation where the judge would convict, and he must convict, simply on the strength of the falsity of the advertisement, regardless of whether it has misled or not.

The witnesses also objected, as others have before them, to the inclusion of civil redress measures in section 31.1 of Bill C-2. I am afraid our association completely parts company from them with regard to this point of view. As I mentioned earlier, we are concerned, first of all, that competition policy in Canada should move increasingly in the direction of the civil law area and not away from it. Secondly, we are equally concerned that those who are directly affected by anti-competitive conduct should have a means of civil redress. As I indicated earlier, it is not sufficient to show that a guilty person may be punished; it is also desirable, indeed important, that those consumers and others who have been damaged by the wrongful conduct in question should be able to obtain civil redress. My understanding is that this is the objective of section 31.1. We believe it is a correct objective, and in our opinion it is entirely in line with the thrust of legislation in other jurisdictions. I have in mind, Mr. Chairman, the anti-trust legislation in the United States, where civil suits are regularly brought in the federal courts to obtain civil redress for anti-trust practices.

Just to give one illustration, several years ago an anti-trust action was brought against Pfizer, and other drug companies, because of alleged price fixing activities. The case was eventually settled, with the approval of the court, and the companies agreed to establish a fund of $100 million, which was to be distributed among state governments and other agencies, and among consumer groups, in accordance with the terms of the order. We believe that there is absolutely no reason why a similar procedure should not be available in Canada.

We were happy to be here, Mr. Chairman, and were happy to answer your questions.

The Chairman: Well, I think I was responsible for interjecting most of the questions as you went along. However, one cannot be a professor without being accustomed to questions.

Professor McQueen: As far as future appearances are concerned and the possibility of our being here, as was mentioned by Senator Buckwold, it is always very nice to be asked back. And if we are asked back by the Senate of Canada we will come back, but if you could ask us back before we start teaching classes again on January 6, that would be convenient.

The Chairman: Well, we will not be back until towards the end of January. We have had various professors who have appeared before us here on different bills, and they have always seemed to be able to arrive at a date which accommodated themselves and which also accommodated us. But whether or not we will want you again will depend on the direction which our consideration of the bill will take. We are hearing submissions and analyzing them as we go along, but we have not yet put in an acceptable form, in making our report, where we think changes should be made and why. When we come to do that, that might be the time at which we might say to you, "Can we have your views?" We know you represent a substantial body of consumers.

Professor McQueen: If the call comes, we shall answer, senator.

The Chairman: And we too are accommodating on the question of dates. Thank you very much.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 19

WEDNESDAY, FEBRUARY 5, 1975

Complete Proceedings on Bill C-39 intituled:

"An Act to amend the Customs Tariff, (No. 2)"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

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THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of Proceedings of the Senate, February 4, 1975:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Cook, seconded by the Honourable Senator Smith, for the second reading of the Bill C-39, intituled: "An Act to amend the Customs Tariff, (No. 2)".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Cook moved, seconded by the Honourable Senator Inman, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, February 5, 1975
(24)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m.

Subject: Bill C-39 "An Act to amend the Customs Tariff (No. 2)".

Present: The Honourable Senators Hayden (*Chairman*) Blois, Connolly, Cook, Desruisseaux, Everett, Flynn, Gelinas, Laird, Macnaughton, Molson, Sullivan and Walker. (13)

Witnesses:

Department of Finance

Mr. J. Loomer, Director, Tariffs, Tariffs Trade and Aid Branch.

Following discussion, and upon motion of the Honourable Senator Molson, it was *Resolved* to report the said Bill without amendment.

At 9:50 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, February 5, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-39, intituled: "An Act to amend the Customs Tariff, (No. 2)", has in obedience to the order of reference of Tuesday, February 4, 1975, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, February 5, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-39, to amend the Customs Tariff, (No. 2), met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (Chairman) in the Chair.

The Chairman: We have this morning one public bill, Bill C-39, to amend the Customs Tariff, (No. 2). We then have two submissions to deal with: one on behalf of the Canadian Trucking Association; and one on behalf of the Patent and Trademark Institute of Canada. We will proceed first with the public bill. Mr. Loomer is here. Will you open the proceedings, Mr. Loomer? You were in the gallery of the Senate last night when Senator Grosart spoke on second reading of this bill. He raised a number of questions. I would assume that you at least made a mental note of them. Would you proceed to state them and deal with them?

Mr. J. Loomer, Director, Tariffs, Tariffs Trade and Aid Branch, Department of Finance: Yes, Mr. Chairman. Senator Grosart raised several points yesterday evening. I shall briefly summarize them, as I understood them, and will comment on them.

The first point that Senator Grosart raised concerned the categories in which the goods fall in Bill C-39 and the impact of the tariff cuts. Perhaps the simplest way to describe the tariff items which appear in Schedule II of the bill is to say that they cover a wide variety of consumer food and non-food products ranging from canned meats, fresh and processed vegetables, to drugs, spectacles, tableware and other householdware, and sporting goods.

When these tariff reductions were originally introduced, particular attention was given to goods for which the rates were above 15 per cent MFN. It is believed that the tariff reductions on these products can play a significant role in dampening the upward pressure on consumer prices. That is really all I have to say on the first point raised by Senator Grosart.

The Chairman: Are there any questions on that point? As there are no questions, please proceed to the next point, Mr. Loomer.

Senator Walker: What is the next point?

Mr. Loomer: Senator Grosart referred to the fact that the General Preferential Tariff rates do not benefit from the lower rates in Schedule II to the bill. The provision that Senator Grosart referred to appears in clause 2(2) of the bill on page 2.

The General Preferential Tariff rates are to remain the lower of the pre-budget British Preferential Tariff rates or the Most Favoured Nation Tariff rates reduced by one-third. This is the basis on which the rates came into effect on July 1 last year. It was never the intention that the General Preferential Tariff rates should be calculated on the basis of temporary tariff reductions of the kind proposed in Bill C-39, but that they should be set in relation to the permanent rates in the Customs Tariff. It is considered that the Canadian system of preferences for developing countries is as favourable as that of other developed countries.

The Chairman: Are there any questions on that point?

Senator Laird: Is there any possible conflict with GATT in doing that.

Mr. Loomer: No. These were unilateral concessions by the Canadian government and they have no GATT implications.

The Chairman: What is the next point?

Mr. Loomer: With reference to the third point, Senator Grosart mentioned item 69615-1, which appears on page 4 of the bill. The first point I should like to make is that the words "Under such regulations as the Minister may prescribe" have been in the item for a number of years. The second point is that the new words in the item which are shown in italics as subsection (a) do not contravene our obligations under the Beirut Convention. The convention provides that the final authority to decide whether an imported product should be accorded the duty-free entry privilege contemplated by the convention rests with the appropriate governmental agency of the importing country. Some of the certifying agencies in other countries have become lax about the issuance of certifications. The item as proposed in its amended form will permit Revenue Canada to exercise the authority which is permitted under the Beirut Convention. So, there is no contravention of the Beirut Convention. What we are doing in this instance comes within the terms of that convention.

The next point on which Senator Grosart expressed some concern is the proposal under tariff item 87500-1 which would authorize the Governor in Council to specify the handicraft goods. This item is of a relieving nature and provides for duty-free entry of handicrafts from countries entitled to the General Preferential Tariff.

The problem is that there is no accepted definition of handicrafts. In this connection, the proposed tariff item 87500-1 will provide a certain degree of flexibility. I should mention that Canadian craftsmen have expressed some concern that the indiscriminate duty-free entry of handicrafts could have a serious impact on the sale of domestically-made products. In this regard I wish to refer to a statement made by the Minister of Finance in the house in which he said:

> The Governor in Council, if the item is approved by Parliament, would initially designate a short list of products which are clearly recognized as handicraft

and which would not adversely affect the sale of Canadian handicraft. In establishing this list we would consult with the Canadian craftsmen organizations. We would also intend to ask developing countries to make known to us the specific handicrafts which they would like to export to Canada on a duty free basis. After a careful examination of these requests, additions may be made periodically to this list as circumstances warrant.

As to the matter of precedents for such delegation of authority, I refer to sections 273(j) and (1) of the Customs Act, which authorize the Governor in Council to reduce or remove duties on articles which are used as material in Canadian manufacturing. As Senator Grosart mentioned, under section 273, the delegated authority is restricted to articles being further processed. Section 11 of the Customs Tariff authorizes the Governor in Council to reduce the duty on any goods as compensation granted by other countries on Canadian products. Here again, the scope of the delegated authority is limited. Under tariff item 87500-1, as proposed in Bill C-39, there is also a careful definition of the authority the government is seeking.

Senator Walker: Perhaps you could go a little slower. You are pouring out this wisdom pretty fast.

Mr. Loomer: I apologize, senator.

Finally, I should mention that there was no provision in the legislation which came into force on July 1 for the duty-free entry of handicraft products from developing countries. Handicrafts were dealt with in the same way as other products from developing countries in the earlier legislation. Therefore, tariff item 87500-1 represents a new duty-free concession to the developing countries. It is an addition to the previous legislation. It does not take anything away that they had in this previous legislation.

The Chairman: Is that the last of the points you noted?

Mr. Loomer: I have one other point, Mr. Chairman.

Senator Walker: It is a good thing you were in the gallery last night, isn't it?

The Chairman: I should think that if Mr. Loomer's recollection fails to cover the whole situation, Senator Walker, who was sitting so close to Senator Grosart last night, will be able to fill us in.

Senator Walker: I think that he has already covered more than Senator Grosart raised.

The Chairman: Continue, Mr. Loomer.

Mr. Loomer: Finally, Senator Grosart asked why certain items which were in the May 6 budget were dropped. In this connection, Senator Cook, in introducing Bill C-39 for second reading, referred to the fact that economic conditions are somewhat different now from what they were in May, and to illustrate that point he cited the slowdown in construction, particularly the reduced number of housing starts in Canada and the United States as having an impact on such sectors of the economy as the plywood, furniture and household electrical appliances industries. Accordingly, those products were not included in the November 18 budget.

The Chairman: So, it is a matter of a policy decision?

Mr. Loomer: Yes, Mr. Chairman.

The Chairman: Are there any questions?

Senator Molson: I have three questions, Mr. Chairman. I should like to know, first of all, whether there are any increases in the schedules.

Mr. Loomer: There are none in Schedule II, senator. In Schedule I the authority granted to Revenue Canada under tariff item 69 615-1, to remove some goods from that item which now come in duty free, could result increases. These are goods which should never have come in under the item, as they are not within the terms of the Beirut Convention. However, we had no authority in Canada to do any policing.

Senator Molson: That is the only one?

Mr. Loomer: Yes.

Senator Molson: Looking at page 4 of the bill, after July 1, 1975, aircraft and aircraft engines seem to go up in the MFN rate from "free" to 7 ½ per cent. What is the rationale for that?

Mr. Loomer: This is something which has been done a number of times. The duty has been waived, since 1952, I believe, for periods of one, two or three years on a temporary basis, in the expectation that it may be possible to negotiate the rate that would have come into effect if it was not waived, in the context of multilateral trade negotiations. But it has been waived periodically.

The Chairman: To provide a bargaining position?

Mr. Loomer: That is right, Mr. Chairman.

Senator Molson: One other question, Mr. Chairman. Would it not be possible in publishing these schedules to put the old rates and the new rates side by side? Did they not do that years ago?

Mr. Loomer: That was a separate document which was a republication of the Notice of the Ways and Means Motion which appeared in the house. That is the way it was always done. It never formed part of the bill, because the bill becomes the act. It was done by a separate document in previous hearings before this comtee.

Senator Molson: It has not been given to us.

The Chairman: This is a point that bothers me from time to time. Let me illustrate. In the first reading copy of Bill C-29, respecting Canadian business corporations, which was dealt with in the Senate last night, and also in the bill as passed on second reading after the report of the committee of the other place was received, there was a complete index, and also in the second reading copy, which embodies the report of the committee of the other place, were underlined the amendments which were made in committee. But when you come to the bill as passed by the other place, there is no index and no underlining of the amendments. The obvious explanation for that, of course, is that the bill as passed is the one which, if passed by the Senate without amendment, will be published in the annual statutes, but I do not think that is an adequate or satisfactory explanation. The bill that will be printed in the annual statutes will be the bill that has received Royal Assent, not necessarily as passed by the House of Commons. Frankly, I do not see any reason why we could not have had an index in the bill that was before us last night. It would be very helpful in searching for something, especially where you have 240 or 250 pages to wade through

and note the amendments. As and when Royal Assent is given, that is the thing the annual statutes are based on. It is the only thing they can be based on, so I think, notwithstanding the explanation you gave us, it is still a practical thing that could be done.

Mr. Loomer: As part of the bill rather than as a separate document? I think normally this is the sort of document that has been provided.

The Chairman: The trouble is that it is the bill that really comes forward to us. The *Votes and Proceedings* of the House of Commons, unless you think in a particular way about it, are not as readily available to us. They could be if we thought about it. You can put anything you like in the bill and identify that it is not part of the bill and is only a matter of convenience. I think serious thought should be given to it.

Senator Molson: At least we should get the same information as the House of Commons gets, whether it is in the bill or in some other form. It is certainly not helpful to get a list of changes in tariffs like this without having a clue whether they have gone from a tariff of 100 per cent to zero, to free; that is not enough.

The Chairman: I think it is about time we insisted.

Senator Molson: I think so.

Senator Walker: What does the House of Commons get in this connection more than we have got?

Senator Molson: The change.

The Chairman: They get more material. The material they get would be available to us if we looked for it, but the most convenient form would be to have it all in one place, which is in the bill, so that we could make comparisons. Anyway, we have recorded our problem and our views, and I take it you will follow it up.

Mr. Loomer: I will, sir.

The Chairman: Are those all the questions Senator Grosart asked?

Mr. Loomer: Yes, sir.

The Chairman: Is there any additional statement you want to make about the bill?

Mr. Loomer: No, sir.

The Chairman: Senator Cook, you sponsored the bill. Have you anything to add?

Senator Cook: No, thank you, Mr. Chairman. I quit while I am ahead.

The Chairman: Or there is the old saying, which I like, that when you have sold something, wrap it up. Are there any questions from the committee on the bill?

Senator Desruisseaux: Have we still the anti-dumping protection?

Mr. Loomer: The Anti-dumping Act, yes.

Senator Desruisseaux: Are any of these items liable to come under that?

Mr. Loomer: An anti-dumping investigation arises out of a complaint by a Canadian producer. He could complain about an item that is in the bill, but the bill is really not related directly to the Anti-dumping Act.

The Chairman: Are there any further questions on the bill? Shall we report the bill without amendment?

Hon. Senators: Agreed.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 20

WEDNESDAY, FEBRUARY 5, 1975

Tenth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

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THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, February 5, 1975
(25)

Pursuant to adjournment the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:50 a.m.

Subject: "The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*) Blois, Connolly, Cook, Desruisseaux, Everett, Flynn, Gélinas, Laird, Macnaughton, Molson, Sullivan and Walker. (13)

In Attendance: Mr. R. J. Cowling, C.A., Mr. John F. Lewis, C.A., Advisors.

Witnesses:

Canadian Trucking Association: (Greater Ottawa Truckers Assoc.)

Mr. A. K. Maclaren, Executive Director;

Mr. Léo Sauvé, member; and

Mr. Lyle Nunn, Member.

Patent and Trademark Institute of Canada

Mr. R. Barrigar, Chairman of Committee on Bill C-2; and

Mr. John Ellis, Past President and Member of the Council.

At 11:35 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson
Clerk of the Committee

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, February 5, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9:50 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have a submission to deal with from the Canadian Trucking Association. Those here representing the association are Mr. A. K. Maclaren, the Executive Director; Mr. Leo Sauvé, who is a member; and Mr. Lyle Nunn, who is a member. Who will make the opening statement?

Mr. A. K. Maclaren, Executive Director, Canadian Trucking Association: Mr. Chairman, perhaps I could say a few words.

Mr. Chairman and honourable senators, on my immediate right is Mr. Léo Sauvé, the Executive Secretary of the Greater Ottawa Truckers Association. Next to him is Mr. Lyle Nunn, President of the Niagara Region Aggregate Haulers Association. We also have here Mr. Cecil McCallum of the Ottawa Truckers Association; Mr. Roy Acres, President of the Ottawa Truckers Association, and Mr. Robert Thomas, President of the Hamilton Aggregate Haulers Association. With your permission, Mr. Chairman, I would ask Mr. Sauvé to summarize our brief, if that is convenient.

The Chairman: Yes.

Mr. Léo Sauvé, Executive Secretary, Greater Ottawa Truckers Association: Mr. Chairmen and honourable senators, our brief outlines the position of the independent owner-operator, the man who owns a truck and operates one truck for his livelihood.

The Chairman: Is that the combination for which your brief makes the presentation?

Mr. Sauvé: The owner-operator.

The Chairman: That is, an operator-owner of one truck or a number of trucks?

Mr. Sauvé: Primarily the owner-operator. Our membership and the licences in the province are, by and large, for the owner-operator.

Turning to the national picture, we are not wholly familiar with the situation, but we understand that the Maritimes and the Prairie provinces are pretty well governed as to rates and control by the government itself; they negotiate and set the rates for the industry.

The Chairman: You mean the rate regulation in the provinces?

Mr. Sauvé: Not necessarily rate regulation. They are negotiated with the association at that time. The highways department of the province negotiates a rate with the trucking industry of the area. This submission, though, is based primarily on Ontario owner-operators, which we are more familiar with.

Up until 1968 the situation in Ontario was that if you wanted a licence to operate on the highways in Ontario you had to apply through the Ontario Highways Transport Board. In the spring of 1968 the government decided to remove that control of entry and throw the thing wide open, so that anyone could get into the industry and start operating.

The Chairman: Without a licence?

Mr. Sauvé: Without a licence. They are now issued automatically, just upon application. The result is that there has been a considerable influx of truckers into the industry. There are now approximately 30,000 dump trucks registered in the province of Ontario, representing roughly 7 per cent of the vehicles in the province. Of those 30,000, approximately 10,600 hold a public commercial vehicle licence to operate on highways. As I say, these are granted automatically on application. We presume the others are those who operate within a municipality, in which they do not require that licence, or there may be farm trucks that go out to work on snow in the wintertime, which again do not require a public commercial vehicle licence.

Senator Laird: When do you require a P C V licence?

Mr. Sauvé: When you go beyond the three-mile limit of a municipality.

Senator Laird: Does that include counties?

Mr. Sauvé: Right. In Ottawa, for instance, if you are going out to Leitrim or Orleans, beyond that point you need a P C V licence.

We would like to point out that in Ontario also since 1968 there has been a 90 per cent turnover in these class F PCVs that have been issued, the prime reason being that a fair number of them are repossessions. There are too many trucks for the amount of work available. In contrast to that, in Quebec it is totally controlled to the point of the limit of the number of licences that are issued by county. Also, the Province of Quebec, through its transport committee, sets the rates by region, so they have total control over there.

Senator Walker: Political control?

Mr. Sauvé: No, through legislation, sir. The effect, as it affects Ottawa or Ontario, has been that they have limited the number of licences that can be issued by county, so a new trucker starting up in business since 1972 cannot go to work in the province of Quebec. So he can come ove to

Ontario side and we have the additional influx from there. By and large, the general result is that they come in for a lower rate than we may have been working for, because, like everyone else they are interested in the cost and the finances and they have families to keep.

Senator Laird: Does he not require a PCV licence?

Mr. Sauvé: No. He comes within the city of Ottawa itself and within a 3-mile radius and he can work in any excavation project that is going on in the city. He does not need to have Ontario plates. And, if I may make this little point, they do not have to pay Ontario sales tax.

The Chairman: This is on the background of the conditions in the industry?

Mr. Sauvé: It is an asphalt jungle, in the true sense of the word. We are the only industry that I have been able to come across, in the ten years I have been involved in it, where the rates are set by the users rather than by the supplier of the service. Every time we have tried to negotiate or discuss rates, we have been hit and thrown out by the contractor, pointing to the fact of the Combines Act. He says, "Because of the Combines Act, you cannot do it." That is said repeatedly, not just here. It has been the experience of every association across this province and, presumably, across the nation.

The Chairman: What you are saying is that you cannot organize in an association so as to publish a price or a rate for the different types of carrier, and that the threat has always been mentioned about its being a violation of the Combines Act to do so, is that right?

Mr. Sauvé: That is right.

Mr. Maclaren: If I might interject one point here, Mr. Chairman, the position in Ontario is similar to that in British Columbia. In Quebec there is protection by legislation, both when working for the government or working for private contractors. The rate is set by region, under government legislation. In the Maritimes, as Mr. Sauvé said, and in the Prairies, most of the work in the dump truck industry is done with the province, and that is a rate negotiated with the province and that sets the pattern. In British Columbia and in Ontario you have the situation where less than 50 per cent of the work done is for provincial governments, and the problem really exists in the area when you are dealing with private contractors.

The dump truck associations in Ontario—and there are many of them—do publish suggested prices, but the Combines people have hauled them up on the mat have and said: "You dare not go beyond this point of publishing a suggested price." Now, it is no more than that, so they can go that far and no further. Through their local association, they can publish a suggested rate. Then it is a question whether a contractor will hire you or put one trucker against another.

Senator Laird: So it becomes a case of dog eat dog?

Mr. Maclaren: Very much so, given the number of people in the business, given the cost of equipment in the business these days, where the cheapest two-axle dump truck you can get is running in the $20,000 range, and up, considerably up. If you want to take advantage of the maximum-weights in Ontario, with a tri-axle, you can go up to $40,000 or even beyond that with a dump truck these days.

The Chairman: So a solution might be the kind of solution you have in some of the other provinces, including Quebec, where there is regulation of rates by the provincial authority?

Mr. Maclaren: That is true. In our submission we have referred to official pronoucement on this from the Roach Commission, from the various Ontario government authorities. But, in actual fact, five or six years ago the Ontario government moved the other way. They did have a regulated dump truck industry, and they de-regulated it. So even the PCV operator now, when he wants to operate three miles beyond the municipality, simply goes in and gets a licence for nothing, or without having an approved public conveyance, as the larger common carrier or city trucker does. He is under regulations.

The point we are faced with in Ontario is that there is no regulation of entry, despite admonitions, even official admonitions, that this is not a very good thing. We understand now that there is to be another inquiry into the dump truck industry, which is to take place—when, Mr. Sauvé?

Mr. Sauvé: The minister announced it a week ago yesterday.

Mr. Maclaren: Even if you had regulated entry, you would still have the problem of individual truckers having to deal with contractors on the question of rate, terms and conditions of carriage.

The Chairman: The regulation of that is not a problem that we can deal with?

Mr. Maclaren: No, you cannot deal with it, sir.

The Chairman: Then we get down to the question of regulations having rates and having the strength behind you so that you can bargain on the basis of those rates and not be in violation of the Combines Act?

Mr. Maclaren: That is correct, sir.

Senator Molson: Are there any co-operatives in the industry, any trucking co-operatives?

Mr. Maclaren: Not that I am aware of.

Mr. Sauvé: As a group?

Senator Molson: Yes.

Mr. Sauvé: No.

Mr. Maclaren: There is a situation, Senator Molson, where one operator may have several trucks that he uses. Most of the people represented here today are single owner operatives. Some of them have three, four or five trucks. They have these local associations, regional associations, that do their best for them, in many areas and in many different ways. But, on the question of rate, they can go no

further than suggesting a price. Of course they do sit down and, collectively through the Ontario Trucking Association, deal with the provincial government. In fact, last year the provincial government granted the industry terms for all Ontario government contracts, and it is then written into the contract that the province has with any truck owner that they use a minimum rate, which gives a substantial increase. In fact it went from $12 to $16.

Mr. Sauvé: That is right.

Mr. Maclaren: They can presumably deal with governments in that manner, collectively sitting down through their associations and talking to them, but it is a problem in Ontario and British Columbia particularly dealing with the private contractor. He will dictate load factors. He will dictate the rate, and he will also dictate where the rate is related to the distance you have to haul aggregate, say, form an excavation to where you dump it. He indicates what the mileage rate will be, if it is a ton-mile rate you are getting. As Mr. Sauvé has said, it is a jungle. The only solution we see to this problem, to partially redress the balance, to give the small entrepreneurial businessman, the dump truck owner, some bargaining power, is to include in section 4(1)(b), where they are dealing with the position of the fishermen, the same coverage for dump truck operators.

There may be another problem. The problem that dump truck operators face may well apply to service station owners and other categories of people. Short of a general provision allowing independent businessmen, who are not eligible for collective bargaining in a union, to act collectively in dealing with other business interests, the provision we would like to see is an amendment to section 4(1)(b) to allow the addition of the words "dump truck operators" to the word "fishermen".

The Chairman: We have two ways of dealing with this. If you can presuade the Ontario authorities and the B.C. autnorities to regulate the rates which are applicable and establish minimum rates, that would give you that bargaining power in dealing with the private sector. Is that right?

Mr. Maclaren: That is true.

The Chairman: All right. Or you could ask Ottawa to provide an exemption for the small trucker whereby he could collectively bargain and, therefore, have some weight in his bargaining. Is that right?

Mr. Maclaren: That is right.

The Chairman: Yes. Now, you mentioned the fisherman. The fisherman is a peculiar case. First of all, I think possibly fishermen are subject to federal regulations, and this amendment that occurs in the present Combines Act has come before us quite a number of years in succession as annual amendments, exempting the fishermen from the question of collective bargaining.

The obvious purpose of this is exactly as Mr. Maclaren has put forward: that is, so that, collectively, they can bargain and get a better price for their fish. What you want is to have the same thing applied to you.

Mr. Maclaren: Exactly, sir. While the fishermen may come under federal jurisdiction directly, of course our dump truck operators do not because only common carrier truckers who have operating authority that is extraprovincial—that is, either interprovincial or international—come directly under federal authority. Certainly, our understanding is that as far as the Combines Act is concerned it has application to the entire scope of business activity in Canada. So that whether the dump truck operators are local does not matter. There is only one province, I might add, which has attempted to introduce rate regulations, rate control, over this part of the trucking industry, and that is Quebec. In the province of Quebec, of course, you have a history going back many years whereby small, local business operations come under what they call the parity committee system. That applies to the local construction industry and local cartage industry, whereby through government legislation they take the standards set in collective bargaining by bigger companies. For instance, in the trucking industry, the Teamsters Union locals bargain with the larger truckers and the rates and the terms and conditions of work that come out of that collective bargaining are then taken, and on a regional basis under this parity committee system are then applied to the small non-unionized companies. That is the tradition in Quebec. I am not sure what the likelihood would be of any other province getting down to trying to regulate, on a province-wide basis, rates *per se* for dump trucker. It would be a pretty complicated arrangement.

The Chairman: Do you have any comment on that, Senator Flynn?

Senator Flynn: The law to which the witness has referred is the extension of the application of collective agreements.

Mr. Maclaren: Yes.

Senator Flynn: The Department of Labour will examine your collective agreement to, as you say, by larger employers and unions, and then it will apply to all the people concerned in a given area. I do not know how you could have this in the field of trucking.

Mr. Maclaren: They have extended it. In trucking it applies in Quebec in two areas. It applies to the small common carrier, the local cartage man in the Montreal region and in the Quebec region, the parity committee system; but they have gone further in Quebec legislation.

Senator Flynn: But I do not think you can find a collective agreement in which the rate of trucking is set.

Mr. Maclaren: Oh, yes.

Senator Flynn: I doubt it.

Mr. Maclaren: We just had a strike, Senator Flynn.

Senator Flynn: Yes, the salaries of the truck operators, agreed, but this is not a relation between employer and employee.

Mr. Maclaren: That is right, but what I have said is that they have extended that parity committee concept in Quebec to the dump truck situation.

Senator Flynn: Yes, you could have a law which could extend this principle to trucking.

Mr. Maclaren: They have done that in Quebec. They have extended this principle to these owner-operators in

Quebec. But the concept certainly is not there in other jurisdictions, and I do not think the chances are very great that it will be.

Senator Flynn: The idea is interesting, but I did not know that it was extended to the trucking operations between the trucker and the client.

Mr. Maclaren: Yes, on a regional basis, on a county basis. And they limit the number of truckers by counties who can get into the dump truck industry.

Senator Desruisseaux: Mr. Chairman, how would interprovincial trucking come into the picture?

Mr. Maclaren: With respect to interprovincial trucking, technically, of course, you go back to the Winner case of 1952, New Brunswick, S.M.T. That case went to the Privy Council where it was decided that interprovincial trucking undertakings came under federal jurisdiction. As a result of that decision Ottawa, which did not have regulatory machinery in place to regulate trucking, passed the Motor Vehicle Transport Act in 1954, I think it was. That legislation says that the provincial regulatory boards will, in fact, act as Ottawa's agent. But that only applies to the larger truckers, not to the dump truck people. These people are primarily intraprovincial or regional, local operators. So the provincial regulatory boards regulate entry into trucking for the common carrier, the intercity trucker, the part of the industry that hauls freight in competition with the railways. For instance, they come under regulatory boards in each province. Some of those boards are rate regulatory; some of those boards regulate entry and rate, and other boards regulate only entry.

There is another problem for the bigger truckers under the Combines Investigation Act which cannot be settled here, for that very reason, in the non-rate regulatory jurisdictions. With the exception of the situation which Mr. Sauvé mentioned of truckers coming across into Ottawa, where Ontario and Quebec have agreed that it is a common, metropolitan area so that they can forget about the border, as it were, the provincial boundary—with that exception, the people we are talking about are primarily local fellows who operate within a province.

Senator Blois: I have had several letters in the last few weeks from the Maritime provinces. The problem there, so far as I can understand it, is not with the dump truck business but seems to be with the truckers going between towns and cities and other places, who are in direct competition with the railways. They feel they are getting a poor show. The government, through the CN, are perhaps bonusing them to a certain extent. They are wondering whether or not the regular licensed truckers, who are carrying in the provinces or between the provinces, can be covered in some way by this or by some act, so as to give them a breaking point with the railways.

Mr. Maclaren: Well, senator, the problem there, if I could just touch on it very quickly, is this business we have been reading and hearing about so much, and on which there has been so much discussion up here, especially, namely, the railway rate freeze. Our interprovincial truckers—or many of them—are caught in that freeze for competitive reasons. The fact is that when that freeze was put on in January or February of 1973 it froze the railway rates at 1972 levels. The railways have been compensated for their loss of revenue in hauling at that rate. Ou people, who compete with them, have not been getting a nickel, so it is a different problem.

Senator Blois: I realize that, but whether we can do anything for them is the question. I have had a number of letters on the subject.

Mr. Maclaren: But the dump trucker in the Maritimes —

Senator Blois: That does not seem to be a problem, as far as I know.

Mr. Maclaren: It is not a big problem, because in the Atlantic provinces, as on the prairies, the majority of the work they do is with provincial governments—highway contracts, and things like that. They do sit down and talk to the provincial governments, and that rate tends to become the only rate, and one assumes it is a reasonably fair rate. It may not be that the dump trucker thinks he gains in all cases, but at least, presumably, it is not a rate as a result of which they are being squeezed to the wall, as perhaps is the case when you are dealing with private enterprise contractors, and things like that.

The Chairman: Are there any other questions?

Mr. R. J. Cowling, Special counsel to the Committee: Mr. Maclaren, if you obtain the amendment to section 4 that you are seeking, would that not put the Ontario truckers in a better position than, say, the Quebec truckers, or the Maritime truckers, where there is at least some regulation?

Mr. Maclaren: The incentive to come here came from the Ontario dump truck haulers. They asked the Canadian Trucking Association to help them out, and, of course, we were very glad to do it; but in the time frame when we were first apprized of this, it was baiscally that the Ontario people now have experienced the same problem — in fact, even worse, perhaps—as in British Columbia, because I understand that there, the independent dump truck operators, when they want to work on a construction site, cannot get on to the site unless they pay a monthly fee of $25 to the Teamsters Union. That is even to get on the site. So we are not asking for an amendment applicable just to Ontario; we are asking that an amendment be introduced for all dump truck operators. The problem is at its maxiumu in Ontario and British Columbia, but it is a national problem. It is less of a problem in those provinces where the amount of industrial and commercial construction is not as great as provincial construction.

The Chairman: Are there any other questions?

Senator Laird: Does that $25 fee that is paid to the Teamsters make the dump truck operators members of that union?

Mr. Maclaren: No, it does not. They are not allowed to become members unless they happen to have been an employee-driver, and have a card.

Senator Laird: You mean they are not allowed to by the union.

Mr. Maclaren: That is the information I received from the British Columbia Trucking Association as of yesterday, namely, that to go on a construction site they must pay the Teamsters Union $25. They must pay them a monthly fee of $25.

The Chairman: I suppose you could call it an entry fee to go on the job. Is that it?

Senator Laird: Yes.

The Chairman: Well, Mr. Maclaren, we know what your problem is. You have explained it. We know the background. What we have to decide is whether there is any basis on which we can propose anything in this bill, C-2, that will give you the relief you want. We know the relief you want. My question is, is there anything we can do? It is not as simple as you suggest, just to put you in the category of the fishermen.

Mr. Sauvé: What we are asking for, Mr. Chairman, is the privilege of meeting the contractors as equals, that is all.

The Chairman: Well, no. You want to marshal your forces so as to have that added weight in discussing rates with the contractors. Because you are individually small operators you say you do not have that weight, as against the contractors, at the present time.

Mr. Maclaren: That is correct, sir.

The Chairman: We understand the situation. We will certainly think about it. Is there anything more you want to add?

Mr. Maclaren: No, not really, Mr. Chairman. All we can do, of course, is ask the Senate and the parliamentary committee to consider our problem. I would hope that it would not be an insurmountable drafting problem.

The Chairman: It will be a problem of exemption.

Mr. Maclaren: Yes, a question of exemption. We simply took a look at the exemption in section 4.(1)(b), and saw that the wording is spelled out there as "Nothing in this act applies", and that would cover section 32, which is the "Thou shalt not collude" section, and then (b):

> contracts, agreements or arrangements between fishermen . . .

The Chairman: We have got to look at the broader field. If this group were successful, you might have a situation where every small operator in every small business might come in here and say, "Give me some freedom under this combines legislation so that I can throw my weight around better in dealing with the people that I am going to bargain with, and have some authority." I suppose the weight that you have by marshalling your forces is that the service is not available unless you reach an agreement on prices and rates.

Mr. Maclaren: Yes. Well, the service is not available, but I have to say this about the trucking industry, and it applies right from the very largest trucking companies—and some of them are $70 million, $80 million revenue companies—right down to the dump trucker, and I know of no other industry that has quite this problem, and that is that if the person who is liable to use your service does not like your rate and does not agree with what you want, he has a right to go out and roll his own wheels. He can buy his own trucks and, in fact, many of the contractors we deal with have their own fleets.

The Chairman: Mr. Maclaren, don't let us kid ourselves. The reason you want this is to give you more power in bargaining.

Mr. Maclaren: No question.

The Chairman: You say there is service available otherwise, but it may not be the kind of service that the contractors would want. However, we have to look at it from the point of view of how many other industries or operations may come in here and put forward the same proposition: "We are small operators. We want the strength that goes with the ability to marshal our forces in bargaining on rates." That is really the problem you have. We will have to look at it but, obviously, at this stage, we cannot say yes or not to it.

Mr. Maclaren: Of course.

Senator Desruisseaux: I was just curious about whether or not there were any representations made to the ministers of transport—either provincial or federal—on these matters of uniformity of rates, and so on.

Mr. Maclaren: For many years in Ontario, the dump truckers, through the Ontario Trucking Association have been trying to get some kind of regulation introduced. Six years ago Ontario went the other way, and they took away regulation of entry. The federal Minister of Transport would have no jurisdiction in this matter. But these people are overwhelmingly local truckers.

The Chairman: There would not appear to be any relief you could expect from the federal authority, other than some change in the impact of the combines legislation, which would permit you to bargain on prices.

Mr. Maclaren: That is correct, sir.

The Chairman: As a collection of truckers.

Mr. Maclaren: That is correct.

The Chairman: Well, we will have a look at it.

Senator Molson: Mr. Chairman, what would happen if the truckers formed a union? They are exempted in this type of thing.

Mr. Maclaren: Senator Molson, the Roach Report which we referred to here, on the investigation of the Ontario dump trucking industry a few years ago, specifically said that we are not eligible. An independent businessman is not eligible to form a union and he cannot get the protection of that.

Senator Molson: Because he owns a truck?

Mr. Maclaren: Because there is not a master-servant relationship.

Senator Molson: But what about when he takes on a contract?

Mr. Maclaren: I think that makes no difference. At least, that is the conclusion reached in the Roach report and that seems to me to be the way it has developed.

The Chairman: The only thing that occurs to me, and of course we try to be helpful, is that if there is an association, for instance, in Ontario that had contracted with all the truckers and if this association were the one and only one that would bargain with the contractor, and if it bargained at fixed rates because it had contracts with all the truckers, then there might be some element there. I just say there might be. However, we will have a good look at it.

Mr. Maclaren: Thank you.

The Chairman: The next submission we have is from the Patent and Trademark Institute of Canada, and we have Mr. R. Barrigar, who is Chairman of the Committee on Bill C-2, and Mr. John Ellis, who is a member of the

Council. Mr. Barrigar, are you going to make the opening statement?

Mr. R. Barrigar, Chairman of Committee on bill C-2, patent and trademark institute of Canada: Mr. Chairman, honourable senators, the paper that is being handed out at the moment is one that we will come to later when we get to section 31.4

I have with me this morning Mr. John Ellis, Past President of the Patent and Trademark Institute of Canada. The current president, Mr. Grove, has been detained in Toronto. He would have like to be here, but that was not possible. I hope that either Mr. Ellis or I will be able to answer any questions you may have.

I should like at the outset to spend a few moments going over a few points raised in our brief, of which you have all received copies. Perhaps I should mention, first of all, that our institute is a voluntary association of patent and trademark agents and other patent and trademark practitioners in Canada. It is not a compulsory organization. If we may take a parellel, the Law Society of Upper Canada is composed of all members of the Bar of Ontario and anyone who wishes to practice law in Ontario must be a member of the Law Society of Upper Canada. However, the Canadian Bar Association in Ontario is a voluntary organization and it is up to the individual practitioner to decide whether or not he wishes to become a member of that association. Similarly, a patent and trademark agent, in order to be entitled to practise, must register before the Canadian Patent and Trademark Office but he need not become a member of this institute. This institute is purely voluntary.

The institute has made no submission to yourselves concerning the overall intent, purpose or policy of the legislation. We are content to abide by the decisions that Parliament may make with respect to the overall policy. Our submissions are confined to a few areas in which we are concerned that there may be some impact upon patent, trademark, copyright, unfair competition, design, laws, practice, procedure and the operation of our profession in implementing that procedure in Canada.

I think we will progress most conveniently by going from the easiest point to the more difficult ones. First of all, in section 29 of the proposed bill the only language that we are concerned about in the original draft says "facilitate the commission of an offence". That language has been deleted by the revisions introduced by the minister on December 4 in the House of Commons. If you gentlemen are prepared to accept those amendments, then we have no further problem with that particular clause.

The Chairman: We have copies of those amendments, and they are also before the committee of the House of Commons. Of course, we cannot speak for that committee, but what you are telling us is that insofar as your association is concerned you have at this time, having regard to those amendments, no objection to section 29.

Mr. Barrigar: Quite so.

The Chairman: All right, let us go on to the next one.

Mr. Barrigar: Let me turn rather than to the next one in sequence in the brief to section 38 dealing with resale price maintenance. We deal with this on page 5 of our brief. Section 38.(1)(a) refers to certain offences that can be committed by a person owning a patent, trademark, copyright or industrial design in Canada. The clause provides that no person may by agreement, et cetera "attempt to influence upward" the price at which any other person supplies or offers to supply or advertises a product within Canada. The institute is somewhat concerned about the breadth of the language in the phrase "attempt to influence upward", bearing in mind that ordinarily when a patent, trademark, copyright or industrial design is licensed, the licensor extracts a royalty. When that royalty is extracted, it follows necessarily that the price at which the article or service eventually becomes available to the public must rise. Now, is the normal extraction of a royalty by a licensor an attempt to influence upward the price? That is the concern of the institute. We notice that in the December 4 amendments, no amendment had been made with respect to this particular provision, and we have had no assurances from the minister that that interpretation will not be placed on the legislation. If we were to have such assurances, I believe that our worries would disappear.

Senator Flynn: You would be satisfied with assurances only that this would not be the interpretation?

Mr. Barrigar: Well, this would go a long way because, after all, the minister has among his advisers legal counsel who can and presumably will reflect upon the proper interpretation to be given to this language.

Senator Molson: Yes, but it can change very quickly.

Mr. Barrigar: This is always a possibility. In any event, this is what causes the institute some concern and we would like to see, if possible, some alternative language chosen which would not take into the ambit of the legislation the normal extraction of a royalty by a licensor.

The Chairman: You are making reference to section 38?

Mr. Barrigar: Yes.

The Chairman: What are the particular words that you say hurt you?

Mr. Barrigar: "... attempt to influence upward", in section 38(1)(a).

Mr. Cowling: Would the same argument not hold true for wholesale prices, Mr. Barrigar? If that is the case, really everything is included in the gist of the complaint you make.

Mr. Barrigar: The section is specifically directed to patents, trademarks, copyright and industrial designs, so one must presume that Parliament is concerned with respect to an abuse involving that type of proprietary right. The royalty, of course, is the normal incident of the licensing of that proprietary rigth and, therefore, the concern we have may be particularized somewhat.

Senator Cook: Charging a royalty is not an abuse, is it?

Mr. Barrigar: Exactly; that is the point, it should not be introduced, yet the words "... attempt to influence upward", we are concerned, might in a broad sense catch the charging of royalties.

The Chairman: Please explain this to me, Mr. Barrigar: If you have a trademark and the manufacturer and supplier want to use that trademark in connection with the marketing of the product, usually the method of proceeding is to enter into an agreement. There may be a licensing and there is a payment for that?

Mr. Barrigar: Yes.

The Chairman: Call it royalty or anything else. Now, how do you correlate that payment of royalty to the price at which the supplier may offer the product? If in your royalty, or licensing agreement, you stipulate a minimum price, then, of course, you are bringing yourself right under section 38(1), are you not?

Mr. Barrigar: Quite so.

The Chairman: Is it a practice to stipulate the price?

Mr. Barrigar: It is certainly not a practice that the institute supports, if it does exist.

The Chairman: The point is, how do you come under the section if you do not stipulate a price? Just because a royalty is charged for the use of the trademark?

Mr. Barrigar: This is what we are concerned about: how broadly does one properly construe the language "attempt to influence upward"?

The Chairman: Surely, if you make an agreement under which you license someone to apply that trademark, for instance, to a product and the fee is based on either a flat rate in dollars, or it is so much per article that is sold, where is there any attempt to increase upwards or affect downwards the price of the product?

Mr. Barrigar: The point is that, given a free market, one may buy what appear to be essentially equivalent products, one of which is sold in association with a trademark which is promoted and, presumably, the quality of that particular article is vouched for by the owner of the trademark. One can buy a substantially equivalent article which does not bear the trademark and for which there is no vouching for quality, yet the articles may be roughly equivalent. The first article is sold through a licensing arrangement at a price which involves a fee paid by the retailer to the trademark owner for the use of the trademark.

The Chairman: Does the licensing agreement measure how the royalty is calculated by relation to a price to be charged?

Mr. Barrigar: Not normally. It may be as a percentage of a selling price, but not as a fixed price set by the licensing agreement.

The Chairman: But surely there is no regulation of the selling price if that is as far as the agreement goes?

Mr. Barrigar: No, but we have in the market an unbranded article—

The Chairman: So what?

Mr. Barrigar: —which is selling at 60 cents and one bearing the trademark which is selling at 75 cents, and we have the payment in the article bearing the trademark of a royalty by the person selling it to the trademark owner.

Senator Cook: But, presumably, the trademark owner does not care at what price the retailer sells it, as long as he receives his fee?

Mr. Barrigar: No, he does not, but he has in the market place influenced upward the price of that article to the consumer.

Senator Flynn: Yes, but not "attempted"; that is the result of the action he took, but he did not do it for that purpose.

Mr. Barrigar: Gentlemen, I think you can see the difficulty I have. If you all agree that the difficulty is not caused by the legislation, that is up to yourselves. I am merely expressing the concern that we have that the legislation could be construed to apply to such a situation.

The Chairman: I think you are looking for ghosts in the closet that may not be there.

Mr. Barrigar: I hope that is right, sir.

Senator Walker: Anyway, you are getting free information. The people here would be worth about $10,000. On the other hand, you may be getting what you are paying for also.

The Chairman: You know, Mr. Barrigar, we agree that a trademark may have value when it is attached to a product and, therefore, it may enhance the value of that product in the eyes of the public or of those who are going to buy it. Now, you translate that into a royalty to the man who owns the trademark.

Mr. Barrigar: Yes.

The Chairman: And he says, "I will license you to use that trademark if you pay a royalty of so much", which may be on the basis of the selling price. That is not stipulated; the agreement speaks simply of "the selling price", or it may be on the volume of sales.

Mr. Barrigar: Yes.

The Chairman: Then are you suggesting that because the trademark enters into that deal the supplier is making to use it on a product, that that is attempting to enhance the price that the supplier may charge for the product?

Mr. Barrigar: That is our concern.

The Chairman: The only way it can do that is, if the royalty is too much the seller of the product would have a cost which he could not meet in selling the article, so he would be silly to make a deal for the trademark.

Mr. Barrigar: Quite so.

The Chairman: Then, frankly, by what stretch of the imagination, in those circumstances, can any arrangement or licensing of a trademark and charging of a royalty, in which licensing agreement no bargain is made as to the price to be charged by the seller of the product, attempt to influence upward or affect downward the price of the product? It is completely lost on me; I cannot follow it.

Mr. Barrigar: The point is simply that the equivalent product and, perhaps, the identical product, may be available, not bearing the trademark, in the marketplace at a lower price.

Senator Flynn: And the price of that latter article would be increased by the action with respect to the first.

Mr. Barrigar: Yes. The price of the article increases once it bears the trademark.

The Chairman: The supplier of a product has a cost which is at least the amount of the royalty. Therefore he has to get more for his product or he has to increase his volume to be able to obtain a lower price. But that is his problem. Where does the trademark owner come into that?

Mr. Barrigar: He is simply extracting the royalty, and we consider that normal business practice.

The Chairman: We know what your point is and you know what our present views are. What is the next point?

Senator Laird: If Mr. Barrigar gets into court over this, let him take with him the minutes of this meeting to show to the judge, and he is home free!

Mr. Barrigar: Let me turn now to section 32(4), which is dealt with at the bottom of page 5 of our brief. This point essentially concerns an item of self-interest to the Patent and Trademark Institute. Nevertheless we submit that this is an enlightened self-interest and that our self-interest is in no way detrimental to the Canadian public on this particular item.

For many years the Patent and Trademark Institute has adopted a tariff of fees which are set, among others, for foreign associates who obtain Canadian patents and trademarks through the services offered by our profession.

The Chairman: You refer to Colonel Sanders Kentucky Fried Chicken. Is this only an illustration?

Mr. Barrigar: That is an illustration.

The Chairman: You have no interest in promoting?

Mr. Barrigar: No.

The Chairman: The reason I ask is because I happen to be a director of a company that markets Colonel Sanders Kentucky Fried Chicken under a franchise arrangement. I do not want to get in the middle of any promotion that you are making.

Mr. Barrigar: No. I will deal with that part of the discussion, if I may, when we deal with section 31.4.

Senator Walker: Do you want another opinion? Are you asking that there should be an amendment?

Mr. Barrigar: We are not here to give opinions. We are asking that there be an amendment. The amendment has been proposed.

Senator Walker: Then let us get to the point. Let us hear what your problem is.

The Chairman: Tell us what the amendment is and why.

Mr. Barrigar: I think it would be helpful if you had a little background on the problem. The situation is that under the Canadian patent legislation one must retain a Canadian patent agent when one is applying from abroad for a Canadian patent right. This leads to a wide variety of services that are delivered by the Canadian patent profession to the benfit of foreign applicants in Canada. The Patent and Trademark Institute tariff for many years has dealt with the schedule of fees in relation to foreign associates who are applying for patents in Canada. You will recall—

Senator Everett: Are we still on section 31.4?

Mr. Barrigar: We are dealing with section 32(4).

Senator Everett: What happened to section 31.4?

Mr. Barrigar: We will revert to section 31 last.

Senator Everett: We are no longer with fried chicken?

Mr. Barrigar: No. The chairman got started on fried chicken. I would like to revert to that matter later.

Under the existing combines legislation there is an exemption for articles exported from Canada. Under Bill C-2 we have the additional policy implementation that the act will now extend to services as well as to articles. So we have two policies combined—exemption of exports from the legislation, and covering services within the legislation. How do you talk about the export of a service? This is really our concern. This profession, among others in Canada, is offering services in large measure for the benefit of foreign applicants.

The Chairman: Is that exactly the way you should state it? You are the sort of—I was almost going to say governing body. But the services which are rendered are rendered by the patent attorneys.

Mr. Barrigar: Yes.

The Chairman: And I take it that your association does not practise or engage in the practice of being patent attorneys.

Mr. Barrigar: No, but our members do.

The Chairman: Your members do, but they do not do so because they are members of the association but because—

Mr. Barrigar: They are registered patent and trademark agents. I would emphasize that we are a voluntary association.

The Chairman: What are you concerned about, so far as your association is concerned?

Mr. Barrigar: So far as our association is concerned, we want to maintain the existing tariff, vis-à-vis foreign applicants for patents in Canada who retain our services. This could come within the ambit of the combines legislation if the legislation is extended to cover services.

The Chairman: These rates are rates which your association set and which the patent attorney who is performing the service is required to charge. Is that correct—is required to charge?

Mr. Barrigar: Is required to charge if he belongs to the association and accepts the tariff as compulsory.

The Chairman: And your association has no provincial regulation?

Mr. Barrigar: Quite so.

The Chairman: And it is not governed by a provincial statute?

Mr. Barrigar: That is correct. It would appear that the intention of the legislation would be to exempt from the legislation the services that are performed by people in Canada for the benefit of foreigners. In other words, the benefit of the services is exported. However, section 32(4), in our respectful submission, is not happily worded to cover the exemption in the case of services.

We have proposed, on page 6 of our brief, that the section be reworded in accordance with the proposal which can be seen at approximately mid-page.

Mr. Cowling: Mr. Barrigar, may I interrupt you for a moment? In the third line of your proposed amendment to subsection (4) you use the word "commit". I wondered if

that was your intention? The word used in the act is "convict".

Mr. Barrigar: I am sorry, it is a typographical error.

Senator Walker: It is an important one.

Mr. Barrigar: Yes, it is. I apologize. You will note in the brief that an alternative solution was adopted in a parallel British provision, but the institute considers that the wording we have proposed is superior. That is all I have to say about that.

The Chairman: Why is it necessary for your association to settle a schedule of fees which the patent attorneys may charge for their services? What is the sanction—if they charge more or less?

Mr. John Ellis, Council Member, Patent and Trademark Institute of Canada: There is no sanction for charging more. It is a minimum tariff, sir.

Mr. Cowling: Is there any sanction for charging less?

Mr. Ellis: Yes, there is a sanction for charging less. It is a minimum tariff, and one is supposed to abide by that tariff if one is a member of the institute. If not, he is free to operate outside, but he is still registered by the Patent Office.

Mr. Cowling: But he may be expelled from the association?

Mr. Ellis: Yes. There is a variation in the kinds of disciplines. There are reprimands and what-have-you. I am not aware of a case in which anyone has ever been expelled for not charging the tariff.

Senator Desruisseaux: What would be the individual's situation if he was expelled?

Mr. Barrigar: If the person were expelled he would simply lose the benefits of the association.

Mr. Ellis: He still qualifies to practise before the Trademarks Office and the Patent Office.

The Chairman: A member of the association, I take it, pays a fee to be a member?

Mr. Barrigar: Yes.

The Chairman: And for that fee he is entitled to the services of the association and whatever benefits they are able to attract in the way of business?

Mr. Barrigar: That is true.

The Chairman: And you have rate regulations and minimum rates intended to be a benefit to the patent attorney?

Mr. Barrigar: Quite so.

The Chairman: In what way do you think you are caught under the proposed section 32?

Mr. Barrigar: The point is that the legislation as a whole, if passed, will apply to services.

The Chairman: And that is where you are caught?

Mr. Barrigar: We are caught by that change in the legislation.

Senator Flynn: It would be a coalition to set prices.

Mr. Barrigar: Yes, that is essentially correct. It is a voluntary association.

Senator Flynn: I am not speaking of the association. I am speaking of your members banding together to set minimum fees. Under the legislation, that would be a coalition to set prices for services.

Mr. Barrigar: That is right. We are concerned only with the fees that we set vis-à-vis foreign applicants.

Senator Flynn: But lawyers would be caught in the same way if it were not for the exemption under the provincial regulations.

Mr. Barrigar: That is right.

Senator Molson: I did not think lawyers ever got caught!

Senator Flynn: Repeat that pearl of wisdom.

Senator Cook: If the combination is a bad thing when applied to Canadian applicants, what makes it a good thing when applied to foreign applicants? What is the rationale?

Mr. Barrigar: The rationale, presumably, is that when it comes to Canadian businesses attracting foreign exchange Canadians might just as well get the benefit of whatever market power they can wield by acting in unison, vis-à-vis the people who are supplying the foreign exchange.

Mr. Cowling: That has been recognized in so far as articles are concerned. I think Mr. Barrigar's point is that he wants to be sure it is recognized for patent services provided to people outside the country.

Mr. Barrigar: That is right.

Senator Cook: Are we interested in the practising lawyers at this point or foreign exchange?

Mr. Barrigar: The two are correlated.

The Chairman: It may be that we are only interested in the question that if the act does not apply to the export of products, then why should it apply to the services that are charged in connection with the export of such products?

Mr. Barrigar: That is essentially the point.

Mr. Cowling: The intent would seem to be that it should not apply. "Articles" was there first and the drafters of the legislation followed a simplified formula for extending it to services by simply substituting the word "products" for "articles" throughout, and "products" is defined as both articles and services. That procedure leaves anomalies of drafting in several places in the legislation.

Mr. Barrigar: Precisely.

Mr. Cowling: Amendments to section 138 of the Bank Act covered in Bill C-2 are dealt with much more clearly.

The Chairman: The word "product" is defined in this bill as including articles and services. The proposed section 32(4) reads:

> (4) Subject to subsection (5), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of *products* from Canada.

If the definition of a product includes the article and the service, if there is any doubt in the context I read that product has a lesser meaning, then it should be clarified.

Mr. Barrigar: That is essentially our point. Thank you for expressing it so clearly, Mr. Chairman.

We turn now to the proposed section 31(4), which is the last point I want to deal with. This is dealt with on page 1 of the brief. Perhaps we could choose an example, Mr. Chairman, other than one in which you have an interest.

The Chairman: I do not have an interest in the example. I might have in the sample.

Mr. Barrigar: Let us suppose that a businessman wishes to involve himself in an enterprise for the installation and sale of automotive products and he considers, let us say, mufflers. Let us further suppose that there is a chain of franchise muffler sales and installation vending locations which goes by the chain trade name of Maxwell Mufflers. Our businessman approaches the Maxwell Muffler people and says' "I would like to use your trade name and obtain a franchise from you. What is the deal?" And the Maxwell Muffler people then tell him that he will have to carry only their mufflers because they are concerned about the quality of the muffler sold. Also, he will have to carry their shock absorbers, to which he replies that he does not really want to be involved in shock absorbers but only mufflers for the time being. The Maxwell people then tell him that in order to get a franchise he has to carry their shock absorbers because they provide a complete muffler ans shock absorber service at all their installation locations. Let us suppose that our businessman then asks to carry Achilles brake linings, which is a new chain starting up, and the Maxwell people refuse because they have not vouched for the quality of those brake linings; in other words, he would be confined to Maxwell mufflers and Maxwell shock absorbers. So, the businessman gets into that situation and signs a licensing agreement with the owner of the Maxwell Muffler trade name and trademark. Note, he did not have to get into this deal at all. He could have purchased mufflers from an independent supplier and sold them under his own business name. However, he chose, as a member of the free entreprise community, to become involved in a particular franchise operation. The Maxwell Muffler people, for their part, were concerned about maintaining their reputation for quality, not only in his particular operation, but also in the entire national chain which they had set up. For that reason they were concerned that certain products not be sold by him and they were concerned that he carry the full line of the products they supplied so as to maintain the reputation they had acquired throughout their national chain.

The Chairman: If you must deal with the supplier and give him a product that he wants but he does not want to take other products of yours, there may be the economic element involved in that, because if the manufacture of that product is not a specialist and is manufacturing only that product, there is the larger area you have to look at, the economic position, and the need to market all the lines of products he carries, or the cost, of course, would have to be much higher if he were permitted to pick out certain items. This raises the question that we have had before on exclusive dealing, market restrictions and tied selling.

Mr. Barrigar: Quite so.

The Chairman: It comes into the three of them.

Mr. Barrigar: That is right.

The Chairman: It arises in connection with the franchising of trademarks. Also, is there not involved the matter of allocation of territory?

Mr. Barrigar: There is, although that is not so usual. A trademark owner or trade name owner may restrict the number of outlets that he franchises within a particular geographical area, but he does not dictate to the person operating in that area how far he may sell. I think that is the concern the minister had when he was talking about market restrictions.

The Chairman: We have got the same question coming up next week when we are going to have a submission from the Coca-Cola people.

Senator Everett: I wonder if we could allow Mr. Barrigar to continue with his scenario. I was rather interested in how it worked out in connection with the proposed act.

Mr. Barrigar: In connection with the proposed act, let us suppose the Achilles Brake Linings asks the commission for an order with respect to the Maxwell Muffler operation, to prohibit a particular contractual arrangement with the franchisees of Maxwell Muffler that would preclude the dealers, individual operators, from carrying Achilles brake linings. One of the offences the commission can examine and make an order in respect of is set forth in section 31.4(2), bridging pages 18 and 19 of my copy of Bill C-2. Achilles claims that this particular activity is impeding its entry into the market; it is impeding its introduction of product into the market.

Senator Everett: Does paragraph (a) also apply? What entity does the word "firm" in paragraph (a) apply to?

Mr. Barrigar: In the case of Achilles, they would claim that it applies to them.

Senator Everett: Would it apply equally to the franchisee?

Mr. Barrigar: It might apply equally to the franchisee with respect to its entry into the market for brake linings.

Senator Everett: What sort of an allegation would the franchisee propose to the commission? Let us go back to your example. Suppose it wanted to handle another line of mufflers. You said it was a muffler franchise handling Maxwell Mufflers under a franchise for Maxwell.

Mr. Barrigar: Suppose it did. Then Maxwell would say, "No, we won't permit that, because if you handle another line of mufflers people seeing the Maxwell Muffler sign out there will feel we vouch for it, and we simply haven't vouched for it."

Senator Everett: Could you follow through what would happen? Let us say Maxwell has said no to the handling of the other line of mufflers, or, in the case of your chickens, the other brand of chickens.

Mr. Barrigar: The same subsection to which I am referring empowers the commission to make an order prohibiting these particular arrangements. That presumably is the outcome that could apply to Maxwell Mufflers.

Senator Everett: Where does it do that? Suppose the franchisee wants to handle another line of mufflers, perhaps at the same time that it handles the Maxwell muffler. All I want you to describe for me is how subsection (2)

operates to prevent Maxwell from refusing to supply, which I assume is what Maxwell would do.

Mr. Barrigar: The kind of activity to which you refer is a species of tied selling as defined by clause 31.4(1)(a).

Senator Everett: Would it not be exclusive dealing?

Mr. Barrigar: It could be exclusive dealing if we are talking about the entire product line. If you are talking about a selected set of products, such as Achilles brake linings and mufflers, or, using the other example I gave, mufflers and shock absorbers, then we are talking about tied selling in clause 31.4(1)(a).

Senator Everett: Let us revert to the chicken example. A person wants to buy his chicken other than from the Kentucky Fried Chicken people. Can you tell me what would happen in that case?

Mr. Barrigar: As I understand the purport of the clause, the commission, after an appropriate hearing—

Senator Everett: Go back beyond that. I would just like to hear how it would build up. Suppose the Kentucky Fried Chicken franchise holder decides to go out and buy his own chickens. I am not certain that they require them to buy the chickens.

Mr. Barrigar: I do not know either. I really have no idea.

Senator Everett: I am using your case where you allege that is so. Suppose he wants to buy from somebody else—

Mr. Barrigar: Excuse me, senator. I would not like to take the position that I am speaking for the actual franchising operation of Colonel Sanders. I have not seen their contracts; I do not know anything about them. I am assuming this as a hypothetical working example, which in my submission is representative of the kind of example one can encounter in a franchising arrangement. Let us take this example. Your point is, given the restriction on the individual operator to purchase chickens only from a central supplier—let us say the trade mark owner or from his nominee—what happens as a matter of practice in arriving at a remedy?

Senator Everett: Let me read from your brief:

> It would not be surprising if the "Colonel Sanders" franchisor required the franchisee to purchase chicken for resale at "Colonel Sanders" outlets only from approved sources. If the franchisee is permitted to use unfettered discretion concerning sources of supply, the franchisee may choose fowl of lower quality than the franchisor wishes to tolerate, with a consequent reduction in public esteem for the trade mark, which is the franchisor's most valuable asset. Therefore, it is commonplace in trade mark franchising arrangements that the franchisor has the right to approve product supply sources for at least those essential supplies directly used in providing the article or service ultimately sold to the public by the local franchisee.

I am asking you to carry that example through, supposing that happens.

Mr. Barrigar: Then one of two persons could lodge a complaint with the commission, the individual franchisee or someone who is trying to market chickens or fowl. The commission, in an appropriate case, if it so finds can, pursuant to clause 31.4(2), make an order prohibiting this exclusive dealing or tied selling.

The Chairman: Perhaps I might interrupt for a moment. We had a phase of this question earlier in our hearings. Senator Buckwold raised it. When they talk about product it is "a" product. How do you interpret that? Is it a generic term? If it happens to be cameras, instead of cars or mufflers, supposing the manufacturer of the Kodak camera imposes these restrictions?

Senator Everett: I think I was at that hearing, Mr. Chairman, and what we were referring to then was the "refusal to supply" section, if I recall correctly.

The Chairman: If a supplier goes to the director and the director makes a reference to the commission and the supplier says, "I have been trying to buy Kodak cameras and they won't sell them to me or they impose these terms," is the language, the word "product" as used here, referring only to cameras, or only to Kodak cameras, or is it a generic term?

Mr. Barrigar: That is the point raised in the brief.

The Chairman: It was raised by previous persons.

Mr. Cowling: There is an amendment proposed for that.

The Chairman: Perhaps I should read it. Senator Everett, there was an amendment proposed by the minister which might deal with the situation. It says:

> 31.2 (2) For the purposes of this section an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless he has access to the article so differentiated.

This amendment does go a distance. I do not say it goes all the way.

Mr. Barrigar: It would not apply to this particular section at all.

Senator Everett: It applies to section 31.2. What you are dealing with is section 31.4.

Mr. Barrigar: This is section 31.4, so that amendment would not cover this particular situation.

The Chairman: I do not know why you say that. Subsection (4) says that the commission "shall not make an order under this section where, in its opinion . . ."

Mr. Barrigar: Yes, Mr. Chairman but, as I understand it, the amendment you have just read applies only within the confines of section 31.2.

Senator Everett: It specifically mentions section 31.2. This is 31.4.

The Chairman: Section 31.4 makes 31.2 and all the other provisions of 31.2 inapplicable if you can establish what is set out in subsection (4).

Senator Everett: It all depends on what is meant by "section". It comes in after 31.2 and it is supposed to be 31.2(2) and it says "For the purposes of this section . . ." If "this section" means to include the previous 31.2, then it is confined to that.

Mr. Barrigar: As I understand the scheme, section 31.2 is separate from 31.4.

Senator Everett: It certainly looks like it, in the yellow book.

The Chairman: Well, there is a difference in viewpoint, as far as I am concerned.

Mr. Barrigar: In any event, an amendment along the lines of the one that you have just read, in respect of "product" is one of two solutions which the institute has envisaged to the general problem of franchise. A solution of a different sort is the one that was typewritten on the hand-out that you received this morning. That is one of my own drafting. When I was going through this brief last night, it occurred to me that perhaps some wording of the sort that I had in mind, at least might be helpful to yourselves. I came up with this wording. It does not have the authority or sanction of the institute; it is simply my personal suggestion.

The Chairman: We have had suggestions in other briefs along the lines of what you propose here. In subsection (4) they do say that the commission cannot make an order "under this section" and, "under this section" is broadly more than just subsection (4), because there is no provision for making an order under subsection (4). It is when they cannot make an order that subsection (4) deals with it.

Senator Everett: But you are dealing with subsection (4) of section 31.4. I think what the witness is trying to say is that 31.2 is a separate section and the amendment proposed by the minister refers only to 31.2. He is asking for an amendment to section 31.4.

Mr. Barrigar: The amendment which has just been read, as I understand it, applies not to section 31.4. but just to 31.2.

Mr. Cowling: I think that is probably correct, but it points up the difference, because if it applies in one place for one section for one purpose, then it affects the interpretation of the word in other sections where a similar amendment is not made.

Mr. Barrigar: That is right. In other words, it emphasizes the fact that we have a problem in 31.4.

It is the submission of the institute that the kind of franchise and relationship that I have described are ordinarily indulged in by trademark owners to safeguard the good will and reputation associated with the trademark. It is our respectful submission that, where the primary objective of including the kinds of limitations that we have been discussing is to exercise quality control over the use of that trademark by or on behalf of the trademark owner, such provisions in trademark licenses should not be made the subject of a prohibitory order by the commission. That is essentially our submission.

Senator Laird: In other words, you should not be put in jeopardy at all?

Mr. Barrigar: Quite so.

Senator Everett: What would the effect of it be? It seems that if you put that in, section 31.4 would be totally ineffective; it would do nothing, and you might as well take it right out.

Mr. Barrigar: We are dealing only with the trademark situation. For example, it would still preclude a patentee from forcing you to buy an entire train when he has a patent only on the locomotive.

Senator Flynn: I do not know what you mean when you say that the purpose would be to exercise control over the quality of the production.

Mr. Barrigar: Yes.

Senator Flynn: I do not think that is what you have in mind at all. I am quite sure it is control over the type of production, not the quality.

Mr. Barrigar: In my respectful submission, it is the quality.

Senator Flynn: I cannot really see that you would do that for the quality of the product, for your own production. It would be very subjective. If you take the Maxwell Muffler people, they would do that in order to make sure that they would sell only their own mufflers, but they would not care a bit about the quality.

Mr. Barrigar: In my respectful submission, it is a primary function of trademark to constitute a voucher for the quality of the product.

Senator Flynn: Well, qualitatively, generally speaking, but really what you have in mind is your own product. You yourself consider it to be better than other products, but that may not be so, so far as the consumer is concerned or the public at large.

Mr. Ellis: But the trademark owners are greatly concerned, since the trademark covers services as well. We want to include in this the concept of control of the type of service rendered as well as the product.

Senator Cook: What you are interested in controlling is the protection of the trademark.

Senator Flynn: Yes, it is not the quality.

The Chairman: Senator Flynn, what my friend Mr. Barrigar is trying to suggest is that if there is a trademark on the muffler, or camera, or whatever it is, and then the owner of that, as a condition of agreeing to sell to a supplier, insists that the supplier not carry any other line, then the problem is to try to expand the value of the trademark to say that because you carry another line which does not have that trademark then, if I permit that to go on, I am damaging my trademark. This is something I have difficulty in following.

Mr. Barrigar: Mr. Chairman, let us distinguish between sales of articles bearing a trademark and licenses under a trademark. It is one thing for Kodak to say, "If I send you my Kodak cameras, you are not to handle anything else." We have no quarrel with legislation that would prohibit that on the part of Kodak. What we are saying is that if Kodak sets up a franchising operation, a licensing operation, whereby, under the trademark "Kodak", not only are cameras sold but services are rendered, film developing and what-have-you, then Kodak must be in a position to safeguard the reputation of the trademark "Kodak" exercised by the licensee. Therefore, Kodak may properly insist that the chemicals used in developing be of an appropriate standard and what-have-you. It is this that we are concerned about. We are not concerned about an outright sale by the owner of a trademarked product to someone selling the product. We are concerned about a franchise whereby there is a licence granted for the person to use that trade-

mark. It is not merely a licence to sell the product. You don't need a licence to sell trademarked products, but if you are going to use that trademark so that the public associates the mark with your own particular entreprise and the public also associates that mark with the trademark owner, a national owner, let us say, then the national owner has every right, in our submission, to be concerned about the quality of the goods and services offered by the licensee. So there is a distinction to be made between licensing and sale.

Senator Flynn: He is concerned with the quality of his own production.

Mr. Barrigar: Yes.

Senator Molson: Would your proposed amendment not give greater weight if you said, "For the sole purpose of exercise and control", instead of, "For the primary purpose"? There is quite a difference in the breadth of that concept.

Mr. Barrigar: In my respectful submission, there is practically no situation under the sun which is solely associated with quality control. It must have some other effects.

Senator Flynn: I think the word "authenticity" would be better than "quality". That is what you have in mind.

Mr. Cowling: Are you protected under the Trade Marks Act in that connection as far as quality control is concerned? Would those provisions override this act?

Mr. Barrigar: Not as we understand it. There are provisions in the Trade Marks Act for the recordal of licensees as registered users of the mark, and the Registrar of Trade Marks exacts as part of the standard licensing arrangement a provision that the owner must have the right to exercise quality control over the licensee. But there are some licensing situations which do not require recordal of licensees as registered users, and, furthermore, the working paper on the revision of trademark law, which is now before the review committee working on revised trademark legislation, proposes that the registered user recordals be eliminated entirely.

Senator Everett: In your proposed section 31.4(6), why would you not take out the words "market restriction", which do not seem to me to have any relevancy? What you are concerned about is exclusive dealing and tied selling.

Mr. Barrigar: Essentially.

Senator Everett: It seems to me to weaken your amendment by throwing in the words "market restriction".

Mr. Barrigar: I cannot think, off hand, of a situation where market restriction would be essential to the exercise of quality control. That does not mean there is not such a situation.

Senator Everett: But you are certainly weakening your amendment if you include those words. You are broadening out the net. Just as a matter of advice I would suggest that you take the words "market restriction" out, if you are proposing that amendment.

Mr. Barrigar: As I say, this is something I concocted last night. I daresay it could be improved.

The Chairman: Senator Everett, the kind of market restriction they are talking about in the bill is simply the allocation of geographical areas. Presumably, that is for the benefit of the person who imposes such a restriction.

Senator Everett: But using Mr. Barrigar's example of mufflers or of Kentucky Fried Chicken, market restriction would not apply.

Mr. Barrigar: Market restriction would not apply in those cases, and I am hard pressed to think of a case in which it legitimately could arise. So I think your point is well taken.

Senator Everett: Mr. Cowling, section 31.4(2) has in it the words, "impeding entry into or expansion of a firm in the market". I assume that does not mean the franchise or the user of the patent. This would mean somebody who was a supplier, would it not? It seems to me that the dealer—if that is the correct word—would move under section 31.4(2) for refusal to supply.

Mr. Cowling: Yes. In other words, this refers to a new competitor of the supplier who was trying to get into the field but was having difficulty because the other supplier had these arrangements.

Senator Everett: Yes, he has it all locked up. I just wondered if a note should be made in the legislation to make it clear that that subsection only applies in the case of somebody who is trying to enter the field as a supplier.

Mr. Cowling: Before we leave that point, senator, I think that we should not also that the minister has proposed an amendment to it.

Mr. Barrigar: I believe the amendment is contained at the bottom of page 18 of the bill:

> . . . is likely to lessen competition substantially by . . .

That wording was introduced, and then (a) and (b) follow. There is a change in the verb from "impede" to "impeding".

Senator Everett: Where are you reading from?

Mr. Barrigar: I am at the top of page 19. Perhaps I do not have the same copy of Bill C-2 as you have before you.

Mr. Cowling: I think Mr. Barrigar is reading from the proposed amendments, which were proposed by the minister in December.

Senator Everett: And that refers to section 31.4, subsection (2).

Mr. Cowling: That is right.

Senator Everett: I still make my point that in respect of the impeding entry and/or expansion of a firm, after the words "substantially lessen competition," there should be a clarification to the effect that the firm there is a supplier, or the holder of a trademark or patent.

Mr. Cowling: Mr. Chairman, there is, perhaps, some support that has been lent to Mr. Barrigar's argument by another amendment which was proposed by the minister, again to section 31.2; so it does not apply to the section he is talking about there. It has been suggested that the expression "trade terms" be expanded a little to say that "trade terms" means, "in respect of payments, units of purchase and reasonable technical and servicing requirements". Some of the witnesses who have appeared before the committee have said that that still does not go far

enough; but I think it is along the lines you have been thinking of for the section that you are talking about.

Mr. Barrigar: Yes.

Senator Molson: Would you read those words again, please?

Mr. Cowling: Yes.

Senator Molson: I have the paragraph. Just the words.

Mr. Cowling: It would be an amendment to sub-section (3) of section 31.2, and it would read as follows:

> (3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Senator Molson: Thank you.

Senator Everett: But, again, that applies to 31.2, so it is required in 31.4.

Mr. Cowling: Right.

The Chairman: Any other questions? Have you anything to add, Mr. Barrigar?

Mr. Barrigar: No, Mr. Chairman, thank you very much.

The Chairman: This concludes our work for today.

Next week we have a number of hearings in the morning on the competition bill. I expect that if the excise tax bill is referred to our committee we will deal with it as well, and in the afternoon we would have two submissions to deal with under the Income Tax Act.

As you will recall, in early December we heard the Canadian Chamber of Commerce and also the Canadian Petroleum Association. They very graphically presented the position of the oil industry, and the effect on its earnings, and the resulting lack of money for exploration, by reason of the mineral resources proposal in the income tax amendments not to permit the deduction of royalties payable as an expense. Within a few days after that Alberta and several other provinces made changes in the application of royalties for the purpose of making money available for exploration purposes if applied to those purposes. As a result I said to those two people, "The material you have given us is now, for any purpose we might have, out of date," and I asked them if they would bring their material up to date by reflecting the present state of affairs, and what the oil industry is entitled to get and to have available for exploration through the provinces. This is the purpose of their appearing.

Senator Cook: When is this to be?

The Chairman: Next Wednesday.

Senator Flynn: You speak of the effects of concessions made by the provinces, not by the federal government.

The Chairman: Well, of course, we are studying the income tax bill.

Senator Flynn: I know.

The Chairman: We just study it from the point of view of what it says.

Senator Flynn: Rather than what it means.

The Chairman: Yes. Now, the other thing is that the Canada business corporation bill has been referred to this committee, and I had thought that the committee might sit next Thursday morning to start its consideration of that bill. So work is piling up. We have to get it out of the way.

Senator Flynn: The problem of adjusting the sittings of the various committees is involved. I do not know how we will be able to manage with all these committees. I understand the Leader of the Government is thinking about some kind of procedure whereby we could adjust the sittings of the various committees in order not to have more than two or, at the most, three, sitting at the same time.

The Chairman: I should add that your chairman and staff are busy analyzing the submissions that have been made on the competititon bill, and I would say we are well into the business of developing the substance to support headings on matters on which we propose to comment in relation to the bill. The moment that is completed we will have a meeting of the committee and a discussion as to which way we will go on some of these items.

Senator Flynn: Do you expect the bill to come from the house before we produce a report, or do you suggest that we might produce a report in order to give some suggestions to the other place?

The Chairman: Well, I think I told this committee, and if I did not, I will tell them now, that in a meeting with the minister, that took place at his request, he suggested that it would be of advantage to him—and I am not using his exact words—if we were proposing any changes other than the ones that appear in the submissions, and a lot of which they have picked up in the amendments which the minister has already presented, to have those in his hands before the committee in the other place concludes its hearings. I can understand that, because it is not as difficult to deal with these things in committee, but the moment the committee reports to the house, then the minister may have to say to the house, "The Senate insists on this, that and the other thing," and there may be a lot of discussion—let us put it that way.

Senator Flynn: I think I can understand what you are trying to convey to us.

Senator Cook: It has happened before.

The Chairman: If we do not have anything else, then—

Senator Everett: Mr. Chairman, it may be too much work, but is there any possibility of getting the legislation and the amendments tied together in one proposed act? It is difficult, when you are reading the thing. You are into the act, and then you have to be into the amendments, and you have to go back and forth. It might be a lot of work, however.

Mr. Cowling: Yes. In the back of the blue book, in the yellow pages, you have something of that kind, but it is still not as easy to follow as a complete consolidation would be. You are referring, really, to a consolidation.

Senator Everett: No, because we have that, but we also have all this stuff here which amends it.

Mr. Cowling: But it does not include the latest one.

Senator Everett: It would make it a lot easier.

The Chairman: What we could do would involve preparing a master copy of the bill and then cutting the bill into

pieces and pasting in, in the relevant places, the amendments and then Xerox the whole thing. That would do it.

Senator Everett: Yes.

The Chairman: Shall we adjourn?

Hon. Senators: Agreed.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT

1974-75

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 21

WEDNESDAY, February 12, 1975

Eleventh Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

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THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act,* in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

28638—1½

Minutes of Proceedings

Wednesday, February 12, 1975
(26)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to discuss:

SUBJECT: "The Advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden, (*Chairman*), Barrow, Beaubien, Connolly, Cook, Desruisseaux, Everett, Flynn, Gélinas, Laird, Macnaughton, Molson and Walker. (13).

Present, not of the Committee: The Honourable Senators Heath and Lafond. (2)

In attendance: Messrs. R. J. Cowling, C. A. and John F. Lewis, C.A., Advisors.

WITNESSES

National Automotive Trades Association

Mr. L. M. Joyal, Q.C., National Counsel, Ottawa, Ont.;
Mr. R. Curtis, President, Kelowna, B.C.;
Mr. Lloyd Kinneard, Executive Vice-President, Vancouver, B.C.;
Mr. J. Tramble, Vice-President, Antigonish, N.S.;
Mr. R. J. Biddell, Treasurer, Edmonton, Man.; and
Mr. Archie Dickson, Director, Calgary, Alta.;
Mr. J. Ward, Winnipeg, Man.;
Mr. J. L. Belles-Isles, Montreal, Que.;
Mr. D. McGregor, Halifax, N.S.;
Mr. D. S. Prowse, Toronto, Ont.; and
Mr. Des Achilles, Calgary, Alta.

At 10:50 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson
Clerk of the Committee

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, February 12, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, this morning we have one submission on the competition bill, and that is by the National Automotive Trades Association of Canada. After that we have a submission on the income tax amendments, from the Canadian Chamber of Commerce, particularly Mr. Martin and Mr. Cochrane. They will be updating the submission they made some time ago. If you recall, at that time the provinces, particularly Alberta, had not made the concessions they subsequently made, so I asked them to update their material in order that it might be available for us. That is all the business we have to deal with today.

Tomorrow morning we start on the Canadian Business Corporations bill, when we will hear the departmental officers. Next Wednesday we will hear the Canadian Bar Association on that bill. Mr. Herb Gray, the former minister, has asked to be heard. I asked him on what points and he said it was in connection with the directors' provisions. I am not sure how well received that information has been over in the other place. I told him to write a letter. We have nothing in our rules that prevents a member of the Commons from coming here to say what he has to say. He has his own forum over there, but if he wants to pick this one I do not see why we should refuse him. It is up to them to have their own rules to govern their own members. After that, we will carry on with the departmental officers.

We will sit also on Thursday February 20, we will be sitting on Wednesday and Thursday of next week. By that time we should make quite a hole in the Canadian Business Corporations bill.

The income tax bill I believe had second reading in the other place yesterday evening, which means that it then goes into Committee of the Whole for clause by clause examination. The minister tabled three or four amendments and we will have copies of those amendments later today to distribute to you. Of course, they will not be discussed until we reach that particular item in the bill to which they relate. You will see that we have lots of work ahead of us.

We will now get down to receiving the submission of the National Automotive Trades Association. We have here Mr. Curtis of Kelowna, British Columbia, who is President of the association. Are you going to make the opening statement, Mr. Curtis?

Mr. R. Curtis, President, National Automotive Trades Association of Canada: Mr. Joyal will make the opening statement, Mr. Chairman.

The Chairman: Very well. You have whichever of your members you want beside you.

Mr. Joyal, who is national counsel for the National Automotive Trades Association of Canada, will make the opening statement. He will introduce the officers and all the other people who are here.

Mr. L. M. Joyal, Q.C., National Counsel, National Automotive Trades Association of Canada: Thank you, Mr. Chairman. Honourable senators, my name is Louis-Marcel Joyal, and I have the pleasure of being National Counsel for the National Automotive Trades Association of Canada who, as you will gather if you have read the brief, have been waiting a long time for this opportunity to come before Parliament with respect to some of the problems they face in their industry. A measure of their interest and their keenness might be exemplified by the number of people who have come from all over the country, perhaps to pay you tribute to you directly, but also to show a great deal of interest in the deliberations of your committee.

The President of the association is from Kelowna, British Columbia, Mr. Rocky Curtis, sitting on my right. Beside him is Mr. Lloyd Kinneard, from Vancouver who is Executive Vice-President of the association. Next to him is Mr. J. R. Biddell of Edmonton, the Treasurer. Over on the east wall is Mr. Archie Dickson from Calgary, Director; Mr. J. Tramble of Antigonish, Vice-President. Then we have the provincial managers: Mr. Jack Ward of Manitoba, Mr. Belles-Isles of Quebec, Mr. Des Achilles of Alberta, Mr. McGregor of Nova Scotia, and Mr. Prowse of Ontario. I think that is about the slate, honourable senators.

Senator Walker: With that feat, you should be a politician.

Senator Macnaughton: He is.

Mr. Joyal: The opening brief will not be longer than the brief which has already been submitted to you. I hope that you have had an opportunity of reading through it.

The Chairman: Yes, we have studied it.

Mr. Joyal: You are well known, honorable senators, as people who do their homework. Perhaps we should dispense with the opening statement. Mr. Curtis and his colleagues are here at your disposal.

Senator Laird: Mr. Chairman, one thing fascinated me in this brief. I wonder if I may ask some questions about it?

The Chairman: Yes, go ahead.

Senator Laird: You are alking about the different types of dealers.

The Chairman: At what page?

Senator Laird: This is on page 12 of the bilingual version of the brief, the last paragraph. I remind you of what you said:

> The franchise dealer is quite prepared to face price competition from gas bars and other self-service outlets and he has no objection to these outlets selling their products at discount prices. His fundamental objection rests on his own exclusive supplier treating others more generously than he is being treated himself.

In what fashion is the self-service outlet treated more generously than the franchise dealer?

Mr. Curtis: Honourable senators, I would ask Mr. Biddell to respond to that question.

Mr. J. R. Biddell, Treasurer, National Automotive Trade Association of Canada: Mr. Chairman, honourable senators, the way that he has been treated better is in a matter of price. It is a known fact, although it is hard to prove, that across Canada the average gas bar and wash outlet, et cetera, can buy gasoline anywhere from 2 cents to 8 cents a gallon cheaper than the franchise dealer. Our industry feels that we can face any form of competition based on our service and our ability to manage our own businesses properly, but we cannot face that one piece of competition where the other people are starting at a position much ahead of us in the race. That is why this is put in here, because it is a fact.

Senator Laird: I suppose there are none of these self-serve stations in your organization?

Mr. Biddell: The reason there are no dealers in our organization at the present time is that most of the self-serves are operated by company personnel of the oil companies at the present time. They are not leased out. In fact, they are just not allowed to be leased out. So we are actually competing with our own oil companies when it comes to the self-serves.

This is not true of the car washes and some of the other gas bars, but it is definitely true of the self-serves at the present time, with a few exceptions.

Senator Laird: What proportion of these self-service outfits would actually be company operated? Have you any idea?

Mr. Biddell: I would say it is at least 80 per cent.

Senator Laird: 80 per cent?

Mr. Biddell: At least 80 per cent. It may be higher.

Senator Laird: I presume, then, that you would say that you should get the same cost base as they do?

Mr. Biddell: We should get the same cost base, and it could be that some of their own outlets may be charging them exactly the same amount as they are charging us. But the company operated station has something to fall back on that we do not have. Number one, they can afford to operate the outfit at a loss, if necessary, to keep the price down, because they have a nice cushion behind that on their wholesale price. If you remember, last year most of the companies raised their wholesale price on an average of 10 cents a gallon across Canada, which is a nice cushion to operate on. Our belief is that they are using that to compete against their own lessees across Canada. It is an unfair situation.

Senator Laird: Their overhead for help, for example, would be somewhat less, would it not?

Mr. Biddell: On a self-serve it is historical that it means paying less money for gas. It should be, because you are helping yourself and there are no attendants hired, except someone to take your money. It is logical that if you want to buy gasoline and serve yourself, you are taking the wages away from helpers. If you did not get your gas cheaper, it would be odd. I am talking at the retail level now, but the wholesale level is what we are concerned about.

Senator Laird: That is why, I suppose, you felt free to say in your brief that you are prepared to face price competition from the gas bars.

Mr. Biddell: Oh, yes, we feel that some people want to help themselves and others want service. Those who want service are willing to pay for it.

Senator Laird: Well, here is one guy who wants service. So I wouldn't go to one of those self-serve places.

Mr. Biddell: I am glad to hear that.

Mr. Joyal: I think, Senator Laird, that that paragraph should be read in terms of what preceded it, which is that the franchise dealer, the exclusive dealer, is not in a competitive position with the supplier. He has to buy from him. He does not care so much what price the wholesale supplier will charge him for the gas. What he objects to is that that same supplier sells the gas at other independent outlets at a price lower than that available to him.

Senator Laird: Now, wait a minute.

Mr. Joyal: This is the point.

Senator Laird: Wait a minute. Mr. Biddell just said that 80 per cent of those self-service places were operated by the companies.

Mr. Joyal: In some areas, but not in all. You still have, the independent retail merchandiser—"Capital City Gas." You can give it any name. They are buying surplus gas from any one of a number of suppliers and getting it at the lowest possible price. The supplier then finds himself feeding his gas into these unbranded tanks, if you wish, at a price which is considerably lower than the price at which he makes that same gas available to one of his own dealers.

Senator Laird: I think I had better pin you down on this. Apparently the percentage of company operated self-service outlets is not 80 per cent?

Mr. Joyal: It is 80 per cent in Alberta.

Mr. Biddell: May I answer that? There are two distinct groups here. We were concentrating on self-serves here in our original discussion. But self-serves form only a small part of the total picture in Canada. What about all the other people who are not self-serves, who are buying gasoline cheaper than we are. I guess we did not discuss that, but that is the part that hurts us more—all these other people who are actually getting the gas cheaper. I can give you some examples, if you like: Simpsons-Sears or Woodwards. You can name many others across Canada who are actually buying the same gas at anywhere up to 8 cents or 9 cents a gallon less than we are. We are more concerned about that type of competition than we are about the self-serves. We realize that the self-serves are going to be selling gas cheaper than we are, because they don't have to pay the staff. It is quite true that most of them at the present time are being operated by the oil companies themselves. That is the only bad thing. We would hope that they would be operated by independent businessmen like we are, so that we are all competitive then. We are not competitive otherwise. This is one side of the picture. The other side is that this gas is going to these other places so much cheaper than we can buy it, and yet we are supposed to compete.

Senator Laird: I hate to appear ignorant, but do Simpsons-Sears actually have gas stations?

Mr. Biddell: They do in the west. I don't know about the east. Eaton's is another, and so is Canadian Tire. You can mention many of them, and they are certainly buying gas cheaper than we are. We cannot prove it today, but it can be proved.

Senator Laird: This operation would then be big and you might get a quantity discount, I suppose. Is that the reason?

Mr. Biddell: Well, sir, that is not quite true, because some of these organizations start up and they don't buy any bigger quantities than a lot of us do in our retail outlets. If we were buying at the same prices as they were, we would out-gallonage them by many times. The main reason that their gallonage is so large is that they are getting that price advantage, they are getting a preference price. Our answer to that is that if we were getting the preference price that they are getting our gallonage would be just as big or larger, because we feel that we are just as competitive, we feel we are better trained in most instances and we also feel that we can give the public better service. So we know that we could certainly have the gallonages. But I do not really believe the amount of gas you sell in a year should regulate the price. I think the thing that should regulate the price is the amount you buy at one time and how much it costs your supplier to deliver it to you. In our industry we buy the same size loads as these people who are getting discounts. It is exactly the same cost per gallon to them as it is to us. So that should not be a factor. We have talked about that for many years.

Senator Laird: I have just one more question. On page 13 you propose an amendment. In view of the general agreement you have with the review process, are you willing to have this problem reviewed by the commission.

Mr. Curtis: May I have Mr. Kinneard answer this one? I think he is more conversant with it than any of the rest of us, and he could probably supply the answer.

Mr. Lloyd Kinneard, Executive Vice-President, National Automotive Trades Association of Canada: Honourable Senators, if I could comment on that point, we in our organization have given this matter very careful consideration, and it seems a rather strange thing to us that in the Combines Act, for many, many years, there has been a clause that prohibits price discrimination. Anyone would understand what is meant in a general sense by price discrimination, and though it is there, and the obvious intent is clear enough, as a result of the careful inquiries we have made, to the best of our knowledge there has never been a successful prosecution under that section of the act in the many, many years it has been on the statute book. So it seems pointless to us to have a prohibition set up under the act if it is not operative and cannot be made to operate. There are reasons why, under the criminal rules, as would be necessary under the pertinent section, it is almost impossible to get a complaint effectively dealt with through the courts on this price discrimination.

To answer your question more specifically, yes, sir, we feel this is the way to go, that is to take this section on price discrimination out of the prohibitive section in the act, as it presently is in this bill, and put it under the reviewable section, where it can be properly appraised by the tribunal in due course.

Senator Laird: So you are prepared to have it reviewable?

Mr. Kinneard: Very much so.

The Chairman: Well, Senator Laird, it would appear that price discrimination is covered under the present law as an offence.

Mr. Kinneard: An unenforceable prohibition, sir.

The Chairman: What I understand these people to say is that they would prefer to have it made a transaction reviewable by the commission.

Senator Laird: That is what I was trying to point out.

The Chairman: Putting it into the area of civil law.

Senator Laird: That is exactly what I was trying to find out.

The Chairman: And civil law may not help them too much.

Mr. Kinneard: The present law does not help us at all. This would give us at least a possibility of some relief. The intent is clear enough, but if it is not usable it does nothing, either for the industry or for the public.

The Chairman: Let us test that for a moment. The procedure in a reviewable transaction under this bill would be for the director, on receiving a complaint, to make a report to the commission. The commission picks it up from there. Now, under the price discrimination section in the statute as it exists at the present time, the director is the one who receives the complaint and institutes the

investigation. You are dealing with the same person. Do you think when he is wearing a different hat, and going through a different set of procedures, he is likely to deal more in favour of the interests that you are attempting to put forward?

Mr. Kinneard: We would hope so, sir. Certainly he has not so dealt under the old act.

The Chairman: What do you mean, he has not so dealt? The statute covers the point.

Mr. Kinneard: The statute is there, but there is sufficient difficulty in bringing a case successfully before the courts, that though there are many cases of price discrimination, to our knowledge, we are not able to seek relief by going through the courts or through the director.

The Chairman: Is that because of some failure of evidence?

Mr. Kinneard: The statute.

The Chairman: I mean, is it because of not being able to adduce the necessary evidence to support the charge?

Mr. Kinneard: No, there are some obvious defences that are very difficult to overcome. We have found, in dealing with complaints of this nature, that not only must it be a price discrimination, but we must prove that the parties complaining are competitors. We have found them as much as three blocks apart, and they have said that this is not necessarily a competitor, and it is rather frustrating. We must also establish that it is a practice, and that can go on for a day, a week, a year. It is the old problem of, "How long is a piece of string?" These are difficult things, and if we must get over these barriers before getting to the nub of the price discrimination, it puts us in an impossible position.

We say that the statute is clear enough in its intent, but its effect is almost useless. We feel it would be more practical if it could be reviewed by a tribunal, but in any case there might be certain types of price discrimination that are quite acceptable in society: Children half price, for instance, from day to day. The parts that would be objectionable, and predatory pricing in practice, and things that would be against the public interest, could far better be reviewed by a tribunal, we think, than through the present procedure of criminal proceedings in the courts.

Senator Cook: There would probably be less weight of evidence, would there not, if it were only a civil matter instead of criminal? If it were treated as a civil matter, the commission would investigate, and perhaps issue a warning quicker than in a criminal matter, where you have to have proof beyond doubt?

The Chairman: There is no case of issuing a warning. If this is a reviewable transaction, the commission takes on the case and hears evidence from the complainant and from those who are alleged to have indulged in this particular practice, and then they come to a conclusion and make an order. The moment they make the order, it must be obeyed, or there can be a charge laid in terms of which you are subject to a fine, or to a fine and imprisonment. There is no such thing as a warning. It is a question of the amount of proof necessary to establish the charge. I would think the proof in criminal law is that you establish beyond a reasonable doubt that the offence has been committed. I do not know that in a civil action there is any difference with regard to the degree of proof required. The question of the credibility of witnesses comes up, but of course you have that both in criminal and in civil actions. This is the thing that bothers me.

Mr. R. J. Cowling, Special Counsel to the Committee: The commission almost has discretionary powers.

The Chairman: Yes. It bothers me as to why section 34, in the present law, is not workable. It seems to me that it is something we can get from the departmental people when they come here. We might ask them why that is. They are proposing another remedy, but will it work any better? The witnesses here today say it will, but it will be interesting to know the attitude of the department.

Mr. Joyal: Mr. Chairman, there might be a ray of hope there. Mr. Kinneard raised some of the technical defences under the price discrimination section. There is another one, too, which the industry has faced. The department's investigation people took the position with respect to oil and gasoline sales that a branded gasoline—Esso, Texaco, or what have you—is of a different quality than that same gasoline coming from a Texaco refinery and being sold through an Econo service station, or whatever the name is that they might give them. In other words, they assumed there was a distinction in quality between a branded gasoline and an unbranded one, which meant that no matter how often there might be complaints filed with the combines people, there was not very much enthusiasm in taking any further action on it.

Senator Cook: You mean they assumed that, without testing the gases?

Mr. Joyal: Yes; but naturally, however, in discussions with the combines branch, there seems to be an awareness now that to an increasingly sophisticated public the brand they buy under an Econo label from an Econo service station is exactly the same gasoline they would buy under the Texaco or Esso label. Therefore, I think there is now a new awareness that the old, fictitious distinction between branded and unbranded lines no longer applies. However, the matter has not been tested along those lines, and it might very well be that with the restructuring of the statute some further efforts could be made.

It does not eliminate the other points that Mr. Kinneard has raised. We take the view that if we can bring price discrimination within the purview of what we would call the civil level of proof—preponderance of evidence, if you wish, and that type of rule, because it is going to be a hearing which will not be of a criminal nature but rather of a civil nature—then there will be more clout by that commission—more effective leverage, if you wish, that that commission could exercise—than if the only recourse is for the combines people to make a case, and then to prosecute.

We are dealing with businessmen, and it may very well be that once a complaint is made and the investiga-

tion discloses that there is price discrimination, we are going to have consent orders. I am sure the oil companies will say, "All right, we will stop doing it", and then if they do repeat it they are liable to criminal prosecution for breach of the order, but it would make the process of bringing a case of price discrimination not only before the commission but before the public, a much easier process.

Mr. Curtis: Mr. Chairman, if I may interject here, I think part of the reasoning behind this is also the speed with which action could be taken through the board rather than through criminal action. In the case of criminal action quite possibly eventually we would get a ruling and do something about it, but in the interim the people most interested would be bankrupt and out of business. It would be too late and there would be very little comfort coming out of it for them. But with board action, that action could be taken and acted on in time to stop such things from recurring.

The Chairman: You are making the assumption that the director, when he receives a complaint under the bill, simply passes it on to the commission. We have not yet had the director here as a witness. Do you not think that the director might want to make the same investigation, to see if the complaint has any support before he refers it to the commission?

Mr. Curtis: Quite possibly.

The Chairman: In other words, to make the same kind of investigation that he would make if he were going to prefer a charge?

Mr. Curtis: If an immediate criminal charge is involved, would they not tread a lot more gently in their proceedings? They would realize the seriousness of it. With the board the investigation would lead up to a definite ruling which is, in effect, a dog being allowed a first bite.

The Chairman: When you say "ruling" let us not get confused with words. The power of the commission, if they are satisfied that the complaint is justified and supported by evidence, is to make an order prohibiting the doing of this any further; and then the criminal process comes in and if you do not obey the order you may be fined and you may go to jail, too. You are assuming that the commission will move faster than the courts.

Mr. Kinneard: All we know is that one does not work and we hope the other will.

The Chairman: I think we understand your point on that. Now, what is your next point?

Mr. Cowling: Mr. Chairman, I wonder if I might ask a question of Mr. Joyal? On page 8 there is some suggested wording for an amendment. As I understand the philosophy behind the combines legislation, it is to try to get products into the hands of the public at the lowest possible price. It seems to me that your suggested wording is perhaps the other way around, in that you are suggesting that the sale of a product in like quantity to any person at a price lower than that available to an exclusive dealer shall be deemed to be price discrimination. What would you think of putting it the other way around, so it would read this way—

Mr. Joyal: I already have, Mr. Cowling. I am very pleased that you raised that point, because it is a matter that unfortunately had not occurred to us until we had a meeting on it yesterday. We found that the emphasis was wrong and that it should be reversed. This is to be found on page 13 of the bilingual brief and on page 8 of the English brief. It should read as follows:

> provided, however, that the sale of a product by a supplier to an exclusive dealer at a price higher than that available to other purchasers of that product shall be deemed to be price discrimination under this section.

Mr. Cowling: I would think that would be more acceptable.

Mr. Joyal: The idea would be that if, for example, the idea of removing it out of the prohibitive sections into the reviewable ones does not appeal to you, or if you find that it creates more problems than it resolves because of other circumstances—

The Chairman: But this form presents no defence. If you establish the fact of the difference in price, then you have no ground of defence. It is what we call a *per se* offence.

Mr. Joyal: Perhaps I should say "shall be presumed to be price discrimination" or "shall be deemed to be—". We are getting into a very technical field here, but what we want to do is this: when you are dealing with a complaint from an exclusive dealer, all he has to do is to prove that he has bought this gasoline at a price higher than that at which it is available to the independent outlets. After that, let the oil companies come back and show cause—either because of quantity discounts or any other cause, but the burden of proof would rest on them. It is a much better position as far as the complainant is concerned if there is an early switch in the burden of proof than if there is no switch in the burden of proof as is the case with the section as written.

The Chairman: Under the wording as you proposed there would not be an opportunity to do that, because all you have to do under the wording that you propose is to establish that there is this difference in price, then guilt is established and there is no opportunity for a defence.

Mr. Joyal: Perhaps the wording should be "presumed to be." However, I would leave this to the legal draftsmen and counsel to see to what extent we could not borrow here from the narcotics and drug legislation where possession in itself is an offence—it is a *prima facie* offence subject to the right of the defendant to say "Well, you know, it was not in my possession to my knowledge."

The Chairman: What you are doing then is shifting the onus.

Mr. Joyal: That is right.

The Chairman: You want to put the onus on the person who is said to have discriminated against, rather than the usual procedure of having the onus on the party

making the allegation? We understand your proposed amendment and we understand the amendment which brings it more in line with the section of the bill, and we understand the question of onus and your desire to shift the onus to the supplier.

Mr. Joyal: Only in cases where you are dealing with an exclusive dealer. That is the case we are trying to make.

The Chairman: Why should not the supplier, as a matter of defence, be able to say, "But I have not hurt this person who is complaining; we are not competitors."

Mr. Joyal: All of the other defences would be open.

The Chairman: They would not be open unless we make them open.

Senator Cook: Is it section 43 of the main act?

The Chairman: Section 34 in the main act.

Senator Cook: The brief cites section 43(1)(*a*).

Mr. Cowling: That is a typographical error and it should be section 34.

Senator Desruisseaux: Mr. Chairman, I am confused on one minor point and I would like clarification of it. Do I understand that in purchasing gasoline you do not purchase through some form of co-operative so as to obtain discounts?

Mr. Kinneard: Some co-operatives operate service stations and as co-operatives would purchase directly from a refinery. However, this would not be the normal situation for brand line service stations, which are tied contractually, both by product contract and lease arrangements to a particular oil company. Such stations have no choice and must purchase the products of that oil company at its established prices. They cannot bargain elsewhere. Co-operatives do exist, but they are an exception and not a normal operation.

Senator Desruisseaux: I was thinking in terms of quantity discounts.

Mr. Kinneard: Those operators with a service station under lease arrangement have no bargaining power. They simply must buy their products from the refinery at its established prices and there is no quantity discount available to them.

Senator Cook: At the price set by the supplier? Is that not qualified at all?

Mr. Kinneard: Not with the brand line service stations, but some department stores, which have more clout and are in a bargaining position, get preferential treatment. The brand line service station that sells a brand of gasoline has no bargaining position, no clout and must accept the fixed, as we term it, the tank-wagon price, or wholesale price, as set by his company in that area.

The Chairman: If we have exhausted this particular point, we can turn to a question in the brief with reference to price fixing. Would you care to discuss that? It is in the bilingual brief, at page 14?

Mr. Joyal: Mr. Ward will be able to discuss that?

Mr. Curtis: Mr. Chairman, is there any particular question with respect to this section that you or members of the committee have, or would you prefer Mr. Ward to give an explanation?

The Chairman: Tell me what the problem is.

Mr. J. Ward, Provincial Manager, National Automotive Trades Association of Canada, Winnipeg, Manitoba: Mr. Chairman and honourable senators, our main concern throughout the price-fixing section of the brief is with the inclusion of services in the Combines Investigation Act. It has been during the past and it will be in the future necessary in this area to consult, run through our cost analyses and then publish a suggested rate. The inclusion of services in the act could mean that this would be against the law. It is of great assistance to the motoring public that this be done, because invariably through the years of business the motorist comes in and first of all wishes to know how long and how much. We have always done this and I think you will find it even in other trades in the service area. They will collectively analyze the costs and decide on what should be a fair charge.

The Chairman: Does the association do that?

Mr. Ward: Generally by means of discussion, yes.

The Chairman: And what happens if a station operator does not adhere?

Mr. Ward: That is entirely up to him.

The Chairman: Does he cease to be a member of the association?

Mr. Ward: No.

The Chairman: There are no sanctions?

Mr. Ward: No; all we can do is advise. Shall we say that if he is the type of man who will charge too little, he will cease to be a member, because he will not be around very long.

The Chairman: You mean he will bankrupt himself?

Mr. Ward: Yes.

Senator Barrow: Do you mean that the insurance companies will not send him any more business?

Mr. Ward: This, of course, is another area in which I am vitally concerned personally, being from Manitoba. In the bodysehop business we are forced to do this, because we have to negotiate with the government insurance agency in the same manner as with unions.

The Chairman: Then you would say that in Manitoba there is provincial government regulation? I do not mean physically, by actual regulations, but they will not give you business unless you agree to certain rates?

Mr. Ward: The wording there may be incorrect, because they still allow the motorist to go to the bodyshop of his choice. However, they then tell the owner of the bodyshop how much they will pay him.

The Chairman: Do you mean the provincial authority?

Mr. Ward: Yes.

The Chairman: Well, is that not regulation?

Mr. Ward: Yes, it is.

The Chairman: And, as I recall the Canadian Breweries case, Mr. Justice McRuer at that time, in dealing with liquor, decided that the industry was well regulated, therefore there was no problem. However, this is just one problem; are there others?

Mr. Ward: It exists also in the Provinces of British Columbia and Saskatchewan.

The Chairman: In those provinces your rates are regulated and in order to do business that is covered by the provincial insurance authority you must adhere to their rates?

Mr. Ward: Yes, but, of course, that is only one part of the industry, just the body repair section. That does not affect mechanical, towing services or anything like that.

The Chairman: Do the rates established by the association deal with all these other aspects as well, so as to achieve a uniformity in rates?

Mr. Ward: I am not quite clear what you mean by that. We do not deal with the government with respect to the rates that the garage or service station will charge.

The Chairman: I did not ask that. I asked with respect to the aspects of your business in which you are not subject to provincial authority and in which cases they cannot impose a rate on you.

Mr. Curtis: If I may, Mr. Chairman, yes, we do issue charts suggesting list prices as a result of suggestions throughout the trade. As is stated on page 18:

> ...the publication of any suggested price lists resulting from such exchanges and to be used for public information and guidance.

To that we have added: "...to help maintain the highest possible standards and value to the customer."

This is the effect of these charts, because with the pricing comes a package to deliver to the customer the highest value possible for the particular price.

The Chairman: Do you think that the bill in its present form would catch you?

Mr. Curtis: There is that possibility because, in effect, it will require us to set prices illegally.

Mr. Joyal: The conspiracy might not work, nevertheless it is a conspiracy.

Mr. Cowling: Even with your amendment, are you not right back in the same situation because of subsection (3), because subsection (3) provides quite a limitation on the effect that subsection (2) might otherwise provide? One of the first things mentioned in subsection (3) is prices. I do not know whether your suggested approach would accomplish what you have in mind.

Mr. Joyal: If you have proposed legislation to cover services within the Combines Investigation Act, I think it would be public policy that what had been usage or practices of a particular trade are not going to be continued in the form or substance in which they have historically been followed. Facing what we would call a real pragmatic situation when dealing with services involving automobile servicing and body work, we want to make sure that the publication of these statistics and the resulting suggested list prices are not illegal acts. For greater caution, notwithstanding the exceptions contained in subsection (3), we would not wish to be regarded as in breach of the statute.

The Chairman: What you are saying is, one, that having regard to the fact that services are included in this bill, the association will have to revise its approach to the problem of rates; and the method they may follow may be the published suggested rates. If they publish suggested rates and there are no sanctions against the individual service operator, can it be said in those circumstances that you are imposing a price? If it cannot be so interpreted, then you are not violating this bill. Would you agree with that?

Mr. Joyal: Yes.

Mr. Curtis: These things have been contemplated.

The Chairman: Is there anything further that you wish to say on that point? I think we have resolved it down to the least common denominator. Are there any questions?

Senator Laird: Mr. Chairman, I have one on that point. Is it not a fact that when your services are being rendered in connection with a warranty on a car, the manufacturer decides precisely what you are going to charge for a certain repair?

Mr. Kinneard: Yes, sir, it is.

Senator Everett: Does the witness believe that the sort of thing described on pages 16 and 17 contravenes section 32(1)?

Mr. Joyal: Senator Everett, it would certainly be my view that it does.

Mr. Kinneard: There is a concern within the industry and the trade. They use these books called flat rate books, obtained from factories and other sources. For example, in British Columbia it has been decreed by the Insurance Corporation that the provincial government will use a particular flat rate book. They name which one it is and where to get it. We are using a common flat rate book, all referring to the same schedule. We would not want to feel that we are contravening the law.

Mr. Cowling: Is it not the objective that higher prices will not be charged? There is nothing in the act which says you cannot agree so that higher prices will not be charged.

Mr. Kinneard: The flat rate books—again I am referring to body shop operations—usually are scheduled in terms of time rather than in money or amounts. They tell you the number of hours and minutes necessary for a given operation. You would apply the labour rate that

would apply in any particular shop, which might vary from shop to shop or area to area. Flat rate books deal with the time factor.

Mr. Cowling: Still the result is to get the work done for less money rather than for more money.

Senator Everett: I have to disclose an interest in this. I am not a member of the Automotive Trade Association, although I am involved in the automotive business. Is it not a fact that members of the automotive trade would not use a common flat rate book? There is no imposition of a flat rate manual? Some people use general flat rate manuals that are produced by people like Chiltons, and others use manufacturers' flat rate manuals.

Mr. Kinneard: There are several in British Columbia. Under the Insurance Corporation, at their direction, they refuse to use anything other than Glenn Mitchell. In that case it is imposed on the trade, yes. In other areas, books put out by competitors are available and are sometimes used.

Senator Everett: What is your reaction to the point raised by counsel?

Mr. Joyal: That it would not constitute a breach of the statute? I think it would be simply for purposes of greater caution. In other words, if there were a statutory provision providing for the exchange of statistics and the publication of information, this would be another way of having a suggested retail price.

Senator Everett: Most flat rate manuals I have seen suggest hours. The individual entrepreneur is free to determine what he charges per hour. We are being asked by everyone to amend this statute just in case it might impinge on their business. I am very leery of that.

Mr. Joyal: It would be, Senator, with respect, a provision of general application. I am sure that either the people who are going to administer this statute, or yourselves, will be faced more and more with problems associated with the Combines Investigation Act relating to services. There have been practices going on for a hundred years. The law society is concerned about tariffs, and people in the securities business are concerned about tariffs and rates on brokerage, and so on. All these things have been going on for a long time and it will be a heck of a problem, in our view, if you say to all these institutions, which have had such historical lines of conduct, "From now on you cannot agree between each other as to what the prices will be."

If we are going to equate the question, on the one side, of the cheapest possible price, or competitive price, with, on the other, the question of value for that price, you have to create some means whereby industry can set certain standards as to the value of the services, equated with some understanding as to the price; otherwise the consumer will find himself facing an incompetent broker, on the one side, because the rate is low, and, after he has been badly served on the basis that the price is lower, find out that he has received no value. The same thing applies to many other services. In your business, senator, you can suggest that, "The repairs to this car will cost $100." That is the price you know you have to charge to cover your expenses. To arrive at a fair price, you might have to meet with your colleagues, to decide the average costs. Firstly, with some of the smaller entrepreneurs, how do you arrive at what the basic costs should be? I am afraid many of our members are losing money in their particular operations because they do not know their costs. It is that kind of input of information and exchange that we want to make sure would not be prohibited.

Senator Cook: Are any of these provincial associations subject to provincial controls or legislation?

Mr. Joyal: Not really, senator, except when it comes to apprenticeship rules with regard to mechanics and their qualifications.

Senator Laird: Are you saying, then, that services should be taken right out of the legislation entirely?

The Chairman: Well, I do not think that is something which we need to consider seriously. Services are in the bill and I doubt that they will be taken out of it. There may be clarification, but I think our approach to this legislation has to be on the basis that services will remain in the bill.

Mr. Joyal: There might be some delay in proclaiming it.

The Chairman: I am not sure that the amendment you suggest on the question of exchange of information helps you at all. The suggested amendment, which appears at page 11 of the English version of your brief, reads as follows:

> the publication of any suggested price lists resulting from such exchanges and to be used for public information and guidance.

It seems to me that is very naïve. If your members get together and agree that a value should attach to various services and if you exchange that information with other dealers, the net result is that a uniform price is charged. I think that is more than an exchange of information. You are being very naïve to call it that. That is not really the design of it. That is not what Mr. Joyal said today. What he said was, you must be competent to determine your own rates in order to be able to operate economically and that would be the basis for any exchange of information.

The moment you talk with another man in the same line of business to find out his assessment of costs, then you may bring your own up to his or he may bring his down to yours. The intent, therefore, is to arrive at a price which is more or less uniform. When you say you do not know your costs, I find that hard to accept. I do not challenge it, but I find it hard to accept.

Mr. Curtis: Perhaps we are dealing with two different things. We have been exchanging this type of information for a good many years. We have constantly supplied suggested price lists—suggested only—

Senator Cook: To whom?

Mr. Curtis: —to each member of the association.

Senator Cook: What about the public?

Mr. Curtis: These lists are posted on company walls, or wherever the customer is, so that he can see what the suggested list price is. Whether the operators charge the suggested list price, or how many of our members use that list, is strictly up to them. There is no coercion, no force. It is a suggested price only.

Senator Cook: Is there any obligation to publish it?

Mr. Curtis: None at all. They can hang it up or they can burn it. They are supplied with it as information. How they use these lists, or to what extent they use them, is strictly up to the individual operators.

The Chairman: We had a brief from the Patent and Trademark Institute of Canada last week. It has what amounts to a rate or fee schedule. If a member does not adhere to that schedule, he can no longer continue to be a member of the association, although he can continue to practise as a patent attorney. In your case there are no such sanctions. The question is, why do your members agree that this is information? When you say it is a "suggested price," a suggested price to whom?—to the public?

Senator Cook: There might be some virtue, Mr. Chairman, if the publication of such lists in a prominent place were mandatory. A person who knows nothing about cars could then quickly determine whether he is being taken for a ride or not.

The Chairman: If you call it a suggested price list and the service operator posts that list in his garage where the customer can see it and the customer then goes to another garage and sees the same list, he will soon conclude that it is an agreed price.

Mr. Kinneard: If I may make a comment, Mr. Chairman, there seems to be a great amount of consumerism generally across Canada and many provinces have established consumer affairs departments with offices to investigate consumer complaints. In British Columbia, for example, if the Department of Consumer Affairs is dealing with a complaint from a customer regarding the automotive field, that complaint usually concerns the price charged, and in order for the official to determine whether there is any validity to the customer's complaint, he has to refer to one of these suggested price lists, or a flat rate book. We suggest that the compilation of such lists amounts to a public service, in that such lists are made available to evaluate complaints of that kind, and also so that our members have a reliable guide on which to base their prices.

Another aspect of this flat rate matter which is important to us, and which perhaps has been overlooked, concerns the possibility that the individual working on the customer's car may be interrupted several times during the course of his operation. If he has a flat rate book, he would simply apply the schedule and the proper charge would be made to the customer. It is simply a public service and one which our industry has used for many years. Our concern is that we be able to have this service continue.

Mr. Cowling: It seems to have been accepted that suggested retail prices, for example, are not against the law, provided it is made perfectly clear that it is only a suggested price. I realize section 38 of the act may not cover precisely the situation you refer to. I allude to it only because it is an indication of the kind of thinking or the principle that is involved, and it might be helpful in the interpretation of other provisions which you would hope for.

The Chairman: I should think that if the service operator is not obligated to charge the suggested price, it may be an answer to any offence under this legislation.

Mr. Joyal: If there is a specific prohibition of retail price maintenance, with the exception that the publication of a suggested list price is not an attempt at retail price maintenance, then I think it should be made abundantly clear, applying the principle of retail or suggested price lists, that it would be legal to do so with respect to services.

Senator Everett: With respect to an exchange of that type of information and suggested list prices, probably you make a good case. However, if you carry on the logic of the thing, dealing with your particular business which, if I read your brief correctly, is the operation of branded service stations, what would be the difference if the major oil companies say to you, "This is our suggested selling price."? What the NATA is opposed to is the danger of getting caught in a control situation.

Mr. Joyal: First of all, senator, when we talk about oil and gas, we are talking about the pricing of identical products.

Mr. Kinneard: Probably we are in two different fields, senator. We are talking about service stations and suggested list prices. I am afraid what you are talking about, with respect to the oil companies issuing a suggested list price, would be a directive.

Senator Everett: It can be a suggested list price. There is nothing to prevent automobile manufacturers, for example, from publishing suggested list prices.

Mr. Joyal: No problem.

Senator Everett: It is not a problem under the law. To create a situation in which the manufacturer has more muscle to indicate that that suggested list price is something more than a suggested list price becomes very inimical to the members of your association. I speak as one who is not in the branded product line. I think you are playing with fire, frankly.

The Chairman: Senator Everett, on this point I was wondering if you have a view on the definition of a product. Mr. Joyal was talking about resale price maintenance in relation to products or articles. The definition of a product in the bill includes an article and a service, so I would assume that in some way the statute, in dealing with resale price maintenance of a product, would include a service.

Senator Everett: I would think you are right. I do not know what counsel's view is, but I would think you are most certainly right.

The Chairman: There is just a bald definition.

Mr. Cowling: It depends at what level we are talking about. Clause 38 is clearly retail, whereas these gentlemen are talking about something at another level, I think.

Mr. Joyal: Retail price maintenance is when a supplier imposes his price on a retailer. It is not a question of a supplier imposing a price on a customer. That is nonsense. It will be a little dangerous to assume that because products are in a price discrimination clause, with an exception which will permit suggested prices, the same thing would apply when it comes to the question of the services we are talking about. It is not retail price maintenance, because the relationship there is not between a supplier and a dealer.

Senator Cook: I would say that was more protection to the customer, because lots of unsophisticated motor car drivers can be charged a certain price, the garage can charge more to the person it is dealing with and the customer has no guidelines at all in many cases and knows nothing about it.

The Chairman: It is not part of our work to give interpretation to what Bill C-2 covers, what it means and how the director might interpret it. All we are trying to do is to get the submission of the witnesses on the points in the bill that they think would hurt their operations. That is the approach.

We cannot tell you that because of the definition of "product" you are home and free; I am not trying to do that. I am pointing out that there may be some value in having a look at that. The same with the suggested price list. We cannot be positive on that, because even though they may post a suggested price list in every garage, the one issued by the association, the other facts are important. They may vary. Some of these people who post a suggested price list may charge more.

Senator Molson: If they can get it.

The Chairman: Yes.

Senator Cook: It is still a question of degree.

The Chairman: That is right.

Senator Cook: They may charge five per cent more; they may charge 100 per cent more.

The Chairman: There is no sanction to limit them to that rate except the way the public will accept it.

Senator Cook: Except an angry customer who has something to go on.

The Chairman: Mr. Joyal, is there another point? I think we have shaken that one. Is there any point in your brief that you want to talk about in any particular way?

Mr. Joyal: As you know, a good portion of the opening part of the brief deals with the question of reviewable practices. As I mentioned earlier, I think for about 14 years the association has been trying to get some remedial legislation along those lines. Now that we find some of these problems are covered by this proposed legislation, I am sure I am expressing the enthusiasm of every member of the association here at how pleased they are that some progress is being made, so that the rules of the game will be just a little bit fairer; that is all.

The Chairman: It is unusual in our experience in hearing different organizations to have one come and say they support Part IV and the reviewable acts that may be performed by the commission. There are a lot of factors here. This is civil law and civil law is the function of the province. In almost every province, in some form or other, there is consumer protection legislation. In those circumstances, there is a question of jurisdiction. While you may say, "Because we think it is good for our business we support the excursion or the intrusion of the federal authority into civil law," we have got to look at more angles than that.

Mr. Joyal: Mr. Chairman, I do not want to suggest that the approach of the NATA before you should be completely and exclusively self-serving. Even the fact that an attempt is being made to bring what is purely a business clash where it belongs, not in the criminal court but before a civil tribunal, is a matter which the NATA is very pleased to see. Whether it reaches that point where the new tribunal will be vested with these powers and so on is another problem. In the meantime, as I say, you will be very glad to know that we have no intention of cutting corners as regard the attributes, powers or privileges of that tribunal, whether it will be a star chamber or otherwise. At this stage we simply want to find a forum where, between businessmen, issues of fair practices and so on may be heard, and after everybody has had a fair hearing let the tribunal rule accordingly. Whatever else you have to do with the bill, Mr. Chairman, you have got a real problem.

The Chairman: We have got a lot of problems. Is there anything else you want to add? If not, I thank you very much for your submission and for the development of it here. Before we reach the stage of reporting the bill, we will have given all these things a very good shake, as you must know. Thank you very much.

Mr. Joyal: Thank you, Mr. Chairman. Thank you, senators.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 22

WEDNESDAY, FEBRUARY 12, 1975

Third Proceedings on:

"The advance study of the Budget Resolutions respecting income tax and any bill or other matter relating thereto"

(Witnesses: See Minutes of Proceedings)

28640—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, November 21, 1974:

"The Honourable Senator Everett for the Honourable Senator Hayden moved, seconded by the Honourable Senator Inman:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and consider any bill based on the Budget Resolutions relating to income tax in advance of any such bill coming before the Senate, or any matter relating thereto; and

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, February 12, 1975
(27)

Pursuant to adjournment the Standing Senate Committee on Banking, Trade & Commerce met this day at 10:50 a.m. to discuss the following:

Subject: "The advance study of the Budget Resolutions respecting income tax and any bill or other matter relating thereto."

Present: The Honourable Senators Hayden, (*Chairman*), Barrow, Beaubien, Connolly, Cook, Desruisseaux, Everett, Flynn, Gélinas, Laird, Macnaughton, Molson and Walker. (13)

Present, not of the Committee: The Honourable Senators Heath and Lafond. (2)

In Attendance: Messrs. A. Peter F. Cumyn and T. G. Hierlihy, Consultants.

Witnesses:

The Canadian Chamber of Commerce: (Public Finance and Taxation Committee)

Mr. R. W. Cochrane, (Treasurer and Director of Taxation Gulf Oil Canada Ltd., Toronto); and
Mr. E. D. K. Martin (Assistant Manager—Tax Department, Imperial Oil Limited).

At 12:10 p.m. the Committee adjourned until 9:30 a.m. Thursday, February 13, 1975.

ATTEST:

Frank A. Jackson
Clerk of the Committee

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, February 12, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 10:50 a.m. to examine and consider the advance study of the Budget Resolutions respecting income tax or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we will now hear from the Canadian Chamber of Commerce. We have with us Mr. Martin, who is Assistant Manager, Tax Department, Imperial Oil Limited. With him is Mr. Cochrane, who is Treasurer and Director of Taxation for Gulf Oil of Canada Limited. You will recall that they were before us some time ago. This submission involves and updating of the information they gave us at that time as to the effect of the non-deductibility of provincial royalties for federal tax purposes, and the situation it has left the oil companies in with respect to exploration.

Mr. E. D. K. Martin, Committee Member, Public Finance and Taxation Committee, Ontario Section, The Canadian Chamber of Commerce: Mr. Chairman, I will ask Mr. Cochrane to start first by presenting to you the table that he presented last time, with the addition in the final column on the right of the changes due to the Alberta offsets of December 12.

Mr. R. W. Cochrane, Committee Member, Canadian Chamber of Commerce: Mr. Chairman, honourable senators, last December 11 we were before this august forum, at which time we presented some analyses of the situation that the oil industry finds itself in vis-a-vis the November 18 budget. At the time, this was prior to any announcements which were coming out at different intervals as to what the provincial offsets are.

Your chairman asked that we come back and talk a little about the net effect, after taking into account the provincial offsets, and that is the reason for our appearance here today.

I wish to present this one chart, because I think it summarizes pretty simply what the problem is and what happened. We have already talked about the existing tax system of the $3.80, which was the March 31st basis of 1974, changing to $6.50 on April 1, 1974. The November 18 budget then is applied to the $6.50, the current frozen price of wellhead crude, and we have done it before the October Alberta offsets and after the Alberta offsets.

All figures, of course, are still the same. The federal rate has not changed. Now, very simply stated, the provincial take was down 34 cents. Let me go back and tell you what Alberta did, just to make it clear how this was arrived at, and then we can talk about the other provinces and their position in this.

Senator Connolly: What is the 34 cents?

Mr. Cochrane: The $3.34 provincial take on the November budget case, goes down to $3 after you have taken off the provincial credits. To begin with, Alberta announced a program in December under which they offered a number of things. The first was that they would give a rebate of provincial tax on the royalties included. In other words, they say, "We won't recognize these royalties", so to the extent that provincial tax affected the royalties, they reduced their take accordingly. In addition, and starting in 1975, they have adjusted their royalty rate itself. They did this on the basis of changing the break point. You will recall that on the $3.80 basis the rate was about 22.8 per cent at that time—that is, the average royalty rate. For the increment of $2.70 to $6.50, a rate of 65 per cent was applied in Alberta. What they have done is raise the $3.80 rate to $4.40 and continue to apply the old rate of 22.8 per cent and drop the supplementary royalty at 65 per cent to payments of $2.10 instead of $2.70. The net effect was that the average royalty rate which, on the combined figure and on the $6.50, amounted to 40.3 per cent, will be dropped to 36.3 per cent, a drop of 4 per cent in the gross royalty.

Senator Connolly: I am afraid I am lost. Is anybody else lost?

Mr. Cochrane: I will slow down and say it again.

Senator Connolly: It is just that I do not see the figures you mention. Perhaps I just missed you on one and lost the whole train.

Mr. Cochrane: Prior to the provincial action, the royalty collected by Alberta was $2.62 a barrel, which is included in that provincial take, which is the sum of provincial income taxes, other takes, and the royalties. The $2.60 was included for royalties.

Senator Connolly: The $2.97 shown there?

Mr. Cochrane: Yes, senator. In the third column. The $2.97 and also in the $3.34.

Senator Connolly: All right. Thank you.

Mr. Cochrane: Now, after they adjusted their royalty rates they dropped their gross rate by 4 per cent of $6.50 or 26 cents. So of the change of 34 cents, 26 cents is due to a change—a downward change—in the royalty rate itself by the province. The other 8 cents is the change in provincial tax by the rebating of the provincial tax on the royalty.

Let me just go through, for clarification, perhaps, the assumptions that this chart is based on, because December 11 is a little distance away and you may find it useful.

The assumptions here are that the November 18 budget figures shown in the last two columns are calculated at a 25 per cent federal rate. Now, the rate, as you know, on the federal, was 30 per cent in 1974, 28 per cent in 1975, dropping to 25 per cent in 1976 and thereafter. For this

comparison we have taken the lowest rate in order not to overplay the federal portion, and the 25 per cent rate is applied for these after the November budget figures, using the lowest federal rate. Earned depletion banks are used up; in fact, they were used up in years prior to this one; so we are just on the earned banks on a current basis—no accumulated brought forward. The provincial income tax is calculated on the assumption that 30 per cent of the federal taxable income is allocated to the province of Alberta. This is the rate that Mr. Lougheed announced was the average amount of the federal rate, and it checks with our figure roughly, but this is as stated by the province.

Again, the average royalty rates were reduced in the final column by 4 per cent, to recognize this 1975 revision by Alberta, and in addition to this they gave what they call a small explorer credit, which meant that they would rebate the federal income tax—not the provincial income tax—on the royalties handed back. Now, the problem is, they put a maximum of $1 million on this for any one company or any one group of companies—they put the associated rules against it later; and therefore it is almost impossible to quantify in this particular calculation.

In our own case, just quoting Gulf as an example, our royalties were about $100 million. When you take 30 per cent of it you are talking of $30 million, of which we get $1 million credit, or one-thirtieth of the amount that is paid, rather than the full amount, so it will average very differently. We calculated that if our case was the same as for all others, the effect of the federal rebate would be about two cents a barrel; so it is not a very high, significant figure. I do, however, want to say that they have allowed it.

On a small company—a very, very small company, which is why it is called a small explorer credit-it will give back quite a faire share, or perhaps all of the federal tax, depending on how much royalty they are paying to the province.

The last comment is just to explain that for the drilling and exploration costs we are using the Canadian Petroleum Association figures throughout, and they put in $1.55, which breaks down, on analysis, to $1.35 direct drilling and exploration costs, and 20 cents of provincial payments for lease rentals, and other provincial payments.

Senator Molson: I am sorry. Twenty cents of what?

Mr. Cochrane: Twenty cents is other provincial payments, other than royalties, which are fees, licences, mineral taxes, lease rentals, and so on, all of which have been disallowed and have to be added back. We had to break them up for tax purposes here, so in showing this we have added those to the provincial take rather than showing them up as drilling and exploration.

The Chairman: Do you mean 20 cents of the estimated $1.55 is not allowed for federal tax purposes?

Mr. Cochrane: That's right. All provincial payments are disallowed.

Senator Cook: Why is drilling and exploration $1.35 up there, and down below $1.55? Oh, yes, it is the 20 cents.

Mr. Cochrane: It is because we took 20 cents and put it in the provincial take. We paid it to them, so it was easier to show it as being paid to them rather than put it in, take it out and add it back at the bottom. Anyone looking at the CPA figures will see $1.55. That was just to make sure you followed how we made the assumptions. I am sorry, Mr. Chairman. I am not sure whether I answered your question.

The Chairman: You answered one question, but I have another one. When you get an allowance or a rebate, or whatever you call it, from the province, which reduces your royalty contribution to the province, then one effect of that is to increase your taxable income?

Mr. Martin: No, sir.

The Chairman: Provincially?

Mr. Martin: Yes, sir.

The Chairman: So how much have they given with one hand, and, by increasing your taxable income provincially, how much are they taking away with the other hand?

Mr. Cochrane: The federal—and obviously, then, the provincial—taxes are on a base which is set on the gross value for royalty, so it does not make any difference, as long as the price does not change, what the royalty take is. It does not affect the calculation.

The Chairman: No, except that to the extent that you get a reduction in the royalties, you have a lower cost.

Mr. Cochrane: Yes. That is right.

The Chairman: Therefore, you have more income coming in.

Mr. Martin: That is true, sir. However, you are only applying a fraction of the provincial tax of 11 per cent to that 25 cents.

Mr. Cochrane: I still make the point that if you have a cost that is not allowed as a deduction, it does not make a bit of difference whether it is $2 or $1.

Mr. Martin: He is talking about provincial tax, Bob. So when you are talking about provincial income—

Mr. Cochrane: It is still based on the same base.

Mr. Martin: No. Provincially the royalty is going to be deducted, Bob, for provincial purposes.

Mr. Cochrane: Well, I have grossed up one in one case, and allowed the thing to ride in the other. There is a difference of 8 cents, then, in the effect on the provincial taxes, and 26 cents on the others, to make the 34 cents. This has raised the industry retention figure shown in the last line from 13 to 47 cents, obviously, and changed the share of net revenue, which is the fourth line, which shows the net revenue after deducting the straight lifting costs, and the drilling and exploration costs. The share of net revenue is changed; it dropped initially from 27 down to 25 per cent and then down to 2.8 per cent. This increases it back to 10.1 per cent.

While I am on that question, let me make a few comments about the other provinces. Saskatchewan has come out with a scheme to do the same thing as Alberta, that is, not to disallow the royalties and like payments from the tax base. This is the old move substantially; there are some changes in drilling incentives, but they are very small because the quantum of drilling is very small in the province.

Quebec, taking the reverse position, has quickly put through or has announced—I do not think the legislation is through yet—that it will take all the federal revised fig-

ures and go the whole hog, with one exception. They say, "If you do the work in the province of Quebec we will give you, instead of one for three dollars on earned depletion, one dollar for every two dollars you spend, and instead of the 30 per cent write-off development cost we will give you 100 per cent write-off, for the amount of work you do in the province." Actually, the work done in the province is very small, and therefore this is more a kind of encouragement than something that will have a practical effect on the figures. None of the other provinces has moved, but I should like to speak for a moment about Ontario.

Ontario has not made any move yet to change the basis of its law, which was last April's budget, under which the old rules still applied. They still allow a percentage depletion and they still allow deduction of royalties and still allow 100 per cent write-off of development costs. But we are in the position, while this is what is happening at the moment, of knowing that Ontario is examining very closely what its action should be in the next budget. While the other provinces moved back to May 6, 1974, Ontario did not take this position. It let it ride and is going, perhaps, to take whatever action it thinks proper in its next budget. Therefore, in doing this we are not able to take into account, because it is unknown, what action, if any, Ontario will finally come up with. They are just considering the situation as to whether they want to go the way Quebec is going or to go the way of Saskatchewan and Alberta.

The Chairman: Do you anticipate that Ontario will be up or down in relation to Saskatchewan and/or Alberta?

Mr. Cochrane: I have to give you a personal opinion on this. Having regard to the actions that the Ontario government is taking with respect to mining taxes, where they raised their rates to 40 per cent for the larger companies, I do not feel any encouragement that they will not follow Quebec. I hope I am wrong but, practically speaking, I do not have any feelings on the matter.

The Chairman: Your conclusion is that it will cost more in Ontario?

Mr. Cochrane: In these assumptions we have not taken into account the possibility that Ontario is going to do that.

The Chairman: We are just trying to make an educated guess.

Mr. Cochrane: I do not think there is much reason to be encouraged. I feel the odds are that they will go the way of Quebec and add it in and amend their act to conform to the federal act when it is passed.

British Columbia has not moved, as far as oil is concerned, at all. It has come up with a rather involved arrangement as far as natural gas is concerned. This is one of the cases where there is a provincial marketing board involved, which took all the profits. In other words, it bought the gas at anywhere from 18 to 22 cents per thousand cubic feet from the producer on long-range contract and in turn sold it for an average of 82 cents either in the domestic market or in the export trade. With these figures the federal government rules require that there be a deemed royalty assumed and in this case under the federal rule it comes to about 57 cents after deducting transportion, and that the oil companies would have to pay. The fact of the matter is that after we have paid the tax on the deemed royalty, it is more than we get out of the initial sale of the oil. However, the province has made an arrangement with the federal government whereby the provincial marketing company will apparently take over the assumption of the tax on that deemed royalty. The details are not available and it is rather difficult to say, but I guess the situation is that we will continue to pay the federal government and the marketing company will rebate it to us.

The Chairman: The net result of that would be that the income of the oil company or the gas supplier would be 22 cents?

Mr. Cochrane: That is right. Mr. Barrett and Mr. Turner say they have come to a mutual agreement. We have not been able to find out yet exactly what it is, but the net effect is that we will not be liable for the tax on the deemed royalty.

Senator Connolly: If you are liable for it, then it is confiscation?

Mr. Cochrane: Yes, but the bill does not worry about that. It is a situation where we are tied in by a province to a very low rate of compensation for gas and oil drilling and we are getting no more out of it. They used to take their royalty, if you will, by taking the profit between what they buy at and what they sell at. The question is that, if it is deemed that part of that is taxable, then we never got it and we sold it in good faith to the province and we would have to pay tax on it. The tax plus the other cost of three or four cents per thousand would more than offset the 22 cents that we get. This is not a very great encouragement.

Senator Connolly: What about gas and oil not actually produced? Here I am speaking of where discoveries have been made but the gas and oil is still in the ground because there are no transportation facilities or pipeline facilities. I am speaking now of very remote areas. Will the producers who have not now, I take it, the right to sell in the market, have to sell it to the provincial marketing board?

Mr. Cochrane: Well, these remote areas are not within provincial jurisdiction. They are all federal.

Senator Connolly: I was thinking of situations within the province that is, situations where you have fields newly discovered, not on a pipeline, but owned by the producer, with the oil and gas still in the ground. You mean that the producer will not be able to sell to markets that he might develop but must sell to the provincial marketing board when that comes on stream?

Mr. Cochrane: That is the way it is working now. They are insisting that all oil and gas, shall be sold to the B.C. Petroleum Company, which is the marketing board. Whether they will make exceptions to this in the future, I do not know. That is the situation now.

Senator Connolly: And the provincial marketing board pays this price of 22 cents?

Mr. Cochrane: The average is 22 cents. It goes from 18 cents to 23 cents.

The Chairman: Here you are speaking strictly of gas. If the gas is produced in northern areas, outside of B.C., then it comes on stream and is shipped or moved through British Columbia, is that right?

Mr. Cochrane: Either Alberta or British Columbia.

The Chairman: Is it then the situation that the only market you can sell to in B.C. is the government agency?

Mr. Cochrane: Yes. That is, if you are trying to serve the domestic B.C. market that would be true, but most of this will go east, I think, or south.

The Chairman: You can export it?

Mr. Cochrane: Yes; this, as I say, goes south.

The Chairman: So the impact of the B.C. action can to some extent be avoided?

Mr. Cochrane: Very much so. In fact, we are working on that assumption, that we are not tied in and, as Senator Connolly said, the actual producing wells such as Clarkfield and those around Fort St. John are presently being sold and taken over by the province. Of course, they are bringing in gas from Alberta also, but as far as the B.C. fields are concerned we do not seem to have too much choice at this moment.

Senator Connolly: Are those fields by any chance dedicated to ultimate domestic use?

Mr. Cochrane: No, they are selling approximately half to the export market at $1 per thousand cubic feet and selling to B.C. Hydro at 60 cents and they are taking. There is no export tax on natural gas.

The Chairman: Well, you do not need gold to make money, do you?

Mr. Cochrane: No, you sure do not; you need regulations.

Senator Connolly: Regulations are better.

Mr. Cochrane: But they do not assess what would normally be a royalty on it. They just buy it at a price, sell it at another, and take the difference, which is a fairly substantial amount.

Mr. Martin: B.C. gas is not the most important thing in the world, though it has a considerable importance. The position we are in is not very different from that of a distilling company if it were taxed, not on the price for which it sells its products to the Liquor Control Board but on the price at which the Liquor Control Board sells it to you and me. You can understand that a distilling company could go bankrupt very quickly if it were taxed on the Liquor Control Board profits.

Mr. Cochrane: Assuming that the B.C. action returns natural gas to where it was before the November 18 budget, while we cannot foresee the net result, certainly there will be the opportunity for access to higher priced markets and export trade. That is assumed by the B.C. Government action.

The Chairman: The November 18 budget has not affected the position of the 22-cent gas sold to the provincial marketing board?

Mr. Cochrane: No, not with the provincial action. Presumably it will work out, whatever the mechanics are, that if we have to pay it we will get it right back from the province, and vice versa. However, the B.C. Government has not given any indication as to what they will do with respect to oil. They are very silent about this, so we do not expect very much.

The Chairman: What oil is available in B.C.?

Mr. Cochrane: There is some oil in the northern area and the fields around Fort St. John.

The Chairman: I mean producing?

Mr. Cochrane: Oh, yes, producing; very much so. They are not huge. I believe they produce between 5 and 10 per cent of the total oil production in Canada.

Senator Molson: How much exploration is now carried on in British Columbia?

Mr. Cochrane: Right now, none. I must qualify that, because I do not know everything. It is very little. As an illustration, we have gone in as a company and have paid $7 or $8 million bonus to get what looked like Rocky Mountain prospective gas areas. We cancelled it all, once these rules were issued. There was just no way we could produce that gas under the B.C. rules, so we just had to stop and see if this thing will shape itself up a little better before it would pay to invest much more money into that play.

Senator Molson: Are there any shallow areas in British Columbia in which relatively shallow drilling would be involved?

Mr. Cochrane: No, it is mostly mountain and foothill areas, in practically all cases. There is just the shield coming down and you are right into the foothills, which go over past Banff. Then you run into them, most of them being gas and gas-prone, because most of the foothills have produced more gas than oil. There are a few oil fields in the valley, down by Fort St. John, but the major part is in the foothills.

Senator Connolly: It is fair to say that anyone, big or small, domestic or foreign-owned companies, owning gas in the ground in British Columbia has a price ceiling of 22 cents on the product?

Mr. Cochrane: Yes, at the moment.

Senator Connolly: And there seems to be no daylight ahead? It will be 22 cents a thousand cubic feet, whether it goes to the domestic or foreign market?

Mr. Cochrane: Yes, they determine where they put it and what price they obtain.

Senator Connolly: "They" being who?

Mr. Cochrane: The B.C. Petroleum Company, which is this marketing board, an arm of the B.C. Government. I might say, though, senator, to be fair to B.C., they did sign six-year contracts for this 22-cent price. There was a little duress involved. I do not mean that in the way it sounds, but we were required, we did contract on the six years and there was no way we could see of getting out from under.

Senator Connolly: When the price was 22 cents?

Mr. Cochrane: Yes, that was a good price, at the time, in our opinion.

Senator Connolly: What is the price on the foreign market?

Mr. Cochrane: Just slightly over $1 at Vancouver.

Senator Connolly: So any gas that was not contracted for is still locked in now at 22 cents?

Mr. Martin: This is a complicated subject, sir. A complicated schedule was issued by the B.C. board and it would not be fair to leave the committee with the impression that under no circumstances was there more than 22

cents. That was a convenient average which they used, but under cetain circumstances new gas contracted to the B.C.P.C. and sold to them in 1979, if this price schedule is up-to-date, will obtain 33 cents.

Senator Connolly: Big deal, when the international price is $1.02, or $1.05 you can hope to obtain 33 cents.

Mr. Cochrane: Mr. Barrett is looking for $1.93 for his export gas since he came to talk to Mr. Turner about it.

Senator Connolly: And he is only going to pay 22 cents or 33 cents for it in 1979?

Mr. Cochrane: That is an indication of the kind of prices. It is getting over the one dollar.

The Chairman: Is there an export tax on it?

Mr. Cochrane: No, sir; there is no expert tax on natural gas.

The Chairman: So that is a field still open to the federal authorities?

Mr. Cochrane: Yes, sir; I just have to say yes in passing.

Senator Molson: Wide open. Mr. Chairman, are these prices of 22 cents and 33 cents based on Vancouver, at wellhead, or at the border?

Mr. Cochrane: Those are wellhead prices.

Senator Molson: 22 cents and 33 cents are wellhead prices?

Mr. Cochrane: Yes; they are average. I believe it is 87 cents, or some such figure on their average price of selling, which is approximately 65 cents higher. The transportation back to the well which is involved comes off and they come out with 57 cents after transportation difference, which they deem to be the royalty.

Senator Heath: Mr. Chairman, is there any likelihood of offshore finds and would that still fall under the jurisdiction of the British Columbia Petroleum Company?

Mr. Cochrane: I do not like to become involved in provincial-federal arguments over who owns the rights offshore. If drilling or exploration were taking place in any of these areas, as a natural precaution the operators would take out rights from both parties until they settle. That point has not yet been settled. This is one of the reasons why the federal land use act has never been proclaimed. It was withdrawn three or four years ago. As a consequence, until they settle this jurisdiction with the provinces they say they will hold it. This situation applies particularly off the East Coast, where both the Nova Scotia and federal authorities claim jurisdiction. We have a little bit in on the Islands of St. Pierre and Miquelon, also. France claims jurisdiction there as well. We get a premit for the time being and hope it will become sorted out somewhere. It is that kind of a problem for which there is no solution.

I might say that all the work in the North is going on in good faith. We do not know what the royalty rates will be on any production developed in the Arctic. We do not know what it will cost us to go to lease. They grant permits now to explore, but we cannot register a lease because there are no rules yet. The lease will specify what the royalty rates will be. We have gone along with the reasonable assumption that the federal government will be as interested as we are in developing these additional supplies for Canada, and that they will not be unreasonable. We have a few qualms after watching some things; nevertheless, that is our posture. We do not have any rules for the Arctic so far. Significant finds have been made there. We have not yet reached the stage of putting in leases or doing the development work. We hope they will be in place soon, and that the government will declare its intention. It has been almost four years—

Senator Walker: In the meantime, the lack of action on the part of the government will have held up your exploration work?

Mr. Cochrane: We have gone ahead on exploration permits, drilling exploratory wells, doing our seismic work and so on, but we cannot go to lease. That is, we can go to lease, but we do not know the rules that will apply to leasing. We are just trusting that the government will be reasonable about the whole thing.

Senator Connolly: Another inhibiting factor is that there are no transportation facilities in the North; is that not so?

Mr. Cochrane: Yes. It will be a few years before anything can be developed. You do not develop it, put in the gas plants, and do all the other things you have to do—

Senator Connolly: It is the chicken and the egg deal.

Mr. Cochrane: It is more and more a factor in the oil industry today that we are putting in investments 10 years ahead. We can only see through the glass very darkly as to what the conditions will be. One thing necessary is some certainty that once we shake this thing out and get down to it we can go along and know that it will not change every two years or so. If it did, we would run into a real problem. One cannot turn the tap on an off every five minutes.

Senator Cook: They are hoping that by that time there will be two new provinces.

Mr. Cochrane: I hope they will not operate them in the same way as some of the others.

Senator Connolly: There is great pressure involved in this. As I understand the charts, in connection with the consumption of energy, both in the form of gas and oil, projected towards the end of the century, two very important things must be done. The first is to bring into being the oil sands production, and the second, of almost equal importance, is to develop production from offshore areas, north, east and west. Is that not a fact?

Mr. Cochrane: Very much so. The potential is there. There is enough encouragement to indicate general potential. They are not all drilled, and all the lines are not yet available—perhaps for gas, but not for oil. Concerning Canad self-sufficiency, while we may start toanun out for a while, hopefully by 1985 Canada will be back on track with the oil flow from the tar sands, or oil flowing from the remote areas, wherever they may be—hopefully the east coast and at least the delta areas in the Beaufort Sea. More work has been done in those areas then anywhere else.

Senator Connolly: Mr. Chairman, we have taken the witness away from the chart, but I think this background discussion is very helpful.

Mr. Martin: It is very helpful, senator.

Mr. Cochrane: Let me get back to the chart and wrap up this matter. On the chart we talk about the action of the provinces. Alberta, for instance, has done everything it can, although we hoped it might reduce the royalty rate. They have also promised that on the next run of increases they will not take their full 65 per cent bite. We shall have to wait to find out what the effect will be. It is important that they have indicated they are not trying to keep compounding as the price moves up over the next few years.

Senator Connolly: Do the provinces get virtually 65 per cent of the take?

Senator Molson: Net.

Senator Connolly: The federal government gets 25 per cent and the industry gets approximately 10 per cent. Part of that 25 per cent goes back to the province, does it not? Is that net to the federal treasury?

Mr. Martin: Yes.

Mr. Cochrane: Yes. There is no equalization between the federal and—

Senator Connolly: Certainly the lion's share goes to the provincial treasury, and anyone working up there is working for 10 per cent of the take.

Mr. Cochrane: The problem is that now, more than at any time in the history of Canada, we need money to develop these resources. Costs are staggering. At this time the opportunity is taken to syphon off all the effective revenues to the point where it is cutting back our ability to generate enough cash to do the job. There are two prime requirements which everyone, including Mr. Turner, will tell you are necessary. Introducing Bill C-49 in the House of Commons (*Hansard*, p. 2695), he said:

> It is vitally important that the companies should be able to earn a return that is sufficient to compensate them adequately for the risks they incur and to generate the funds required to meet the high cost of finding, developing and delivering the resources . . .

We could not agree more. That is exactly what we must have. We seem to have been a prime target. If the provinces threw everything back into the ground in further exploration, and the federal government did the same, perhaps we would not have so much quarrel; but it does not happen that way.

Senator Connolly: What percentage would you need to do the exploratory work required, given the time schedule ahead, with conventional sources declining, and with greater dependence on the tar sands and remote area production? Can you give me a ball park figure?

Mr. Martin: That, I regret, is a question no one can answer, because there are very long lead times involved in this. We are now exploring, and we do not know whether the oil which we expect to discover will be found in areas where it is easy or difficult to produce. Let me illustrate my point. In the Mackenzie delta area you may find oil in one spot or 100 miles away. It will be a completely different ball game if you are trying to produce the oil on dry land, or in shallow water, or in water five feet or 10 feet deep, or in water 30 feet or 40 feet deep.

Senator Connolly: Or deeper.

Mr. Martin: Yes. It would be a completely different ball game. At this point in time, no one can tell precisely where oil will be found or precisely what the operating costs will be. I would love to answer your question with a specific number, but could I illustrate the impossibility by referring to the job which the Department of Finance did this past summer in trying to fine tune Canada Savings Bonds for this year. It did not want to put too high an interest rate on them or too low an interest rate. It had to predict three months in advance what the rate would be, and I think it is generally conceded that the rate was possibly too generous. That shows it could not be done with any exactness, although to an outsider it may seem a very simple task.

I cannot answer your question, senator. I have far bigger unknowns as to the cost escalation in the 10-year period, the cost of exploration and, finally, the cost of production when the oil is found. All I can say is that the larger the government take, the less money there will be left to explore and develop, and also the less incentive. The larger the government take, the greater the tendency will be, regrettably, for the industry to high grade, to go for the big deposits and ignore the smaller ones, thereby discovering less oil.

Senator Connolly: The average corporate rate in Canada is now about 50 per cent—

Mr. Cochrane: The rate for manufacturers is 40 per cent.

Senator Connolly: Yes, that is right. In your case, the rate is 25 per cent federally, is it not?

Mr. Cochrane: But the others do not pay royalties of 65 per cent.

Senator Connolly: I realize that. I am just talking now of the federal tax.

Mr. Martin: To start with, senator, the rate that you gave of 50 per cent is the federal-provincial rate. It is not the federal rate. The federal rate this year is 47 per cent less 10 per cent, which is 37 per cent.

Senator Connolly: But it is still higher than 25 per cent. This is not a political argument; I am simply trying to assess what the fair rate is for a company. Perhaps I can point it up by saying this: you get 10.1 per cent net out of your operation. If the producing companies put their money into a range of securities, you would probably get that, if not more.

Senator Cook: It is not 10 per cent on capital; it is 10 per cent on the net revenue per barrel.

Senator Connolly: It is 10 per cent of the net production revenue. You could probably get 10 per cent in a much safer form of investment. Until a few weeks ago, you could get 10 per cent on guaranteed investment certificates, which are a lot safer than looking for oil in the Beaufort Sea.

Mr. Martin: That is correct.

Senator Connolly: I think it is important for us to talk about this. Yours is a very high risk industry and still your return is no more than what you could get from a much safer form of investment. Then you look at it and see that the federal take is 25 per cent, which is less than the average corporate federal rate. In addition—and I am not trying to downgrade the provinces—the provinces have imposed a 65 per cent royalty—

Mr. Martin: It is a very high take.

Mr. Cochrane: There are many people who feel that the big problem is the large increase which the provinces imposed in the form of royalties.

Senator Connolly: Mind you, they are not here to answer that, but that is the effect, is it not?

Mr. Cochrane: That is right.

Senator Cook: Apart from percentages and all the rest, is not the whole story the fact that when the net revenue per barrel of oil was $1.95 the producing companies received 53 cents? Now, notwithstanding inflation and everything else, when the net revenue from a barrel of oil is $4.05 the producing companies get 47 cents, 6 cents less. In other words, the net revenue is almost two and one-half times and your take has gone down from 53 cents per barrel to 47 cents.

Mr. Cochrane: That is exactly right, senator. Also, there are costs which come out of the industry's 10 per cent. We have to pay interest on our debt, and so forth. That is not all profit.

Senator Cook: That 10 per cent has no relevance to capital; it is only 10 per cent of the net revenue per barrel.

Mr. Cochrane: That is right, and we do have costs against it.

Senator Connolly: You have to pay dividends, and so forth.

Mr. Cochrane: This chart is simply a comparison between different moments in time. The purpose of the chart is to show these different situations and how it can go up and down and where the flow is. If Canada wants to be self-sufficient in oil, it must have vigorous programs. We believe that private industry is better equipped to carry out these vigorous programs than is the government. What must be realized, however, is that such programs are going to cost staggering amounts of money, amounts which we would never have dreamt of having to spend a few years ago.

In order to make the expenditures which will be necessary, we will have to be in a position to borrow money, and for that purpose our cash flow has to be shown to be demonstratively pretty good. In other words, we will have to have an adequate cash flow. We may not have difficulty in borrowing money for such facilities as a pipeline, or something of that nature, but who is going to lend us money to drill a well in the Arctic? For such projects as that, we have to use our own funds. These are the types of problems with which we are faced. It is very frustrating not to be able to answer Senator Connolly's question as to the percentage we feel we need.

Let me illustrate one point. If you look at the figure in the last column on the right-hand side, you will see that the total exploration cost per barrel is $1.35. That is arrived at on the following basis: in 1974, the petroleum industry, as estimated by the CPA, spent $1.55 billion on exploration and development of oil. They considered that the oil equivalent of production 1,800,000,000 barrels and the equivalent gas converted to oil another couple of hundred million. So, they took one billion barrels and said, therefore, it is $1.35 a barrel. However, we are now at the stage where the government is phasing out exports. The amount being shipped out is declining. This is going to take us right back. In 1973 we were at top producibility. Now we are getting down below that and market prorating goes right back into effect the moment that happens. All of us are being prorated back. So we drop to 800,000 barrels from 1.1, 1.2 on January 1, and to a drop of 600,000 barrels exported come July 1. All right. That is a political decision as to what to do. But the effect of it is that instead of dividing by a billion barrels, we have to divide by a much lower figure, and that figure goes up to $2 just by changing the denominator of the fraction. These are not finite numbers. They are a moment in time when we are trying to make a comparison, and it is hard to say we should have 47 cents, or 67 cents, or 87 cents. It is not that kind of a problem.

We are quite willing to pay our fair share of taxation, but it is essential, if Canada is to achieve self-sufficiency in oil, that the government allow these funds to be ploughed back directly by the oil companies into exploration and development. We are not raising our dividend rates or returning these profits to our shareholders, as everyone accuses us of doing. We are doing very little of that. Every dollar we earn is being ploughed back into further re-investment in Canada, and that is what should be encouraged.

"Profit" is a very funny thing. Some people believe it should be stated one way, others another way, and still others wish to restate it another way. We divide it as between what is necessary re-investment that has to be ploughed back into the business and what is then available to return to shareholders and to do other things.

The Chairman: Mr. Cochrane, I think you have gone fairly far afield in demonstrating the position of the companies and in establishing the priorities of benefit the provinces which have oil and gas want, as well as what the federal authority wants, and also what the companies want. The companies bring up the tail end. However, our problem here is to determine whether the mineral resources taxation, in the circumstances, is fair. The fact that the provinces are getting a lot more does not help us in answering the questions. That story can be told by the provinces.

Senator Walker: I am sure it has been.

Mr. Cochrane: Very much so. Perhaps I could answer your question, addressing myself to this particular matter. Is it fair taxation under Bill C-49? We would take the position in the industry, speaking generally, having discussed this a number of times, that we do not believe in double taxation; we do not think that amounts we do not receive should be subject to taxation at all by the federal government. If we do not receive them, they have nothing to do with us. We are required by law to pay them or they take them in kind, as they have been doing under marketing boards; we do not even see it.

Senator Cook: The royalty paid to foreign governments is deductible.

Mr. Cochrane: If it was not intransigently built into this that these things will be added back, then at least it seems to us that in equity a reasonable royalty or economic rent should be allowed as a deduction. It has been so since the oil industry started, since income tax has been here. In doing this, to say, "You have raised it so high it now has the flavour of income tax as well as economic rent," seems to us to beg the question, rather than saying, "Why don't you make the decision, how much is economic rent?" Prior to this we had a maximum rate up to March 31, 1974, of 25

per cent; it was between 20 per cent and 25 per cent, averaging 22.8 per cent. At that time we were allowed it as a deduction as a normal royalty. Why would they not allow this or some other rate, whatever they pick on, as being their construction of what the right rate is? We consider it unfair taxation to this extent.

The Chairman: All you are saying is that the total disallowance of royalties is unfair, that there is some element in there that has been recognized in other years.

Mr. Cochrane: Very much so.

The Chairman: Recognized as being a fair element which should be allowed.

Mr. Martin: If an oil company has leased two blocks of land, one from a farmer and one from the Crown, he will pay to the farmer, say, 16 per cent, and then the Crown takes the difference between 16 per cent and 65 per cent. On his Crown lease he pays the whole 65 per cent to the Crown. On the Crown lease everything is disallowed, whereas on the freehold lease the amount paid to the farmer is deductible but the amount paid to the Crown is not deductible. You have two people leasing two separate parcels side by side and they get different treatment. I think there is an inequity there. To make it equitable, the amount paid to the province—up to the amount that will be paid to the farmer, or up to the amount in the lease at least—should be deductible, or, as Mr. Cochrane said, the amount that was deductible up until last April.

Senator Cook: Was there not an amendment introduced to the bill a couple of days ago?

Mr. Martin: I understand there was an amendment introduced defining the fair market value of British Columbia gas.

Senator Cook: I thought I saw in the press that there was an amendment relating to royalties also.

Mr. Cochrane: Yes. This is royalty income; it has nothing to do with royalty payments. If we have a net profit interest in a particular field or well and we get a royalty under it, formerly it was not considered to be part of the production income and therefore we got no abatement on it; the 10 per cent to 15 per cent abatement did not apply; we paid the full 46 per cent on it. They have now construed that that royalty income is oil and gas income and should go in and be subject to abatement. That is the only thing they changed the other day.

The Chairman: Mr. Cochrane, if I understand you, the basic inequity may well be the different method of treatment by the province in relation to the farmer and in relation to Crown lands.

Mr. Cochrane: I would not say the province. The province is not involved with the freeholder. But we have a situation like this: Royalties are payable by three or four different kinds of groups. They are paid by freehold interest—

Mr. Martin: They are paid to, not by.

Mr. Cochrane: I am sorry. Did I say, "by?" It is paid to freehold interests. There are freehold lands on which royalty is payable. There are Indian lands owned by the federal government on which royalty is payable—and very high royalty, and there are provincial lands, Crown properties, on which royalties are payable, and, if we have foreign production, there are royalties payable to foreign governments.

The Chairman: I was not addressing myself to that. I was addressing myself to the two figures you mentioned. In other words, if you lease from a farmer, the royalty is 16 point something per cent. If you lease from the Crown, it is 65 per cent. That is what you said.

Mr. Cochrane: That is right.

The Chairman: And I said that the 65 per cent may very well be excessive, but it is a provincial rate.

Mr. Cochrane: Yes, that is right.

The Chairman: And the 16 per cent may be closer to the reality, but it is also a provincial rate.

Mr. Cochrane: Yes, that is right, sir.

The Chairman: All I am saying is that perhaps there is good argument that the cost allowance, as a deductible item by the federal authority, should attempt to relate it to the real value, not to what might be a gouging value in royalty by the province.

Mr. Martin: Yes, sir. That is exactly the position.

The Chairman: That is the thing, in a nutshell.

Mr. Martin: Yes, sir.

The Chairman: It may well be that this method was taken by the federal authority to say, "we will disallow all payments so as to bring reality to all the people who are behaving in the way in which they are," and you got caught in between.

Mr. Cochrane: I have no quarrel if they want to go after the province, but why hit us from both sides in order to accomplish the purpose? The other point I was making was that there are four kinds of royalties. On three of them you are allowed the deduction for the royalty. The fourth one, which goes to the province, is the only one on which you are not allowed that. So it is different treatment for different people. That it is all I am saying.

The Chairman: Subject to any questions the committee may want to ask, I think we have worked that one over. What is the next item?

Mr. Martin: Sir, we were asked to come here in order to update our figures. Basically, the updating I have is much the same as that which Mr. Cochrane has. Unless you request it, I don't know that much would be gained by my taking you through my former viewgraphs and just saying, "Now, we add 35 cents here and 25 cents there." I don't think that would add much to it, sir.

The Chairman: Perhaps I could put this question to you: The amount of money that the private sector would have available after the Alberta offsets would be more than they had available before the Alberta offsets.

Mr. Martin: Yes, sir.

The Chairman: The question now is whether even the additional amount is reasonable, having regard to all the risks, and would provide an economic justification for further venturing into the fields of exploration and development.

Mr. Martin: The best answer I can give to you, sir, is the answer given to this committee by the Canadian Petroleum Association on December 11, when they showed what would happen on full cycle exploration, at which time they showed that on the blow-down of the present reserves it was about 5½ per cent. That would be improved, certainly, by the present Alberta adjustments, offsets. If you had further development in the southern basin, they thought that the d.c.f. rate return would be about 7 per cent, which, as Senator Connolly pointed out earlier, is not a very acceptable rate of return. The Alberta offsets are mostly related to old oil so it would not affect that. With regard to the far north they indicated to you certain rates of return which were not very excessive, and the Alberta offsets would not change that at all.

The Chairman: The point is that, notwithstanding what has happened, the present position of the private sector and the oil companies is not improved to an extent that would make any exploration and development a viable project at this time, certainly in regard to market conditions and cost of money.

Mr. Martin: Yes, sir; but we are going ahead, I must confess, and we are going ahead in faith that things will be better.

Mr. Cochrane: We are not going ahead to the same extent, however. Last year, when the November 18 budget came out, all the majors, including ourselves, had to cut back. We could see our cash flow just disappearing, and we did cut back our 1975/1976 programs very substantially, by about one-third. We tried to keep a body of it going until we could get things sorted out. The change by the provinces is good—we like what they have done—but it is not sufficient to re-instate it. If that is the question, that is the answer I would give at this time.

The Chairman: Well, I think that is a summary of what we have been talking about for the last hour.

Mr. Cochrane: Yes.

The Chairman: Now, have you something to add, Mr. Martin?

Mr. Martin: I do not think there is much I can usefully add to the very fine hearing you have given us. The main point is that we had a certain position last winter when the price increase came through. The returns were at a moderately acceptable level, bearing in mind at that time that we would get about 30 or 35 per cent of the increase. The May budget cut us down to 13 cents. There has been a substantial increase. The Alberta offsets have been substantial, and I really should not add anything more to that, sir, except to say that as the law stands right now there is about 100 per cent take on any further price increase on old Alberta oil because the 65 per cent royalty, and the federal and provincial taxes, bring that up to just about 100 per cent.

The Chairman: I have one question, although you may not figure you would like to answer it. Supposing I asked you to be realistic, and assume that the non-deductible part of the royalties in the present tax bill goes too far, and it should be a reasonable level which would reflect real values and not some other points that the provinces are trying to serve in the way of getting more money, what figure would you set? It would be somewhere between the 16 per cent to the farmer and the 65 per cent to the provinces. Now, where would it fall?

Mr. Martin: I would like to suggest, sir, that the deductible royalty should be up to 25 per cent, which was the amount that was taken by the province of Alberta throughout the winter—a rate of 22.9, it was actually, during the winter of 73/74—and that was deductible, and accepted by the federal authorities. It seems to be the increase that they would not accept, and I think there is a good argument for saying that it is the increase over the 22.89 that should be non-deductible, and up to the 22.89 it should be deductible.

Senator Cook: Would that give you another 11 or 12 cents?

Mr. Martin: It would give us rather more than that, sir.

Mr. Cochrane: Do not forget that we are talking about 65 per cent royalty. The royalty is based on the $6.50, not on net revenue, so it is actually 4 per cent royalty average. If 25 per cent, to put it in simple terms, were allowed as a deductibility, it would go a long way to clearing the situation.

Senator Cook: What extra would it give you in dollars and cents per barrel?

Mr. Martin: It would give us about 10 per cent, senator.

Mr. Cochrane: Yes. In that order.

Mr. Martin: No. I am sorry. You would be deducting the 25 per cent, so it would be 6 per cent.

The Chairman: Is that 22.89 an average?

Mr. Cochrane: Yes. It is an average. It runs from 20, depending on the production in each well, up to 25 per cent.

The Chairman: And what was in existence up to 1974.

Mr. Cochrane: Yes. This was in effect March 1, 1974, when it was allowed as a deduction.

The Chairman: Yes. Well, that is useful.

Senator Molson: On the $3.80 price, what was the time span when that price was in effect? What are the dates of the price going to $3.80 and then $6.50? What is the history?

Mr. Martin: September, 1973, senator, to March, 1974.

Senator Molson: What was it prior to September, 1973?

Mr. Martin: I think it was about 25 cents a barrel less.

Mr. Cochrane: There were a number of steps, so perhaps the easiest way to say it, senator, would be to say that in the year preceding September, 1973, the price had risen 95 cents from $2.85. Roughly it was starting to move about that time. Because of cost factors and a lot of other things, prices were generally moving up and it rose until September, 1973. Then it was frozen until April 1, when it became $6.50.

Senator Molson: So we are talking about September, 1972 when the price started to move by steps up to $3.80 and then it went from that up to $6.50.

Mr. Cochrane: That was frozen until April 1, when it went to $6.50.

Senator Molson: I ask that question because I am trying to relate in my own mind the 53 cents which was the industry share in September, 1973 to the 47 cents which is

now the industry share. I am trying to put it in perspective. The industry share on the lower price of $2.85 would have been how much per barrel? You can give me a rough figure if you like. I am speaking now of prior to that increase to $3.80.

Mr. Cochrane: I would guess offhand it would have been about 60 cents.

Senator Molson: So it is higher than 53?

Mr. Cochrane: Somewhere in that area.

Mr. Martin: Mr. Chairman, one of your colleagues had a question earlier which was not answered.

The Chairman: That was Senator Barrow's.

Senator Barrow: If the royalties were allowed as previously, your profits would then increase by 6 to 10 per cent, but of what would that be a percentage? Of the net revenue?

Mr. Martin: Of the $6.50.

The Chairman: I have another question, Mr. Martin. If we accept the 22.89 cents as being the reasonable and allowable rate on the federal income, what would be the retention, the additional retention by the private sector if that deduction were allowed on the basis of 22.89?

Mr. Martin: If the 22.89 were allowed at the federal rate of 25 per cent, then that would come to about 6 per cent, which in turn is 6 per cent of $6.50, which comes to about 39 cents. So you would add another 39 cents to the industry, which would raise its take to something under 20 per cent, I suppose.

The Chairman: But in dollars and cents?

Mr. Martin: If you added the 39 cents, then the 47 cents would go to about 86 cents, I would say.

Senator Cook: Did I understand you to say that if there is no change and that if the price were to go to the world level of $11 a barrel you still would not get any more money?

Mr. Cochrane: That is correct, very little. With the Alberta offsets, 90 per cent or more would be taken by government.

The Chairman: Are there further questions? There are none. I wish to thank you very much, gentlemen, for attending again and updating us on this material.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT

1974-75

THE SENATE OF CANADA

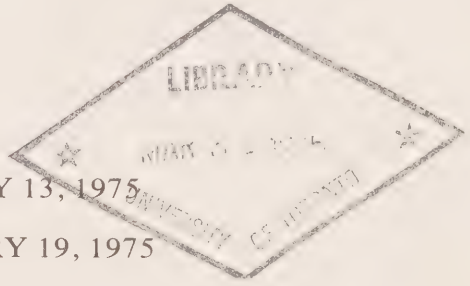
PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 23



THURSDAY, FEBRUARY 13, 1975

WEDNESDAY, FEBRUARY 19, 1975

First and Second Proceedings on Bill C-40, intituled:

"An Act to amend the Excise Tax Act and the Excise Tax"

(Witnesses: See Minutes of Proceedings)

28642—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker—(19)
Haig	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, February 12, 1975:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Macnaughton, P.C., seconded by the Honourable Senator Fournier (*de Lanaudière*) for the second reading of the Bill C-40, intituled: "An Act to amend the Excise Tax Act and the Excise Act".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Macnaughton, P.C., moved, seconded by the Honourable Senator Fournier (*de Lanaudière*), that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, February 13, 1975
(28)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: Bill C-40—"An Act to amend the Excise Tax Act and the Excise Act."

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Connolly, Cook, Desruisseaux, Flynn, Laird and Walker. (9).

Present, not of the Committee: The Honourable Senator Godfrey. (1)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

WITNESSES:

Canadian Association of Equipment Distributors:

Mr. J. S. Thorp, Executive Director; and

Mr. Gavin Harvey, Vice-President and Secretary, Wajax Industries Limited.

Department of Finance: (Tax Policy and Federal-Provincial Relations Branch:

Mr. M. A. Cohen, Assistant Deputy Minister; and

Mr. J. R. Allan, Director, Personal, Commodity and Estates Taxes Division.

Revenue Canada:

Mr. H. Perrigo, Assistant Deputy Minister, Excise.

Following discussion, the Committee expressed satisfaction with the above Bill subject to further information being received from the Office of the Minister of Finance with respect to the objections raised by the Canadian Association of Equipment Distributors.

At 10:45 a.m., the Committee proceeded to the next order of business.

Wednesday, February 19, 1975
(30)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: Bill C-40—"An Act to amend the Excise Tax Act and the Excise Act."

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Buckwold, Connolly, Cook, Desruisseaux, Everett, Flynn, Gélinas, Laird, Macnaughton and Walker. (12)

Present, not of the Committee: The Honourable Senators Benidickson, Lafond, Manning and Sparrow. (4)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

WITNESSES:

Department of Finance:

The Hon. John N. Turner, P.C., Minister; and

Mr. H. L. Jones, Personal, Commodity and Estate Taxes Division.

Revenue Canada:

Mr. H. Perrigo, Assistant Deputy Minister, Excise.

Mr. Turner appeared to answer the objections raised by the Canadian Association of Equipment Distributors during which he explained the policy of the Department with respect to rebate of taxes already paid on certain types of commodities.

Following discussion and questions asked of the Minister by the members of the Committee, further consideration of the said Bill was deferred to a later date.

At 10:00 a.m. the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, February 13, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-40, to amend the Excise Tax Act and the Excise Act, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have two bills before us this morning. The first is Bill C-40, dealing with the amendments to the Excise Tax Act and the Excise Act. I intend to proceed with it first. We have one submission, which is to be made on behalf of the Canadian Association of Equipment Distributors. With the departmental officers here, I think we should first hear from Mr. Thorp of the Canadian Association of Equipment Distributors, so that from the officers of the department we shall be able to get whatever answer there is to this question. Do you have an opening statement, Mr. Thorp?

Mr. J. S. Thorp, Executive Director, Canadian Association of Equipment Distributors: Yes, Mr. Chairman.

Mr. Chairman and honourable senators, I am John S. Thorp, Executive Director of the Canadian Association of Equipment Distributors headquartered here in Ottawa. I am accompanied this morning by Mr. Gavin Harvey, Vice-President and director of one of our larger member companies, Wajax Industries Limited, headquartered in Ottawa, with branch operations across the country.

Our association is a national group representing the great majority of distributors of construction and allied machinery from coast to coast, 190 companies. The business volume of this industry in Canada in 1973 amounted to $1.353 billion. It is safe to say that the 1974 volume will equal or exceed $1.5 billion. A recent survey indicates that about 15,000 Canadians are employed in the distribution sector of the industry.

We thank you for the opportunity of appearing before you to state our case relative to what we consider to be a grave injustice to a sector of our industry arising from the November 18, 1974 budget. We would have liked to have brought before you one or more of the other officers of the association, but I must explain that almost all the senior people in the construction machinery business are gathered in Chicago this week for a once in six years meeting and exposition. It has just been physically impossible to locate these officers in the few hours available yesterday afternoon and bring them to Ottawa. I returned from Chicago after an eight-day absence myself only yesterday morning and was informed of this hearing only yesterday afternoon. Consequently, our statement of the case as circulated is necessarily brief. We believe, nevertheless, that it does embody most if not all of the salient points. However, Mr. Chairman, we shall do our best to respond to questions honourable senators may have, and if you wish I will now read our statement of the case.

The Chairman: Please do so.

Mr. Thorp: At the date of the November 18, 1974 budget, 60 member firms of this association held an inventory of approximately 1,400 units of new construction type machinery upon which federal sales tax amounting to $3.5 million had been paid. These companies are unlicensed wholesalers who, unlike their licensed competitors, had to pay this tax at the time of importation or purchase. They are thus at a very serious disadvantage because of the refusal of the Minister of Finance to authorize refunds, although he has seen fit to do so for the distributors of transportation equipment who are in identical status.

The burden of tax ranges up to $354,000, in the case of one company. Twenty more companies are carrying between $50,000 and $240,000. The balance of the company figures range from $2,000 to $45,00, and many of them are in the $25,000 to $35,000 range. Fuller details are available on a company basis if desired or required.

The Department of Finance has contended that our industry had "ample time to arrange their affairs in anticipation of the proposed tax reduction." This, because of the proposal to remove the tax in the defeated May 6, 1974 budget. We have reminded the minister that there was no certainty until July 8 that a Liberal Government would be returned and, even then, no absolute certainty that this particular exemption would be reintroduced.

Furthermore, during this hiatus there was no assurance that we would have a budget even during 1974. The first intimation of a likely November budget date reached us only toward the end of September. It is totally unrealistic to suppose that unlicensed wholesalers would simple refuse delivery of goods ordered and vacate the market for an indeterminate period between the budgets, which turned out to be more than six months, leaving the market to be seized by their licensed wholesaler competitors. Thus there was and is no significant difference in the status of construction equipment distributors and the transportation equipment distribu brs to whom tax refunds have been given.

We consider this a gross inequity and are extremely disturbed that we have had no reasoned explanation or comment from the minister beyond the statement that refunds would be difficult "because of the wide range of product and large numbers of customers, retailers and distributors involved." This, of course, is not the case in our industry any more than it was in the transportation equipment field.

Furthermore, and very notably, the minister made absolutely no reference to this problem in the House of Commons debate on this bill, even though it was raised by at least five members.

That, Mr. Chairman, is our case, very briefly. But, if I have your permission, I would like to make a few more brief observations which we feel should be made.

There has been considerable correspondence and much telephone communication with the Department of Finance, but only one face-to-face meeting. That was on December 19 last and was with staff members in Dr. Allan's department. Frankly, we have felt that we have not received the hearing warranted by the nature of the case. We have found that there is a considerable lack of understanding regarding the conditions necessary for a wholesaler to obtain a licence exempting him from paying tax at the time of importation or purchase; and I find, sir, this applies to a considerable number of people in our industry and within the federal government.

Briefly, an applicant must show that at least 50 per cent of his business over a specified period is carried out, or was done, with tax-exempt end users. Naturally, many wholesalers cannot meet this criterion if the products they handle are not of a type purchased by tax-exempt end users. It should be noted that a considerable number of distributors are not themselves the importer of record. They purchase from Canadian subsidiaries of United States manufacturers, and it is those subsidiaries who do the importing, pay the tax, and invoice the distributor at the tax included price. In such cases the distributor has little or no control over the arrival of the equipment they have ordered and none relating to the payment of tax thereon.

We should stress again that we see no greater administrative problems in our industry than in the transportation industry if refunds are granted. The machines are readily identifiable by serial number and the number of taxpayers involved is relatively small.

Enlarging for a moment on communications with the Department of Finance, I must report that we received a letter yesterday morning, dated February 6, from Mr. Turner acknowledging our representations, stating that it is not possible to accord us an interview, but that the problem is understood. He does not, however, say anything more about remedial action or anything else.

To conclude, Mr. Chairman, the Canadian Association of Equipment Distributors feels it is suffering a double inequity, unfavourable treatment (a) as between our industry and the transportation equipment industry, and (b) as between licensed and unlicensed wholesalers within our industry. Thank you, sir.

Mr. Thorp: Yes, but with the aid, presumably, of a licence, which some of the other manufacturers have not chosen to obtain.

Senator Beaubien: In other words, you have to buy from someone who has a licence?

Mr. Thorp: The distributor, in some cases, as I mentioned, has to buy from his principal, the firm he represents, and that principal is frequently the importer of record. He makes the importation and pays the tax. He makes the importation in answer to an order received from the distributor, my member. He pays the tax and relays the amount of tax in his invoice to the distributor, who is my member.

Senator Beaubien: You say that some people, because they are registered, do not have to pay the import tax?

Mr. Thorp: Those who have a licence do not have to pay the tax at the time of importation, but only at the time they make their final sale.

Senator Beaubien: Why did they not license everyone right away and be done with it?

Mr. Thorp: That is a good question, senator.

Senator Connolly: Is there an answer?

Mr. Thorp: The answer seems to be that the present regulations require that an importer, in order to obtain a licence, must be able to prove that 50 per cent of his business is with exempt end users. In other words, purchasers of goods—possibly mines, quarries, forestry, logging operations—which do not pay tax. Presumably, it is logical in one sense, inasmuch as it cuts down on the amount of administrative work necessary. If the business is almost entirely with exempt end users, the paper work involved in paying tax does not arise unless and until the final sale is made by the distributor.

Senator Flynn: Perhaps this witness is not the one to explain the decision of the minister to provide for relief for tax-paid inventories of trucks and related transportation equipment. That is another type of equipment. Relief was granted, but it was granted before the law was passed. How was that done?

Mr. Thorp: I understand, senator, it has been granted by means of an Order in Council. I understand that it was made a relatively short time after the date of the budget—early in December, I think—presumably as a result of representations from the transportation equipment industry.

Senator Flynn: Do you know whether that Order in Council was passed?

Mr. Thorp: I am not aware of that, senator.

Senator Cook: It says there are large numbers of consumers, retailers and distributors involved. How do consumers become involved in this matter?

Mr. Thorp: I do not think end users of this kind of equipment are normally referred to as consumers.

Senator Cook: What I am wondering is how anyone is involved in this, beyond the unlicensed wholesalers who have inventories on hand.

Mr. Thorp: In the event that a remission is granted, it will clearly be necessary for that remission to be passed along to the end users.

Senator Laird: Your relief would be by Order in Council. Are you satisfied with that?

Mr. Thorp: We would be happy with any kind of relief, senator.

The Chairman: Whatever means are necessary to get the refund, you are ready to take it?

Mr. Thorp: Yes.

Senator Connolly: Which clause of the bill creates the situation you describe?

Mr. Thorp: This is dealt with on page 14 of the bill, senator, clause 21(7). Part XVI refers to construction

equipment and would be a new addition to Schedule III, which is the exempting schedule.

The Chairman: Clause 8(3), on page 5 of the bill, reads:

> (3) Section 21 of the said Act is further amended by adding thereto, immediately after subsection (3) thereof, the following subsection:
>
> "(3.1) The tax imposed by subsection (1) or by section 23, 24 or 25 is not payable in the case of goods that are purchased or imported by a licensed wholesaler who is deemed by subsection 32(1.1) to be a *bona fide* wholesaler or jobber for resale by him."

Is that the provision that shuts you out?

Mr. Thorp: I do not think so, Mr. Chairman. I have not had an opportunity to review the structure of this bill, I am afraid, in this respect.

Senator Flynn: Am I correct in saying that this bill provides for a reduction of the tax from 12 to 5 per cent?

Mr. Thorp: The situation, senator, is that the tax is eliminated from 12 per cent to zero for construction equipment.

Senator Connolly: I am told, Mr. Chairman, that the problem raised by the witness is really not in the bill. The bill, as I understand it, at page 14, Part XVI of the schedule, exempts construction equipment. The problem arises because of the fact, I suppose, that under the regulations licensed wholesalers are dealt with differently from unlicensed wholesalers.

Mr. Thorp: Exactly, senator.

Senator Connolly: And that arises out of the regulations?

Mr. Thorp: It does indeed, senator.

Senator Connolly: Perhaps the departmental officials can explain this aspect of it.

Senator Cook: The difference is that the unlicensed wholesaler pays tax.

Mr. Thorp: That is right.

Senator Cook: The refund applies as of November 18, does it?

Mr. Thorp: I hope so, senator.

Senator Cook: And it would apply only to these 1,400 units?

Mr. Thorp: Yes, held by 60 distributors in our case.

Senator Cook: And if the refund is granted it would have to follow through into the hands of subsequent purchasers?

Mr. Thorp: Yes.

Senator Cook: The total amount of the refund is $3.5 million?

Mr. Thorp: Yes. Perhaps I should explain, Mr. Chairman, both with regard to the dollar figure given by Senator Cook and the number of machines involved, that this is the result of a study and a survey of the members of my own association. I have no doubt that there are other importers, probably the smaller ones, who are not members of the association and to whom I have no access for details as to their involvement.

Senator Connolly: But these would be unlicensed wholesalers?

Mr. Thorp: Some will be licensed, I have no doubt, senator, and some will not. The business of the unlicensed ones would have to be added to these figures.

Senator Connolly: You do not have the regulations before you?

Mr. Thorp: No, I do not.

Senator Flynn: My understanding is that the end user did not have to pay the tax after November 18 if he bought through a licensed wholesaler, whereas in the case of the unlicensed wholesaler, he having paid the tax before, that tax would have to be passed on to the end user, if possible, although he may still have the equipment in his paid-up inventory.

The Chairman: He has already paid the tax?

Senator Flynn: Yes, and he may not be able to sell the equipment because of that.

Senator Connolly: Is there any possibility that a regulation made pursuant to this legislation might be *ultra vires* of the legislation? The regulations obviously differentiate between the licensed wholesaler and the unlicensed wholesaler.

Senator Flynn: I do not think that would be the process.

Senator Cook: Senator Flynn says that if an end user or purchaser purchases after November 14, he either purchases free of tax, in which case the distributor takes the loss, or else the distributor added the tax and he paid more for his equipment. Would you say the burden of tax ranges up to $354,000 in the case of one company?

Mr. Thorp: Yes.

Senator Cook: What does that mean exactly?

Mr. Thorp: It means that one company in my membership has paid $354,000 of federal sales tax on equipment in his yard, which he now has great difficulty in disposing of because he is that much overpriced against his unlicensed competitor.

Senator Cook: That equipment may have been sold or it may not have been sold?

Mr. Thorp: It probably has not been sold, and probably never will be sold for a normal margin of profit unless relief is granted.

The Chairman: I think what it means, in the case of an unlicensed wholesaler, is that he has paid the tax, which he must pay as part of his cost, which in the normal way he would recover by passing it on to the end user. In the meantime there are other people standing around who have the same equipment for sale, and there is no sales tax to be added to it. That is the kind of competition he is into.

Mr. Thorp: Precisely, sir.

Senator Connolly: It arises from the regulations.

Senator Cook: No, it arises from the bill.

Senator Connolly: There is nothing in this bill, as I understand it—I am certainly subject to correction—which differentiates between the unlicensed and the licensed operator. The unlicensed operator has to pay the tax. I think we should find out about the regulations.

Senator Flynn: The point is that the tax was not collected after budget night.

Senator Connolly: That is right.

Senator Flynn: That is the point.

Senator Cook: There is no obligation for anybody to pay the tax after November.

Mr. Thorp: No.

Senator Cook: The only difference between the licensed and unlicensed wholesalers is that in one case the tax is deferred.

Mr. Thorp: Yes.

Senator Cook: The licensed wholesaler pays the tax at the time of sale; the unlicensed wholesaler pays the tax at the time of imporation. It is in the bill, and I would not think it has anything to do with the regulations.

Senator Flynn: Senator Macnaughton, when he moved second reading, said this in connection with trucks:

> Honourable senators will be aware of the minister's intention, announced on December 2, 1974, to request the government to provide relief for tax-paid inventories of trucks and related transportation equipment. This action was necessary because of a combination of critical factors affecting the trucking industry and related transportation industries. Dealers were unable to sell tax-paid inventories because the sales tax already paid on larger trucks and other equipment often amounted to several thousands of dollars per unit. In addition, customers were refusing to accept shipment of many highly specialized, custom-built items which had been ordered but not delivered as of budget day. Many customers were prepared to wait for tax-free goods to become available or to transfer orders to dealers who already had tax-free inventories on hand.

Senator Macnaughton is describing exactly the problem of these people, which was solved for some others.

Senator Cook: You say there is no more difficulty in solving your problem than the problem in transportation.

Mr. Thorp: Exactly; that is what I said.

Senator Beaubien: What can we do to give relief?

The Chairman: First of all, let us deal with any further questions, if there are any.

Mr. Harvey, is there anything you would like to add?

Mr. Gavin Harvey, Canadian Association of Equipment Distributors: I could say a few words of explanation concerning the application of this sales tax, if you wish.

The Chairman: We have the departmental officers here. I called on Mr. Thorp first so that we would have the problem, and then we can develop it. Thank you very much, Mr. Thorp.

Honourable senators, we all know Mr. Cohen very well; he has appeared before us quite a few times.

Senator Flynn: He knows us too!

The Chairman: He will be here again on the income tax amendments. I would think for a much longer time than we expect to have him here this morning.

Mr. M. A. Cohen, Assistant Deputy Minister, Tax Policy and Federal-Provincial Relations Branch, Department of Finance: I fear that is correct, Mr. Chairman.

The Chairman: What I would suggest is that you deal first with the problem that has been presented by Mr. Thorp and explain the background, why he is stuck in this position, and why when relief was granted in connection with certain items—trucks, et cetera—it was not granted in this case. If it is a question of policy you can tell us it is, and it will be difficult for us to argue policy with you.

Mr. Cohen: In large measure it is a question of policy, but perhaps I can give you a little of the background, which might be helpful. First of all, let me say that we are very sympathetic to the problem that is besetting the construction industry in this connection. I think Mr. Thorp has presented the facts of the situation quite fairly. We have no particular quarrel with that. I suppose there is a question of judgment that has to be applied, and in the end it becomes a question of policy for the minister to decide.

Secondly, may I say to you, honourable senators, and to Mr. Thorp that, although there has not been a long series of meetings, we are very familiar with this case, and we have read very carefully the representations that he and perhaps other members of the industry have submitted; the minister has been fully briefed on this situation and is quite familiar with it. I do not know whether, honourable senators, you want to get back to the origins of how this problem arises.

Senator Flynn: That would be helpful.

The Chairman: Let us start at the beginning and bring it up to date.

Mr. Cohen: The problem is a perennial one that we face whenever federal sales taxes are raised or lowered; it does not matter which. This is a manufacturers' tax. We impose a tax when the manufacturer sells goods. I am afraid nothing is ever simple, but I will try to keep it as simple as I can. In a simple situation a manufacturer has goods that he has finished and is ready to sell. I am talking about the manufacturer, not the distributor. Mr. Thorp's problem is that of the distributor when buying from that manufacturer, but I have to start way back at the manufacturer.

We always eliminate these taxes, up or down, as of a given date. In this instance it was November 18 and sales by a manufacturer after November 18 did not require the imposition of the manufacturer's sales tax. On the other hand, on certain commodities, for example, cigarettes and what-have-you, where we raised the tax, sales by a manufacturer after that day suddenly might have to bear a greater tax.

Senator Beaubien: Mr. Cohen, the tax on the builders was 12 per cent, was it?

Mr. Cohen: Yes, this is the normal federal sales tax, at 12 per cent. Building materials had two different rates, but this is not building or construction materials, being construction equipment. Over the years there has developed a problem and a solution in the statute—not as a matter of regulation, as it happens. Provision is made in the statute

for goods flowing through a production stream and ending up in the hands of what is ultimately an exempt user, a municipality, for example, or equipment used in the manufacturing process, which is exempt from sales tax. There has evolved the problem that it is administratively silly to impose the tax on the manufacturer and, when the goods appear in an ultimate end user which is exempt, refund the tax. So there developed, and it is authorized by statute, the notion of treating the wholesaler, the bulk of whose goods are going in that direction — that is the point, I think, that Mr. Thorp was explaining — as if he was the manufacturer and, therefore, deferring the tax point. Normally the tax is applied when the manufacturer sells. However, if it is a wholesaler who will ultimately sell the bulk of his goods to an exempt purchaser, instead of applying the tax when that wholesaler buys from the manufacturer we delay it and apply it only when the wholesaler, who is the next step in the distribution stream, if you will, sells, and he, of course, only has to apply the tax on his non-exempt sales. Very few wholesalers sell exclusively to exempt purchasers, but he is then in a position to decide that if it is going to an exempt purchaser he does not have to apply the tax but if it is going to a taxable purchaser the tax must be added.

This situation exists in every industry, where some wholesalers, distributers, are holding tax-paid inventory because the tax went on when they bought it from the manufacturer. There are other wholesalers who, by virtue of the make-up of their business, have goods which have not yet borne the tax because the bulk of their sales were going off in an exempt direction. That is the competitive problem faced by the construction equipment distributors. Some of them happen to have, because of the nature of their business, wholesale licences, which means that they are holding all their goods without the tax having been paid. Others, because of the nature of their sales, are holding inventory upon which the tax has been paid. Along comes the government and says the tax is off; from here on in the sales will not attract tax. Some of these distributors are holding tax-paid goods; others are holding goods that have not yet borne the tax and now will not bear it.

There are two distributors, both endeavouring to sell to the same buyer, the taxable buyer, these pieces of equipment, one of which has the tax and the other has not. We fully realize that that is a serious competitive problem which they must bear.

All right; why is it not solved? I suppose the simple answer, and the painful answer for Mr. Thorp, is that generally it has been government policy to not attempt to deal with this problem.

Senator Beaubien: Why?

Mr. Cohen: For several reasons, I suppose. First of all, it involves enormous administrative difficulties, depending on the industry. Now, I would concede to Mr. Thorp that it is easier to handle the problem for construction equipment than for many other commodities. For instance, I would take you back to another item in this bill, which is clothing and footwear, involving thousands and thousands of items. It would be impossible to sort out the problem of who is to get a refund and who is not to get a refund.

Secondly, this cuts both ways. In this particular instance it would go down and someone would be looking for a refund. When we raise taxes we do not go after the unlicensed wholesaler who has managed to buy his goods at a lower rate of tax. The shoe is on the other foot. Then the licensed wholesaler who is suddenly faced with having to pay more tax on those goods and faces a competitive disadvantage. So, if we consider the total situation, it cuts both ways.

Senator Cook: The government has a much bigger shoe than the poor old wholesaler.

Mr. Cohen: No; this is the question of the competitive position between a licensed and an unlicensed wholesaler. If the taxes go down, one has an advantage; if the taxes go up, the other has an advantage. Therefore, it has been general government policy for years, with very minor exceptions, to attempt to deal with the tax-paid inventory problem and let the chips fall where they may, whether it is on the up side or the down side.

Senator Flynn: But usually when the tax goes up, for instance on cigarettes, the retailers will charge it right away, even if they have paid it. My point is that the consumer is the victim in the case of increasing taxes. However, when there is a reduction it is to benefit the consumer, the end user, that the decision is made. In this particular case it is for the end user that the government has decided to reduce or eliminate the tax.

Mr. Cohen: That is quite true, senator; that is the underlying motive, but the problem here is the competitive difference between two people who are attempting to sell to the same customer. This is true throughout the whole of the manufacturing sales tax.

Now, the exception was made for transportation equipment and perhaps that was the mistake. Had we not done that, then perhaps Mr. Thorp would not have had as good a case as he has.

Senator Desruisseaux: Why was the reduction made for the transportation equipment?

Mr. Cohen: The minister alluded to this in his news release. He felt that the situation was particularly acute for the transportation equipment people, for several reasons. One is that it came as a surprise. It had not been an expected result, whereas the construction equipment one had been announced six months earlier in the first budget. Therefore some people—I am not suggesting that everyone was able to get himself into a protected position, but at least many, many people should have, or ought to have and, perhaps, did avoid this problem. However, the transportation equipment item came as a shock to everyone, a welcome shock; it was a relief. Nonetheless, people were caught with no advance notice.

Secondly, I suppose the minister felt that the particular nature of that industry was such that most of these goods were custom made and simply could not be sold. I am not denying for a moment that some of that is not true for Mr. Thorp also, in his industry. However, in the minister's judgment—and it is a matter of judgment, senator—he had a principle which he desired to follow not to deal with tax-paid inventories. Every principle must have an exception and it is a judgment which one must make as to how bad is the problem. He felt that the problem in the case of the transportation equipment industry was serious enough to justify what is in principle an undesirable step.

I suppose all I can say is that he came to a judgment, and a difficult judgment at that, that the time is not true for the construction equipment industry. Similarly, we have had representations, senators, from other industries, such as construction materials and building material, who also

are caught in the same position. They say "Me too. We have unlicensed wholesalers and licensed wholesalers involved in that type of problem."

So, it was a very difficult decision. The minister thought about it for a long time. He had many representations from all industries involved in this and had to make a difficult decision. Whether that decision is a right or wrong one is a matter of judgment and, in the end, a matter of policy.

The Chairman: Mr. Cohen, can you tell us the authority under which this differentiation is made between the licensed and unlicensed wholesalers? Is it by regulation or is there some basis for it in the statute?

Mr. Cohen: It is not a question of the remission, of the relief; it is a question of how you get to be a licensed wholesaler.

The Chairman: I am not talking about remission or anything else. I am saying, is the authority which puts Mr. Thorp in one position, and another man, who may be selling to an end user that is tax exempt, in a different position—

Mr. Cohen: It is section 32 of the statute.

Senator Flynn: Of this act?

Mr. Cohen: Not this bill; it is section 32 of the Excise Tax Act. It is not a matter of regulation; it is in the statute. It is the authority to grant a wholesaler—

Senator Connolly: If it is in the act, then there is no question.

Senator Flynn: If it is not long, perhaps you could read it.

Mr. Coyen: It is section 32(1):

> A bona fide wholesaler or jobber may be granted a licence, but if a wholesaler was not in possession of a licence on the 1st day of September 1938 no such licence shall be issued to him unless he is engaged exclusively or mainly in the purchase and sale of lumber or unless fifty per cent of his sales for the three months immediately preceding his application were exempt from the sales tax under this act.

Mr. Thorp alluded to the 50 per cent tax as well. That is the authority for treating a wholesaler as though he were a manufacturer.

Senator Cook: What was the authority for saying that the refund is given in the case of transportation?

Mr. Cohen: I think the minister's plan, senator, is to seek a remission order under the Financial Administration Act.

Senator Cook: Which course could be open if he decided to extend his mercy.

Mr. Cohen: Theoretically that is quite correct, senator.

The Chairman: While we are on that point, there have been many instances where relief has been given because of this situation of having a May and November budget and their effect on manufacturers and wholesalers caught in between. You mentioned the clothing industry. The clothing industry was dealt with specially. They had a problem. They have to manufacture for the seasons, and they could not manufacture. They were getting an exemption in the May budget, but that did not become effective. They were dealt with in a way in which they could operate without knowing that the next budget would carry through the exemption.

The shoe people were granted relief. Other people were able to get relief by making use of certain sections in the Excise Tax Act—that is, recognizing that the sales tax applies on the sales price. They were able to do some kind of instalment selling under which the sale price was not to be paid until the exemption had been granted by statute. That was recognized by the department.

All Mr. Thorp is asking is: Find some way within the scope of these methods that were used, or under the Financial Administration Act, that will bring me in also. What have you to say to that?

Mr. Cohen: You are very persuasive, senator. The relief that was granted to the clothing industry, which as an interim step was granted by way of a remission order—it is now being authorized by statute in this particular bill—was a different kind of problem. There it was a question of getting the exemption from the sales tax operative.

The problem that Mr. Thorp is troubled with is precisely the problem that the clothing industry faced at the time we passed the remission order. They had tax-paid inventory on hand as well, and that problem was not resolved. All that was dealt with as being special was the actual reduction in the tax point after a given day. That has been the way the government has operated, both up and down, since, I suppose, time immemorial, with one or two exceptions. There was one exception concerning automobiles some years ago. That was the elimination of the tax. I am sure Mr. Thorp is not quarreling with the elimination of the tax on construction equipment. It is this very narrow but serious problem of the competitive imbalance between those who happen to have taxed as compared to those who happen to have untaxed inventories—the licensed wholesaler versus the unlicensed wholesaler.

Senator Connolly: Are there any other people in the same position as those who are represented here this morning?

Mr. Cohen: Yes, sir. The whole building and construction material industry has the same problem. There may be differences in degree, in the quantitative nature, but qualitatively the entire building material industry has exactly the same problem. Some of their products are large and expensive. The problem gets less significant the smaller the item, because what happens is that you can spread the cost of that tax-paid inventory that you cannot recover over all your goods. The bigger the commodity, the harder it gets to do that, because the product gets bigger and the number of products gets smaller.

Senator Flynn: You have the same system of licensing in building materials?

Mr. Cohen: Oh yes, sir.

Senator Flynn: It must be more difficult to find a wholesaler who would sell 50 per cent to a tax-exempt end user.

Mr. Cohen: I think you will find that there are licensed wholesalers in every industry.

Senator Flynn: They must be specialists in building materials.

Mr. Cohen: No. A large part of the distribution system ends up in the hands of exempt buyers. It is not just

hospitals and municipalities. It is the whole manufacturing industry. We do not have a sales tax on machinery and equipment used in the manufacturing process itself. There are lots of distributors. We are selling to exempt buyers because the buyer is not necessarily a hospital or municipality.

Senator Flynn: It seems to me that it is so wide.

Senator Cook: The unusual part about this is that if the minister's budget had gone through on May 8, this $3.5 million would not be owing. Now, when the budget has gone through in November, you see it has gone up $3.5 million which you have given up in May anyway.

Mr. Cohen: If the budget had gone through in May, we would have had the same problem in respect of goods that were on hand on May 5.

Senator Cook: The chances are that you would not have given exemption to the transportation industry, and you would not have to give exemption to these people.

Mr. Cohen: Perhaps that is the solution, senator.

The Chairman: Mr. Cohen, you have said the manufacturer can absorb some of this. Of course, he can. It is a cost, and he could show less profit—and, of course, you would get less tax. His depreciation write-off will be greater. Am I right?

Mr. Cohen: I suppose that is true, senator.

The Chairman: You are an authority in this field. You should be able to say yes or no to that, I would think.

Mr. Cohen: I will give you a yes on that.

The Chairman: The revenues are not necessarily going to be affected to the full extent of a refund that may be granted. Would the refund be taxable?

Mr. Cohen: It would increase the profit.

The Chairman: Yes. So you would get some of it back as income tax.

Mr. Cohen: That is true, senator; but if I may say in rebuttal, the problem is not that serious either then because some of the extra costs which the equipment dealers are bearing will reduce the amount of the income tax which they will have to pay. It cuts both ways.

Senator Flynn: But not the same way.

The Chairman: Are there any further questions?

Senator Flynn: I do not know if I understood Mr. Cohen correctly as saying there was a relief provision in this bill for clothing.

Mr. Cohen: Yes, there is — not on this inventory problem, but on the general elimination of sales tax on adult clothing and footwear. It has now been submitted for parliamentary approval. There was a remission order under the Financial Administration Act in July of this year, but rather than take that kind of step permanently by executive action, the minister felt it would be appropriate to come back to Parliament and seek legislative authority for that from November 18 on.

Senator Flynn: It is not in this bill?

Mr. Cohen: Yes, it is.

Senator Flynn: Would you indicate the clause of the bill which deals with this?

Mr. Cohen: This is dealt with at the top of page 14.

Senator Flynn: Do you mean the part reading, ". . . as the Governor in Council may determine by regulation."?

Mr. Cohen: It is clothing and footwear, basically, and then it includes articles which the Governor in Council may determine by regulations. There are a number of articles on the edge of every industry regarding which it is always debatable in this case, as to whether or not they are properly clothing or footwear. For that reason, the Governor in Council may determine by regulation to extend the list.

Senator Connolly: There might be a question as to whether or not a bikini would be classified as clothing.

Mr. Cohen: I suppose.

The Chairman: When you point to the top of page 14, Part XV, this is a new part which is added to the schedule of exemptions?

Mr. Cohen: That is correct, Mr. Chairman.

The Chairman: But it is the schedule of exemptions that would apply as and from the night of the budget?

Mr. Cohen: That is correct.

The Chairman: The question we were asking was whether there is anything in the bill itself that affirms or confirms the remission that the minister made in July of last year.

Mr. Cohen: The period between July 16 and November 18, 1974 is covered by the remission order. There is nothing in this bill that attempts to go back to that date. The remission order serves for that purpose.

The Chairman: But I understood you to say that while the remission order was made, the minister was seeking some confirmation from Parliament in respect of having done that. Did you mean to say that?

Mr. Cohen: Yes, Mr. Chairman. Perhaps I had better expand on it. The remission order that was passed on July 16 said that from that date forward clothing and footwear were exempt. If nothing further was done, clothing and footwear would continue to be exempt from manufacturers' sales tax by force of that remission order. However, the minister felt it would be appropriate to go back to Parliament—perhaps uncessarily, but properly—to get statutory authority, thereby having the matter debated in both Houses of Parliament, from the date of his budget forward. In a sense, that step was technically unnecessary. The remission order continued, but he felt it would be appropriate to submit that decision—and it is an important decision, a big decision—to Parliament so that Parliament would have an opportunity to express its will on it.

The Chairman: I do not think the remission provision in the Financial Administration Act was ever intended to be used permanently either to impose or reduce or eliminate taxes.

Mr. Cohen: That is precisely why the minister brought the measure back in this bill, Mr. Chairman.

Senator Flynn: As I understand it, the remission order will be applicable until this legislation becomes law.

Mr. Cohen: The remission order is open-ended.

Senator Flynn: I realize that, but from the date this legislation goes into force it will be this legislation goes into force it will be this legislation and not the remission order which will govern.

Mr. Cohen: That is right.

The Chairman: If there are no other questions in that area, we will move on to the special purposes. Are there any special features in this bill to which you feel you should call our attention?

Mr. Cohen: I do not think so, Mr. Chairman.

Mr. Chairman: What is the procedure under which you determine these various classifications for equipment? For instance, in Part XVI, Construction Equipment, how do you determine that a particular piece of construction equipment comes under one of those heads? I am thinking, for instance, of cranes, hoists and derricks. You may have a situation where some of those items may be, in a sense, custom made for a particular purpose, but yet without that custom-made feature they have an end use in the form in which they are before they are dealt with for the special purposes. How do you look at that situation?

Mr. Cohen: This is a matter for Revenue Canada, Mr. Chairman. Revenue Canada, as you are aware, administers this act. There are officials from Revenue Canada here who, if you wish, would be happy to speak to that question. Fortunately, it is not my problem.

Mr. H. Perrigo, Assistant Deputy Minister, Excise Branch, Revenue Canada: It would be helpful, Mr. Chairman, to know a little more of the detail of it. If you have a piece of equipment which is being sold and we can readily determine that it falls within these categories, then there is little difficulty. I think the items of equipment we identify as construction equipment are fairly specific.

However, I can recall problems being raised where a certain kind of steel, for example, is used for a particular purpose, such as bridging. The problems that I can recall in that area end up being a question of whether the 5 per cent sales tax rate on construction materials should apply. There are provisions in there for structural steel, and we do have some administrative difficulties in that area which I would have to confirm, namely, that the list of construction materials, such as structural steel, is not an unlimited list, and we are encountering certain types of products which do not clearly fall in that list of construction materials which are entitled to the 5 per cent rate. There is an additional provision under construction materials which is, more or less, a basket provision, under section 24, which provides for the addition to that list of construction materials entitled to the 5 per cent rate by Governor in Council. At this stage, Revenue Canada officials are working quite closely with Finance officials to close some of these inconsistencies or gaps in the construction materials area

I cannot think of a specific problem which ended up as being a matter of interpretation in the construction equipment area. The problem tended to shift over to construction materials.

The Chairman: Insofar as some equipment is concerned, there are always specialties developing which involve the use of certain basic equipment which might not fit into the description of construction equipment in this Part. There may be specialties by making use of that as the basic equipment and then adding features which convert it into equipment for a particular purpose.

Mr. Perrigo: I am trying to think of some specific examples, Mr. Chairman. I would think, by and large, that with a piece of equipment in this construction equipment category we would look at its primary use and how it is commonly described.

The Chairman: That would be a legitimate course and position for a taxpayer to take, but he has to satisfy you that the overall character of the thing has changed so that it would come in that form under this head.

Mr. Perrigo: I would agree, Mr. Chairman.

The Chairman: Are there any further questions of Mr. Cohen?

Senator Flynn: Coming back to the problem of construction equipment, I have prepared an amendment to clause 16. I was wondering whether Mr. Cohen would say, if this was accepted by the committee, whether it would achieve what we have in mind. I am not asking whether or not he would like it.

The Chairman: There is a problem that strikes me about this. This is a question of a refund. I know that we have the authority and the power to lower taxes, or not to pass a bill if we do not like the form in which it is. However, I am concerned about our authority to provide for a clause in a taxation bill that would be giving away some of the government's money.

Senator Flynn: I have been thinking about that. In fact, if this achieved the purpose we had in mind we would simply decrease the tax. Suppose we say the tax should be four instead of five per cent.

The Chairman: We could do that, in my view. I do not know whether the Law Clerk is glaring at me when I say that.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: No, I am not glaring.

The Chairman: The simple problem here is a refund of a tax that has been paid, and when it was paid it was a tax that was leviable.

Senator Flynn: But if the law said that equipment on which tax has been paid is exempt, there would as a consequence be a right to a refund. It would say that that tax was not due: we would not be remitting the tax; we would say that it was paid without necessity.

Senator Cook: If we did not want to go that far, could we suggest that we were very impressed with the merits of the case and that the minister should review it?

Senator Flynn: Of course.

The Chairman: I am only the chairman, of course. The only way that I can see we can deal with this would be that in our report we might make some statements discussing this feature and expressing our view with respect to it. For instance, are we going to report the bill with or without amendments? If the amendment is to be of this character, I do not think we have the authority to do it.

Senator Flynn: We do not have the authority to do what?

The Chairman: To report this bill with amendments, and then include an amendment of this nature, providing for a refund.

Senator Flynn: If it is outside our rights to do that, I agree; but if we can do it, and if it achieves the purpose that we are seeking, why not?

Senator Connolly: I think we have had this problem many times before. I can remember back in 1960-61 we thought that there should be a change, a reduction in a rate. The debate was as to whether or not we should make an amendment. The government spokesman in the Senate at the time said, "What you are actually doing is interfering with ways and means," and we were persuaded as a chamber to back away from that.

The Chairman: I am not sure how strong the answer is about interfering with ways and means.

Senator Connolly: It was effective at that time. That is the way we did it. It was not by way of a specific amendment that we tried to do it ultimately. I think we had a recommendation somewhat on the line of what Senator Cook said, that perhaps this should be considered. I frankly forget what the ultimate result was.

Mr. Hopkins: In 1960-61?

Senator Connolly: Yes.

Mr. Hopkins: The proposed amendment was referred to Committee of the Whole and removed. That is what happened.

Senator Connolly: As an amendment? We backed away from it.

Mr. Hopkins: You backed away from the amendment.

Senator Connolly: Was that on the Estate Tax Act?

Mr. Hopkins: Yes. I remember Senator Ross Macdonald was then leader of the government, and his remarks, which I could perhaps locate—

Senator Connolly: Ross Macdonald would not be leader of the government then.

Senator Walker: The Tories were in then.

Senator Hopkins: Then I am thinking of another instance where the same thing happened.

Senator Connolly: We have had this several times.

The Chairman: Senator Flynn's proposal could equally be moved on third reading. The Speaker would have to make a ruling, because I am sure the question would be raised. The question now is, what does the committee want to do about it?

Senator Flynn: If we got some assurance that the minister would treat these people as he indicated he would treat the others with regard to transportation, it could be done in the same way, as has been explained by Mr. Cohen.

The Chairman: Then what I suggest is that we adjourn further consideration of this bill and invite the minister to appear.

Hon. Senators: Hear, hear.

The Chairman: Otherwise we are through with Mr. Cohen and the bill is otherwise satisfactory to us. Is that right?

Hon. Senators: Agreed.

The Chairman: It stands, subject only to the question of having the minister come so that we can get his explanation and hear what, if anything, he is prepared to do.

Senator Cook: He might agree without even coming, which would be better.

The Chairman: Thank you, Mr. Cohen. I am not shutting you off. Is there any further speech you would care to make?

Mr. Cohen: No, I do not think so, Mr. Chairman, other than to say I shall be back.

Senator Connolly: I suppose there is this about it. I imagine that the Canadian Association of Equipment Distributors, in law, should have been expected to say, "This was done in the May budget. The May budget was defeated. We had better hold off on the purchase of tax-paid equipment until we see what the new budget is going to do." You are supposed to know the law at all times, but what might have been the law was not actually the law at that time, and I think it is difficult for them to hold off when they have customers who have to be supplied.

Senator Cook: The problem was that the licensed people would not hold off; their market would have been gone and they would not know how long they would have to hold off; it might be six months, it might be a year.

The Chairman: Let us leave the adjournment of the matter this way. The provisions of the bill, to the extent that they go, are satisfactory to the committee, but we are adjourning to hear the minister, and if we have anything further that we want to add to the bill we reserve to the committee the right to do that.

Senator Flynn: We might ask Mr. Hopkins to look into the legality of the proposal I made.

Mr. Harvey: Mr. Chairman, might I be permitted to add a word of explanation on the point just raised by the senator concerning the legal status of the unlicensed wholesalers in the interim period between the May budget and the November budget?

The Chairman: If you have something to add to the disposition we are now making of it, that we want to talk to the minister. I think we understand the problem, and I am sure the officials who were here will convey to him what the problem is. I am sure he knows it already through the correspondence he has had. What is the particular point you would like to add something on?

Mr. Harvey: Mr. Cohen stated very fairly that the decision by the minister was a question of judgment. It is our feeling that the minister's jugment may have been based on inadequate information at the time he made such judgment, and he may not have had a complete understanding of the dimension of the problem as it has been stated to the committee by Mr. Thorp.

The Chairman: When you refer to the dimension of the problem, do you mean the numbers that would be involved administratively in dealing with it?

Mr. Harvey: The $3.5 million of tax-paid inventory in the hands of the unlicensed wholesalers, which they are now stuck with, if I may use that term.

Further, Mr. Turner, the minister, in his response to representations that had been made to him on this subject, stated, if I may quote from his letter:

> Following the defeat of the budget a press release was issued (copy attached) stating that if re-elected it was the government's intention to ask Parliament to enact legislation implementing the proposals contained in the May 6 budget. It would seem that persons who deal in construction equipment would have had ample time to arrange their affairs in anticipation of the proposed tax reduction.

The Chairman: Mr. Thorp dealt with that.

Mr. Harvey: But it is a fact that they would only have two ways in which to arrange their affairs, one of which would be to become licensed wholesalers, which is not open to them.

The Chairman: Or to stop doing business.

Mr. Harvey: Or to stop doing business.

The Chairman: Thank you.

Ottawa, Wednesday, February 19, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-40, to amend the Excise Tax Act and the Excise Act, met this day at 9:30 a.m. to give further consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have a number of groups appearing before the committee this morning. The Honourable John Turner, Minister of Finance, is here in connection with Bill C-40, to amend the Excise Tax Act and the Excise Act. Following that, the Canadian Bar Association will make representations with respect to Bill C-29, respecting Canadian business corporations, as will the Honourable Herb Gray and the Canadian Manufacturers Association. That should make for a pretty full morning.

Mr. Turner, are you familiar with the point that developed in our earlier hearing on Bill C-40, by reason of which we adjourned our consideration to hear from you? The Canadian Association of Equipment Distributors, who are unlicensed, say that its members are adversely affected by the provisions of this bill in that they have to pay sales tax at the time of purchase, as against their competitors who are licensed wholesalers. They say that this, shall we call it, *interregnum* period between May and December has penalized them very substantially.

Hon. John Napier Turner, Minister of Finance: I am aware of the point raised, Mr. Chairman.

The Chairman: Mr. Thorp, the Executive Director of the Canadian Association of Equipment Distributors tells us that this construction equipment is readily identifiable by serial number and the number of taxpayers involved is relatively small.

Hon. Mr. Turner: Mr. Chairman, first let me say I welcome this opportunity to appear before your committee. Accompanying me this morning is Mr. L. Jones, Tax Policy Division, Department of Finance, and Mr. H. Perrigo, Assistant Deputy Minister, Excise, Revenue Canada. These gentlemen may be able to help me with respect to any technical material the committee may wish.

I want to say, Mr. Chairman, I enjoy being here before your committee and to say how useful I think the technique you introduced at the time of the income tax reform legislation is, of having bills referred to your committee as an item of business before the committee after first reading in the other place, so that your committee has an opportunity to digest the material. I think your practice has been very useful for Parliament, and certainly we have welcomed it.

The Chairman: We are now in the process of an advance study of the budget resolutions respecting income tax and any bill or other matter relating thereto, so we will be ready for you.

Hon. Mr. Turner: As a matter of fact, I hope we do not give you too much more time. I do not want to presume on the authority of the other place.

As I understand it, Mr. Chairman, your committee has satisfied itself on the matters dealt with in Bill C-40, to amend the Excise Tax Act and the Excise Act, but you want clarification on the government's position concerning tax-paid inventories of construction equipment.

The Chairman: That is right.

Hon. Mr. Turner: I should note at the outset that the government, of course, was aware that there would be goods in the hands of wholesalers and retailers on which tax had been paid on the date of the announcement which removed the federal sales tax from construction materials, equipment for buildings, construction equipment, and so forth. There have only been two exceptions to the rule that inventories react automatically to the imposition or lifting of taxes. When a tax is increased, dealers benefit because they have tax-paid inventory. When taxes are reduced or eliminated, dealers have to bear the burden.

There was one exception in 1961 when the special excise tax on passenger automobiles was reduced. The Right Honourable John Diefenbaker was then Prime Minister and the Honourable Donald Fleming was Minister of Finance. The special excise tax on automobiles was first reduced and then eliminated. Special action was proposed on December 2, 1974, at which time I relieved the dealers of transportation equipment. Those are the only two exceptions, the reasons in both cases being that the equipment had been earmarked and a good deal of it was custom made, particularly in transportation equipment where you get units that are worth anywhere from $50,000 to $100,000. These units are made for a particular customer and there is absolutely no bargaining power on the part of the dealer. But the general rule has been not to provide refunds or compensation to wholesalers or retailers when commodity taxes are reduced or repealed. Not only would it be very difficult to provide refunds in a fair way in the present situation for persons involved in the marketing of construction materials and other goods for which relief was proposed in the November 18 Budget, but it would also create a difficult precedent to follow if taxes on other commodities were to be reduced or repealed in the future.

It is obvious, for instance, that the reduction of tax on building materials from 11 and 12 per cent to 5 per cent involved hundreds of thousands of items. There is no way we could relieve inventory from that tax, nor did we in respect of clothing and footwear when we eliminated the federal sales tax, first on children's clothing and footwear and then on adult's clothing and footwear.

As I said earlier, Mr. Chairman, it has not been the government's practice to require any adjustment in respect of tax-paid inventories on those occasions when taxes and duties have been increased, and on those occasions such measures worked to the benefit of unlicensed dealers.

With regard to the special action proposed in respect of tax-paid inventories of transportation equipment, the measure was necessary because of a combination of critical factors affecting the trucking industry and related transportation industries. Dealers were unable to sell tax-paid inventories because the sales tax already paid on large trucks and other equipment often amounted to several thousands of dollars per unit. Customers were refusing to accept shipment of many highly specialized, custom-built items which had been ordered but not delivered as of budget day. Many were prepared to wait for tax-free goods to become available or to transfer orders to dealers who may already have had tax free inventories on hand. So, it was a critical situation in respect of specially designed equipment for customers and the unit price of such equipment ranged from $50,000 to $100,000.

It must be emphasized that the proposed relief for transportation equipment inventories constitutes a marked departure from traditional practice. However, the combination and intensity of adverse circumstances affecting the transportation industry made immediate action necessary in order to avoid extreme hardship and a serious disruption of production and employment.

I think I should also note that the transitional problems occasioned by other sales tax reductions proposed in the budget have proven, to be less onerous in comparison. I note that previous witnesses appearing before your committee do not agree with statements suggesting that construction equipment dealers had adequate forewarning to arrange their affairs in anticipation of the government's intention to eliminate the sales tax. The transportation tax was removed as of November 18. We did not touch on that in the May 6 Budget. There was no advance warning for the transportation industry, but for the construction industry, construction equipment, that measure was in the May 6 Budget. The May 6 Budget of course was defeated by the House of Commons and reinstated by the Canadian people. It was defeated by the House of Commons on May 8, and I issued a press release, which we are willing to table, stating that if the government were re-elected the measure for the reduction of tax in this case would be re-introduced. So, the construction equipment industry had been warned as of May 8 that the federal government would re-introduce that measure if re-elected.

Many dealers took advantage of the provisions related to customs bonded warehouses by not taking imported equipment out of bond until after the November 18 Budget. In addition, dealers purchasing goods from persons licensed under the Excise Tax Act were in a position to take advantage of provisions in the act related to instalment purchase contracts and consignment sales. In other words, they did not pay the initial instalment, or did not take the final consignment, until after the November 18 Budget, and Revenue Canada made it quite clear that if the contract so stipulated they would be protected because the property would not have passed. It might also be mentioned, I think, that the Canadian Association of Equipment Distributors advised its members on October 31, 1974, that the government would not provide relief in respect of tax paid inventories. The industry had been put on warning on May 8, and again by its own association on October 31.

I want to summarize, Mr. Chairman. Relief from sales tax for tax-paid inventories of transportation equipment will be provided by way of Order in Council, and consequently the adoption of Bill C-40 by the Senate would not preclude the government from taking further action in respect of construction equipment pursuant to section 17 of the Financial Administration Act. However, I want to emphasize that the government is not at this time contemplating relief for tax-paid inventories of construction equipment. If relief were to be provided in respect of construction equipment it would be difficult for us to withhold similar consideration from persons holding tax-paid inventories of construction material, building material, clothing, footwear, and all the other items affected by reduction or elimination of sales tax.

The Chairman: Any questions?

Senator Flynn: Mr. Minister, you have explained that generally speaking no relief is afforded when there is a tax decrease announced by the Minister of Finance on budget night. I can understand that as far as building materials, footwear and such things are concerned, because it seems to me that all those involved in that trade are on the same footing; there is no inequity. You have yourself admitted that in the case of transportation equipment there would have been some inequity in not providing relief, and it seems to me that in the case of construction equipment there is exactly the same problem. You have said that the items of transportation equipment were very expensive items that were ordered and custom made. However, there seems to be a similar situation in respect of equipment. We do not have the committee minutes from last week, but if I correctly understood the witnesses who appeared before us then it seems to me quite clear. I was wondering why you would not apply the same remedy in this case as you considered you should accept in the case of transportation equipment.

Hon. Mr. Turner: One main reason is because the construction equipment industry was given notice as of May 8.

Senator Flynn: But your warning of October 31 is not very convincing. With respect to those who bought and paid tax after October 31 I can understand the position, but after May who was going to wait four or five months if they were to be able to provide their clients with some goods and have some inventory?

Hon. Mr. Turner: If they provided the inventory and sold it and got paid there was no problem, but if they started building up inventory as of May 8, knowing that if the government were re-elected the tax relief would be forthcoming, then I think it is their risk.

Senator Flynn: Surely you would admit that they had to have some inventory on hand to be able to deal normally, especially during the summer season, which is when you do business. Of course, you could be caught with some tax-paid inventory in the fall, but, after all, it was only normal for them to do that. After October 31, I agree with you; I am not contesting that.

Hon. Mr. Turner: We issued a press release on May 8, which received wide publicity. National Revenue were asked for advice by a good many dealers across the country, and National Revenue told them that in order to protect themselves if they used the consignment sale process or the instalment sale process and ensured that the property did not pass until after the next budget, then they would be protected. In other words, what I am saying is that the construction equipment industry was given adequate notice. After all, this is relief for the industry.

The Chairman: Perhaps I might just develop this. As a matter of fact, Mr. Minister, under the instalment payment provisions of the bill the excise tax applies on the sale price. There was available—and many industries used it—the instalment payment contract which provide for the delivery at various dates before November, but the payment was after November. They adopted various expedients in order to do that, but the payments did not fall in until after the tax was lifted, so in that measure they avoided the tax.

Hon. Mr. Turner: They avoided the tax if they were able to have a contract properly passed when the tax was no longer exigent.

The Chairman: That is right.

Senator Cook: The November date is an *ex post facto* date. Nobody knew in May that the budget would come in November. Indeed, none of the construction people knew that we were going to be blessed by another Liberal government; it might have been another one, and they had to compete with the licensed dealers.

Hon. Mr. Turner: That is true, but the government was re-elected on July 8. On May 8 there was a press release saying that if the government was re-elected that tax was going to come off, and they were told in effect, "Do govern yourselves accordingly".

Senator Cook: Come off when?

Hon. Mr. Turner: Whenever the next budget was. Anybody who arranged his or her affairs was able to put themselves in an inventory position where they would not be hurt.

The Chairman: There is an answer to that, as I am sure you know. You have two classes of people in this industry; there are the unlicensed wholesalers and distributors and the licensed wholesalers and distributors. With the licensed ones, it is only at the end of the road that sales tax has to be paid if they conform to the situation where 50 per cent or more of their customers are in the tax-exempt area, so these people would not be adversely affected by this gap between May and November. Their competitors, the unlicensed wholesalers or distributors, who required inventory in order to carry on business in that interval and meet their competitors, had to acquire the inventory or leave it in bond and go out of business for six months. That seems to be the unfortunate part of their position.

Hon. Mr. Turner: Of course, there are licensed wholesalers in the building materials game too.

Senator Flynn: But this is widely distributed.

Senator Cook: I understand the reasons that in proper cases rebates are not given is because it is impossible to give them, in the case of construction clothing. Here it is possible to give them, and it seems to me clear that one class of taxpayer is penalized against another. I must say, I am not persuaded that there is any good reason why they should not be given the rebates they have asked for in the circumstances.

Senator Buckwold: If you did that I would say there would be a very real case of complaint for those who had paid tax in a wide variety of products that the minister has referred to. Speaking as one who operates a business that in fact was hurt by the sales tax removal, I can assure you that we would not be very happy if a certain group of distributors of certain products had relief while another group did not have such relief. I would also point out that as the tax kept going up in the days when it did go up there was some advantage to those people who had inventory and were able to take advantage of the fact of their stock in trade as the tax increased. I suppose they are paying a little of the reverse penalty now.

The Chairman: That is government policy.

Senator Flynn: Are you complaining about the relief given to dealers in transportation equipment now?

Senator Buckwold: No, I am saying that if it is done for one class it must be done for all classes.

Senator Flynn: Only where it is practicable.

Senator Cook: On its merits.

Senator Buckwold: A way can always be found.

The Chairman: Do you wish to respond to Senator Buckwold?

Hon. Mr. Turner: I agree with Senator Buckwold.

The Chairman: Are there any further questions?

Senator Flynn: Is it a definite "No" that you are giving us, Mr. Minister?

Hon. Mr. Turner: Put it this way, senator: I have stated the policy and also said that in cases of hardship we can review it and we still have authority under the Financial Administration Act to relieve it.

Senator Flynn: But you are not convinced as yet that there is hardship?

Hon. Mr. Turner: I am not convinced as yet that it is justifiable to release tax-paid inventory from the imposition of the tax.

The Chairman: The total dollar amount involved is approximatly $3.5 million for this particular industry.

Hon. Mr. Turner: That is a considerable amount of money, Mr. Chairman.

Senator Flynn: And easily definable.

The Chairman: I would think it represents more money for the industry than for the government.

Hon. Mr. Turner: That is a lot of money, Mr. Chairman.

The Chairman: Are there any further questions? We invited the minister here this morning to obtain his explanation in connection with this particular case. Now we have had it and we must make up our own minds. I understand, however, that the door is still open if the industry can make a case for remission.

Hon. Mr. Turner: Let us not use the phrase "the door is still open". Let us say, rather, that the government still can use the Financial Administration Act to relieve tax.

The Chairman: And they can make submissions?

Hon. Mr. Turner: The door is always open for submissions, but I would not wish this hearing to be construed as giving encouragement to the construction industry.

The Chairman: Well, that is it. Thank you.

Hon. Mr. Turner: Thank you, senator. I may be back.

Senator Flynn: Are we leaving the bill now?

The Chairman: Do you wish to deal with the bill now?

Senator Flynn: No, it does not matter to me.

The Chairman: Let us finish off that item of business with respect to excise tax. Is there a motion to report the bill with or without amendment?

Senator Laird: I so move.

Senator Flynn: I had presented an amendment that would have provided in the act the relief requested by the construction equipment dealers. My understanding was that it would be considered whether this amendment is within the powers of this committee or of the Senate to adopt, and whether in its form it would achieve what I had in mind. I would like to know whether this has been done; and, if there is no technical objection to my amendment, I would move it.

The Chairman: I stated the position of the chair last time, that the Senate did not have authority to make an amendment of this nature, involving the spending of money out of the Consolidated Revenue Fund. I have consulted our Law Clerk since and he supports the view which I expressed at that time.

Senator Flynn: With due respect, I do not think providing a refund is the same thing as establishing that the tax is not payable.

The Chairman: This is the ruling of the chair, which can always be tested by a vote of the members.

Senator Flynn: I always hesitate to test the ruling of the chair, especially this chair.

Senator Cook: I wonder if it would be better to stand this matter. We have a large number of witnesses and we were considering including a reference in our report.

The Chairman: Further consideration of this particular point will stand until later. It may be later this day and maybe later than that.

Senator Walker: The Leader of the Opposition has opened the door, anyway, and that is a pretty good show for this morning.

Senator Cook: We did not get very far in yet.

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The Honourable SALTER A. HAYDEN, *Chairman*

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First Proceedings on Bill C-29, intituled:

"An Act respecting Canadian business corporations"

(Witnesses: See Minutes of Proceedings)

28644—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laing
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseau	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, February 4, 1975:

"Pursuant to the Order of the Day, the Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill C-29, intituled: "An Act respecting Canadian business corporations", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, February 13, 1975
(29)

Pursuant to adjournment the Standing Senate Committee on Banking, Trade and Commerce met this day at 10:45 a.m.

Subject: Bill C-29—"An Act respecting Canadian Business Corporations."

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Connolly, Cook, Desruisseaux, Flynn, Laird and Walker.—(9)

Present, not of the Committee: The Honourable Senator Godfrey.—(1)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Witnesses:

Department of Consumer and Corporate Affairs: Bureau of Corporate Affairs:

Mr. J. L. Howard, Assistant Deputy Minister;
Mr. R. V. Dickerson, Special Consultant to the Department;
Mr. P. Anisman, Director, Corporate Research Branch;
Mr. F. H. Sparling, Director, Corporations Branch;
Mr. J. B. Brazeau, Assistant Director, Compliance Division; and
Mr. R. D. Viets, Senior Legal Advisor.

Following discussion and examination of the witnesses, the Committee agreed to Parts 10, 12, 13, 15, 16, 17 and 18 of the Bill, subject to objections from interested parties.

Further to the above, the Committee deferred for further consideration Sections 4, 187(b), 222 and 223.

At 12:25 p.m., the Committee adjourned until 9:30 a.m., Wednesday, February 19, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, February 13, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-29, respecting Canadian business corporations, met this day at 10:45 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: We now have for consideration the new act respecting Canada business corporations. We have here Mr. Howard, the Assistant Deputy Minister, Department of Consumer and Corporate Affairs. Mr. Howard, if you wish any of your advisors to accompany you, you may have your number one man sitting beside you. Would you please introduce your panel and then, if you have an opening statement you wish to make, present it? Otherwise we will get right into the bill.

Mr. J. L. Howard, Assistant Deputy Minister, Department of Consumer and Corporate Affairs: Thank you very much, Mr. Chairman. On my immediate right is Mr. R. Dickerson, who practises law in Vancouver. He is both a chartered accountant and a Ph.D. in Economics. It is Mr. Dickerson who was retained by the Honourable John Turner, who was the Registrar General and, in effect, the minister for the Department of Consumer and Corporate Affairs, almost seven years ago to the day, to set up a task force with a view to drafting a new federal corporations law, particularly one governing business corporations. I am very pleased by the coincidence that Mr. Dickerson happened to be in town carrying on some other consulting work for us in relation to the draft regulations proposed to be issued under this bill. We are very lucky, therefore, to have him with us today.

On Mr. Dickerson's right is Dr. P. Anisman, who is a lawyer and also has his doctorate, which he obtained at Berkeley University, specializing in corporation law and securities law. On his right is Mr. Sparling, who is also a lawyer and Director of the Corporations Branch in the Department of Consumer and Corporate Affairs. On his right is Mr. J.B. Brazeau, Assistant Director of the Corporations Branch.

The Chairman: Now we are ready to get down to work.

Mr. Howard: Yes; I have no formal opening statement, Mr. Chairman.

The Chairman: Then I would like you to deal with this problem first, which I believe I mentioned to you beforehand. The Parliamentary Secretary, in giving the explanation of this bill in the House of Commons, referred to a number of parts and their headings and said he did not intend to deal with them because, in substance I think his language was, they are in line with the provisions under the same headings in the present act. The list that he gave was securities, registrations and transfers, trusts, indentures, receivers, liquidators, investigation, insider trading, proxies take-over bids and prospectuses.

My purpose in putting a question now to Mr. Howard is that if these provisions relating to these subject matters are, in substance, in line with the existing law, we studied that bill, which became the Canada Corporations Act, in 1970 and wrote a report on it providing for approximately 26 amendments, which were made. It would therefore strike me as being unnecessary to go into a section-by-section study of those headings, unless Mr. Howard is able to point out where there is some, let us say, material difference in any of the provisions as against the present law. The field is yours, Mr. Howard.

Mr. Howard: Thank you, Mr. Chairman. It is a very awkward question in a way, because it is so broad. I would like to underline, first of all, that this bill which you have before you, although it does continue many of the policies of the Canada Corporations Act, is conceptually, technicially and altogether new law. That is why it has taken so long to develop this legislation.

I notice that one of the senators present has the original "blue book" proposals which were published in 1971. That followed almost four years of preparatory work. They were outstanding for two years then we produced Bill C-213, which died on the Order Paper a few months later. This was followed by the present bill, which was tabled last fall, at which stage in the development of this the gentlemen you see here, who have been working with me throughout the development of this bill, have been discussing it with panels of businessmen and professionals throughout Canada. Thus, it is very difficult to say, on the one hand, that this is an altogether new law which introduces fundamental changes and then to say that parts of it contain no substantial changes. I do not wish to qualify that, but I will refer specifically to the parts, each of which continues the policy. Although they may contain a great many technical changes in the wording and in the actual details of the administration, the policy is consistent.

I would like to add also—and you will see this when members of the Canadian Bar Association appear before you next week and from the transcript of the hearings before the House of Commons committee—that there is a tremendous consensus throughout Canada with respect to this bill. That is, that it is a very good bill, and it does contain the substantive rules which most businessmen and professionals—I said "most" but, obviously, we can never get 100 per cent consensus—consider should be in corporation law and how they should be there.

Senator Connolly: Mr. Howard, have you read Senator Hayden's speech and other speeches made on the motion for second reading in the Senate?

Mr. Howard: Yes, indeed I have, sir.

Senator Connolly: Then you can appreciate where we start as a result of that.

Mr. Howard: Yes. In view of the fact that I am generalizing with respect to where there is no substantial change, I just wish you to know that there are always differences in the more minor and technical aspects of these parts. As I start to go through them I will just focus on those provisions which we wish to underline and to which you should turn your attention, because they really are of substantial importance. Is that satisfactory, senator?

The Chairman: Yes. If you say we can accept any of your headings because they basically continue present law, tell us that and we should not waste time on them.

Mr. Howard: I would like to start with Part X, which concerns insider trading.

The Chairman: That is on page 89 of the bill. It is a very short part.

Mr. Howard: This is a very short part. It continues, in essence, the present law. It has two aspects, one being the disclosure aspect, which requires insiders of every major corporation to disclose their actual holdings.

The Chairman: When you say "every corporation," you mean every federal corporation?

Mr. Howard: Every large federal corporation. You can assume from here on in that I am speaking only about federal corporations. The second aspect, of course, is liability. The liability provisions for improper insider trading apply not only to these large corporations, as defined here, that distribute shares to the public, but also to closely held corporations.

We thought, when we put through the amendments of 1970 to the present Canada Corporations Act, that we had clarified the liability provision, but we had not. We have now made it clear that irrespective of whether a corporation is a so-called private corporation or a public distributing corporation, the liability rules apply. In short, improper insider trading is always improper. That is only a technical change, really, to clarify what the original policy was intended to be.

The Chairman: That is the principle of most securities law in Canada, is it not, or all security law in Canada?

Mr. Howard: That is right, sir, except that the Securities Act tends to apply only to public distributing corporations. That is why the various corporations or companies acts have to pick up this rule to broaden its application to the private corporations.

The Chairman: Can you tell me why insider trading rules should apply to other than public companies, or companies that distribute any part of their shares or securities to the public?

Mr. Howard: Are you talking about the disclosure rule, sir, or the liability rule?

The Chairman: The liability rule, first.

Mr. Howard: We feel very strongly that the liability rule should apply to any improper insider trading. If someone for some reason has inside information, we feel it does not matter if there are 12 shareholders or 12,000 shareholders of that corporation, the misconduct is equally serious in either case.

The Chairman: Except that a private company cannot offer shares to the public.

Mr. Howard: Yes; but let us take for example the directors and officers. Let us say there are three in this corporation who also happen to be or who want to be shareholders. They have inside information about the prospects of that company. They do not tell the other nine shareholders, but simply go out and buy the shares from them. I suppose the classic case in Canada is the Lowney case, where this happened in a closed corporation, and the applicable law was not clear at the time. Such a case would be clear under this law and that would be misconduct under this bill.

Senator Connolly: Criminal charges were laid in that case.

Mr. Howard: That is correct, and the criminal route was selected because the securities and corporation law was so unclear at that time.

Senator Connolly: I suppose a good deal depends upon the definition of the word "insider". What you normally talk about, and the example you gave, is where you have individuals trading as insiders for their own benefit. What about the case of people who are trustees, holding shares in a company as a result of a death, under or through a will, and where you have the executor of the will on the board of the company? He is really sitting there as a trustee. Let us say, for the sake of argument, there is an offer on the part of some, perhaps outsiders or perhaps insiders, to buy the shares of the company at a stated price. Is the trustee, who surrenders his shares and takes the deal, an insider trader in that transaction? He may be, because he is a director.

Senator Beaubien: But he is not participating.

Senator Connolly: He is participating as a trustee, not for his own benefit, but for the benefit of an estate.

Mr. Howard: He is a director of the corporation; he is also a trustee for a shareholder, of the shares of that corporation?

Senator Connolly: Actually I guess he is the shareholder there, because he is holding the shares in his own name, but as trustee.

Mr. Howard: Under the present rules, there is no doubt that he would be an insider in those circumstances. This leads us to the next point, which is an explanation of the definition of "insider" in the bill to include the so-called tipee.

Senator Connolly: To include what?

Mr. Howard: The tipee—someone who has received a tip. This is securities market jargon. That, for example, is the lawyer or auditor who happens to be working on the file. If he has information and if he abuses it—under the bill it is very carefully qualified what is an abuse of that information—he is as liable as a director or an officer. Admittedly, that opens up the class very broadly, but still the standards of proof are very high indeed if the plaintiff wants to succeed in a liability claim.

Senator Connolly: The example I gave you is a sort of far-out one, to see how far you could go.

Dr. P. Anisman (Director, Corporate Research Branch, Department of Consumer and Corporate Affairs): The example you gave, senator, is an interesting one. The

person acting as a trustee is, in effect, a director, and the principle is the same with regard to him or a tipee. If he receives information that is not generally available to the public, and uses it for his own benefit—using it, in effect, where he makes a profit, where the trade would be for his own benefit—he would be potentially liable under the legislation. In the example you gave, if a general offer were made which was available to everyone, and he did not use confidential information, there would be no liability because there would be no insider trading, but he would have to report it.

Senator Connolly: That is the answer. Thank you.

The Chairman: Mr. Howard, I suppose a director who is not a shareholder is still liable to the insider rules because of the fact that he is a director?

Mr. Howard: Very much so. Under some of the securities laws he is required to file a so-called nil return; but, in any event, there is no doubt about his being liable if he improperly uses inside information that he has in order to become a shareholder for the first time.

The Chairman: Suppose he uses inside information for purposes other than for becoming a shareholder?

Mr. Howard: That, of course, is equally serious under this. There are two abuses: one is where you abuse information; and the other is where you abuse the power you have as a director. The power abuse is the interested director's problem. We have covered that in section 114. The abuse of information can cover a great deal more than share transactions. It is the traditional self-dealing under the common law, where a director or officer of a corporation uses information he acquired in that capacity and goes out and buys property for himself instead of acquiring it for the corporation.

Senator Connolly: And he knows, because he is a director, that the company wants that property. That is an illustration of the chairman's example.

The Chairman: Can we conclude, Mr. Howard, that so far as Part 10, insider trading, is concerned, that any departures that there might be in language from the present act are not material or substantial?

Mr. Howard: That is correct. Those are really the essential points that I wanted to underline.

Senator Cook: When does inside information cease to be inside information?

Mr. Howard: That is probably one of the most difficult questions in the law. For example, when I am lecturing to corporate directors or officers, I tell them they have always got inside information. About the only time it is safe for them to trade in the securities of their corporation is immediately after public disclosure documents have been filed. They have to be very careful, because they have to be seen by the public to be acting fairly at all times.

The Chairman: I can see a possibility that information may become outdated. So it has no material relevancy to the situation.

Mr. Howard: Yes, that can happen. Certainly the most dramatic case that has ever occurred in this area is the Texas Gulf sulphur case. There the actual drilling of the successful holes was kept secret for quite a long period of time. You cannot put a time limit on these things. The pertinent information can be withheld by the insiders for a long period of time while they acquire outsider shares.

The Chairman: That information would never be out of date. My question had nothing to do with that. If this Part X is in order, I suggest that we do not give any further consideration to it except if points are raised in relation to this section by anyone who appears before us. Is that agreed?

Hon. Senators: Agreed.

The Chairman: Perhaps we can go on to the next Part.

Mr. Howard: Next is Part XII, which deals with proxies. As you will recall, this Part was introduced into the present Canada Corporations Act in 1970. Mr. Dickerson was retained to set up a task force in 1967, the first priority of which was to pick up such areas as insider trading, proxies, financial disclosures, take-over bid rules, and investigation provisions that had been updated in provincial laws in Canada, particularly under Ontario law. Such areas were given high priority, and the proxy material, like the insider trading provisions, came into the present Canada Corporations Act at that time.

In Part XII there is no major substantive change which I would like to emphasize. What we have done is taken out the detail provisions of forms which are used in proxy solicitation and put them into regulations, simply because we can see no reason to set out the details in forms, which vary from time to time, in the statute. One of the problems in this area arises out of the fact that the provinces frequently amend their statutes in this area. If we want to maintain uniformity so that these forms can be interchanged between jurisdictions, we must have some reasonable flexibility.

We have quite a few regulating powers under this statute, many of which relate to forms. One of our concerns is to try, as far as possible, to keep these practices and prodecures parallel with provincial laws. If we do not, then every director and officer who works for a large corporation which carries on its business in many jurisdictions, will find himself liable to file forms in each jurisdiction, with slight variations in each form.

Senator Connolly: Do the provinces do that by regulation?

Mr. Howard: I will say yes, they do do it by regulation. However, it is completely mixed. Some of the rules are set out in the provincial statutes and some of what we consider very important substantive issues which are in the federal statute are set out in regulations by the provinces. The explanation for that is that these rules were imported from the United States federal level, the Securities Act of 1933 and the Securities Exchange Act of 1934. Following their usual Congressional practice, very broad statements of policy were made in the statute and nothing else, and all of the details of proxy solicitation, for example, were set out in the regulations under the statute.

The Chairman: What is the clause in the bill that refers to regulations?

Mr. Howard: The best example is clause 143(1), on page 109 of the bill, which says that the form of proxy must be the prescribed form, and if you look at the definition section you will see "prescribed means prescribed by the regulations." That is a shorthand way of referring to the regulation-making powers.

Senator Connolly: Are the uniformity commissioners trying to level out the peaks and the valleys in the practices in this respect?

Mr. Howard: That is a very delicate subject, senator. The uniformity commissioners have not turned much to it, but the commissioners of the securities exchanges themselves at the provincial level work closely in trying to do this.

Senator Connolly: Work closely with the provincial and federal authorities?

Mr. Howard: They do not work very closely with the federal government, because they do not like what they consider to be our encroachment on their jurisdictional territory. However, we do have good informal relations with them and we try to keep these laws as parallel as possible.

The Chairman: The language used in clause 143(1) is, "... a form of proxy in prescribed form ..." That means, I take it, that if the form prescribed by regulation is not followed, it is ineffective?

Mr. Howard: As I mentioned, the definition section on page 4 of the bill defines "prescribed" as "prescribed by the regulations".

The Chairman: But I am talking about the effect of not following the prescribed form.

Mr. Howard: If someone does not comply with the actual form in making the disclosure, then there are specific remedies set out in the legislation. For example, under the proxy provisions, restraining the proxy solicitation or restraining any meeting that was proposed to be held to exercise the proxy. In addition, there could be a penalty imposed by way of summary conviction under the general penal provisions of the bill.

The Chairman: Years ago there used to be a fair amount of litigation, certainly under the Ontario act, if you did not conform exactly to the language that was prescribed in the act. To me, a lot of it seemed to be a waste of time, because the variations were not always substantial. It would appear that under this legislation there is no opportunity to depart from the prescribed form.

Mr. Howard: We certainly do not take a wooden attitude towards this form, but particularly in respect of proxy material we expect corporations to comply. We all know that most proxies are distributed by the corporation on behalf of management, and we want to be sure that management is telling the shareholder the full story. Therefore, we do require full disclosure. We do not require any kind of wooden compliance in the sense of—

The Chairman: When you say "we," what do you mean by that?

Mr. Howard: The Department of Consumer and Corporate Affairs in enforcing this legislation

The Chairman: But the scope of the legislation is such that if there was any departure from the prescribed form you could charge the individual involved under this section?

Mr. Howard: In theory, yes, but normally we do not have to invoke that particular sanction. The most important sanction is under clause 148 of this bill, the restraining order which I mentioned earlier. What we want is to have the power to get before the courts and restrain an improper proxy solicitation or to restrain anybody from voting those proxies at a meeting.

Senator Cook: Supplementary to the chairman's remarks, does the definition of "form of proxy" and the definition of "proxy" under clause 141 mean that a shareholder cannot execute a proxy on his own? Has it got to be a complete, executed form of proxy?

Mr. Howard: The individual shareholder can, as long as he or she complies with the general rules, execute a proxy. If anyone has solicited a proxy, the individual can give the proxy at any time. Proxy solicitation as such, whether by management or by dissidents, however, has to comply with the disclosure rules.

Senator Cook: I am just wondering whether the two definitions are not too restrictive, unless there is a provision stating that any kind of proxy is valid as long as it is clear.

Mr. Howard: But it has to be a form of proxy which complies with the regulations. In short, the proxy holder must have specific direction.

Senator Cook: Assuming the shareholder did not get any form at all and wanted to execute a proxy—

Mr. Howard: It can be done in very general terms by the individual shareholder; in fact, in sweeping terms.

Senator Connolly: The direction from the shareholder can simply be, "I want so-and-so to represent me."

Mr. Howard: Yes, "and to vote on every issue." However, if you are soliciting proxies from all of the shareholders, then such a form would not be a valid proxy. If you put out that type of proxy form, it would not be valid under these rules.

Senator Cook: I am just wondering whether the two forms are not too restrictive.

Mr. Howard: With respect to the individual shareholder whose proxy has not been solicited, there is great discretion as to the form.

Senator Connolly: And the other people are normally more sophisticated and would look to the act for the form.

Mr. Howard: Indeed, yes. Every corporate lawyer in Canada who works with public distributing operations is familiar with these rules.

Senator Connolly: My own experience is that the forms usually have printed on them, "This proxy is solicited by management." You have got a lot of latitude; you can appoint either the people they suggest or somebody you want to; you write the name in. They are not the people you are looking for.

The Chairman: I think the whole purport of this part is to deal with proxy solicitation by management. It does not specifically say so, though, does it?

Mr. Howard: Yes it does.

The Chairman: Where?

Mr. Howard: It distinguishes between management solicitations and dissident solicitations.

The Chairman: But the prescribed form is intended to apply to proxy solicitation by management.

Mr. Howard: No, there is a similar prescribed form, even under our present Canada Corporations Act, which applies to dissident solicitations.

The Chairman: I am thinking of the shareholder who has a few shares, who may want to give a proxy to somebody; he will write something out, which would ordinarily be effective in law as a proxy, but he may run into trouble at a shareholders' meeting when they start counting proxies; if they do not conform to the prescribed form the scrutineers will rule it out.

Mr. Howard: That could happen, but the prescribed form applies to solicitations, not to an individual proxy given by an individual to another individual where there is no solicitation.

The Chairman: Where is the language that limits it to solicitation?

Mr. Howard: If you look at clause 142 throughout, those are the general rules concerning the appointment of proxy holders.

Senator Connolly: "Solicitation" and "solicit" are defined on page 107.

Mr. Howard: Subsection (1) of clause 142 is just the general statutory provision that has legitimated the use of the proxy for generations. The real formal requirement under subsection (2) is that the proxy in any event must be in writing, so that a scrutineer at the shareholders' meeting has some evidence before him that the proxy holder indeed has power to exercise that proxy.

The Chairman: I have found the answer in clause 143 on the point I wanted to cover. It is limited in its application to proxy solicitation by management. This is where you use the language of the prescribed form.

Mr. Howard: Yes. You will notice that under clause 143 management must solicit proxies; it is a mandatory solicitation. This is really no change in the law. In clause 144 we get to the dissident shareholder provision. This is where shareholders who want to displace management are soliciting proxies.

The Chairman: They come under this.

Mr. Howard: They have to follow the express solicitation rules set out in the bill. This is consistent with the present Canada Corporations Act.

The Chairman: Are there any questions on this clause? ... Then we will deal with this one in the same way as we dealt with the others; that is, we have approved of this part subject to any questions being raised by any other witnesses who appear, and subject to our further review of the whole bill. Is that agreed?

Hon. Senators: Agreed.

The Chairman: What is the next part?

Mr. Howard: The next part is Part XIII, "Financial Disclosure", at page 113.

The Chairman: Is there anything substantial in this part that you should call our attention to as against the present law?

Mr. Howard: The one thing I really want to draw your attention to here is that this is probably the broadest use of regulation making powers under this bill. We certainly do not shy away from this. This has to do with the contents of financial statements.

The Chairman: What clause?

Mr. Howard: Clause 149 is certainly the key clause, starting with paragraph (*a*) of subsection (1), referring to "comparative financial statements as prescribed." Of course, the key wording is "as prescribed", which means by following the procedure in this bill to make regulations we will be able to specify the specific captions and the kind of disclosure that must be made in financial statements.

Senator Connolly: Do you in this part have a requirement for quarterly reporting to shareholders?

Mr. Howard: No. That is not mandatory, certainly not in respect of audited statements. However, there is a provision in here that wherever a federal corporation is required to file quarterly statements with some other regulatory agency, then it must also file a copy with us. This particular bill focuses on the annual report that goes to shareholders.

Senator Connolly: I see that, but in the last few years shareholders have quarterly been getting from public companies a statement of the quarter, the half-year or three-quarter year, as the case may be, and another column showing the comparative figures for the previous year. There must be a requirement, because everybody seems to be doing it. Where does it come from?

Mr. Howard: Normally these arise under stock exchange rules. A lot of them have been derived from the rules of the New York Stock Exchange, which has pioneered a lot of these disclosure provisions. I believe they are now set out expressly in the Securities Exchange Act of 1934. Only the annual report is required to be audited; the interim reports are not audited reports.

Thus, for two reasons we did not specify that in here. First, it is very, very costly to do audited reports on a quarterly basis; it means you have to have auditors in all year. Secondly, it would be a major innovation in the law at this time, and quite frankly we have tried not to do that kind of pioneering work in this part. What we would like to do is to get up to the level of disclosure that has been accepted by accountants, and indeed imposed by accountants on themselves through their institute handbook for the last 20 years; that is our major concern here.

At present, under the present Canada Corporations Act the ficancial statement disclosure rules are so bad, quite frankly, that there is no trouble in complyng with them; everybody ignores them in fact, because they require only bits and pieces of disclosure. What we want to do is to try to get up to the level that the accountants impose on themselves, that the stock exchanges require of listed corporations, and that securities commissions require of public distributing corporations.

The Chairman: In effect what you are asking us to do is to provide the requirement in this part of the bill that financial statements that are to be provided to the shareholders must be as prescribed, which means as provided for by regulation?

Mr. Howard: That is correct, sir.

The Chairman: Are there any limitations on that in this part?

Mr. Howard: There are limitations on it in the sense that there is an express exemption power given to the director of the corporations branch, who can exempt a corporation from any specific item that would otherwise require to be disclosed by the regulations, or even a whole statement where it is not applicable, say a source and application of funds statement, now better known as a funds statement. This is one of the exemptions. The real safeguard that we have taken in here is the control over the regulation making power, which applies to all regulations made under this bill; that is, that they must be drafted by us, they must be pre-disclosed to the public for comment and criticism at least 60 days before they are ever proclaimed in force.

The Chairman: What clause of the bill is that?

Mr. Howard: Clause 254. This is to ensure that before we ever make regulations relating to these matters accountants, businessmen and others have a full opportunity to criticize what we have done, and to get their comments into the government, the committees, particularly the Joint Committee on Regulations and Other Statutory Instruments, and of course to a committee such as this one.

Senator Desruisseaux: Are the same rules being applied to crown corporations in their statements?

Mr. Howard: I said glibly that this law applies to federal corporations. Of course, it is only a bill at this stage. It will not automatically apply to any corporation except a corporation that is incorporated under it, or that takes a positive step within five years to be continued under it. We have some crown corporations that have special exceptions in here, and they may not be required to be continued under this unless the Governor in Council states that they must continue under this. It is only at that stage that they are required to make the same kind of disclosure.

The Chairman: Or unless their articles of incorporation, or however they are created, stipulate that the provisions of such sections of the Business Corporations Act apply.

Mr. Howard: Yes, but of course there is no such act yet, because we have no Business Corporations Act yet. They all refer to the Canada Corporations Act by cross-reference, and the disclosure provisions there, as I stated earlier, are totally inadequate.

Senator Cook: Mr. Chairman, you said when you introduced the bill that if a company to which the legislation applies did not come in within five years that company would be dissolved. Is that right?

The Chairman: Dissolved, yes.

Mr. Howard: There is, however, an exception to that in the case of special crown corporations. The original intention, I might say was as a matter of policy to make this bill apply to every federal corporation and get away from all the special act corporations which have to come before Parliament for what are ordinary internal constitutional amendments and so on.

In addition we have suggested that even the financial intermediaries, the banks, trust companies and loan companies all become subject to one corporation law. However, there was considerable disagreement with respect to that and we finally backed off from that suggestion.

Senator Desruisseaux: Is it intended, Mr. Chairman, that when this is adopted the crown corporations will be brought into the fold as to their statements?

Mr. Howard: Mr. Chairman, the answer to that is, of course, that the Governor in Council has discretion to determine when, or if, these crown corporations should be brought into the fold. It is a very, very complicated mosaic here at the federal level. We have special act corporations, special act corporations which incorporate by reference parts of other corporations acts, such as the Canada Corporations Act. We have other kinds of crown corporations, which are essentially ordinary business corporations incorporated under the present Canada Corporations Act.

We had, therefore, to introduce these rather flexible continuance rules and were properly criticized for this for fear we might be taking away from Parliament some powers it might wish to exercise in respect of these corporations. So you will see that even in these special cases in which the Governor in Council can do it, he can only do it by regulation, which requires going through this whole pre-publication process to ensure that it cannot be done quickly and normally it will be done because a special act corporation wants to come under this law.

The Chairman: It seems to me that if those companies which we are discussing, where we find provisions which relate to and incorporate certain provisions of the present law, the Canada Corporations Act, do not apply for certificates of continuance they will be dissolved. If they do apply, they become subject to the Business Corporations Act.

Mr. Howard: Unless it is a crown corporation. There is a special exception in section 261 for these crown corporations, so that they are not dissolved automatically if they do not become continued.

As I say, as administrators we would have liked that, but the government did not share our enthusiasm for that particular provision.

The Chairman: If they do not have to apply for continuance, they continue as operating entities.

Mr. Howard: That is correct, subject to the Canada Corporations Act, the present law.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: Does this bill apply to charitable and non-profit corporations?

Mr. Howard: No, this bill does not apply at all to non-profit corporations.

Mr. Hopkins: Another bill will be forthcoming, is that right?

Mr. Howard: Yes; we hope to obtain authority within the next two weeks to begin preparing a non-profit corporation act, which will be comparable as far as possible to the provisions of this bill.

Senator Walker: Mr. Chairman, the purposes of the act are set out succinctly in section 4. This was raised in the house the other day. Why is it so restrictive? The section provides as follows:

> The purposes of this Act are to revise and reform the law applicable to business corporations incorporated—

Now, these are the important words:

> —for objects other than provincial—

What is the use of including that if there are no objects under the new Corporations Act and why do you attempt to restrict yourself in this manner, in any event?

The Chairman: Senator Walker, the intention was to conclude with this part now.

Senator Walker: I thought you had finished it.

The Chairman: You have dealt with what you regard as being substantial.

Mr. Howard: Yes, sir.

The Chairman: As against what is contained in the present law?

Mr. Howard: Yes, sir; I have.

The Chairman: Can we, then, say that we approve of this part of financial information required to be given, subject to whatever points may be raised by any future witness appearing before us and subject to the internal actions of this committee when we consider the bill as a whole.

Is that agreed?

Hon. Senators: Agreed.

The Chairman: Now, Senator Walker, we are coming to section 4 of the bill.

Senator Walker: Yes; the Canadian Bar Association takes exception to this. My reason for raising it now is because their representatives will appear next Wednesday. It is section 4, on page 7 and I cannot understand why the words should be inserted in line 3: "—for objects other than provincial—". The section reads as follows:

> The purposes of this Act are to revise and reform the law applicable to business corporations incorporated for objects other than provincial,—

Why that restriction? In the first place, there are no objects under the act.

Mr. Howard: I would rather not get into a major debate on this today, because Mr. Ryan of the Department of Justice, in addition to the representatives of the Canadian Bar Association, will attend next Wednesday to speak very specifically to this topic.

I would like to add, however, that section 4 was introduced by the Department of Justice very much over the objections of our department. However, I, at least, have taken the formal position that I neither consent nor object, because the wording is utterly meaningless as a matter of law. However, you will discover that the Canadian Bar Association does not agree with me. They think it might have some meaning or, at least, that everyone is concerned that some judge might interpret it as having meaning and if he does so it could be some kind of self-imposed constraint, unknown to us for at least a generation, in respect of the federal-incorporating power.

Senator Walker: The judge is bound to assume that it would not be included if it did not have some meaning. He does not know about your upper reaches of thought, but just takes it as he sees it. Therefore, even though it is understandable to you and you are able to brush it aside with great gusto, the Canadian Bar Association, who are not as profound in their thinking, consider it very important that it be removed. Therefore, if you think it has no meaning, why cannot we agree that it should be removed, subject, of course, to Mr. Ryan's views?

The Chairman: Senator Walker, we can remove it.

Mr. Howard: Senator Walker, you imputed to me an understanding of that section. I cannot accept that; I have never understood it, quite frankly. My second point is that I agree with the Canadian Bar Association that it should not be included, because it serves no purpose.

Senator Connolly: So it does not matter, I suppose, what the motive is, because the courts do not look at the motive. As Senator Walker says, they look at the act. However, why was it introduced? Were they endeavouring to solve some jurisdictional problem?

Mr. Howard: Quite frankly, I have never understood it and that is why I say we should defer debate on it until the representatives of the department of Justice and those of the Canadian Bar Association appear.

Senator Walker: May I raise another point, which again you may consider not to be in your field and should be deferred for Mr. Ryan? It is Part XVIII, clause 222.

The Chairman: Senator Walker, this part to which you now refer is on the list of items which I had Mr. Howard prepare in relation to my question, which was to develop the parts in which there is no substantial change and, if there is substantial change as against the present law, tell us what that substantial change is.

Senator Walker: Then I will not interfere further. I do feel that the department should have an opportunity to discuss it and we would derive great benefit from such a discussion.

The Chairman: I had intended to discuss it also.

Senator Walker: But we would like to know the opinion of the department before the appearance of the representatives of the Canadian Bar Association.

Mr. Howard: I believe I have sufficiently stated the department's opinion, have I not, Mr. Chairman?

Senator Walker: Mr. Chairman, would you prefer that I should wait until we reach . . .

The Chairman: Part XVIII, section 222?

Senator Walker: Yes.

The Chairman: No. I am not sure that section 222 is the section you had in mind when you were speaking in the Senate, Senator Walker.

Senator Walker: Yes—section 222, subsection (1). That is, "a shareholder . . . may apply, *ex parte* upon such notice as the court may require,"

The Chairman: We can get an explanation from Mr. Howard now. You wish to know why it is *ex parte*?

Senator Walker: Yes. It is a very stringent section.

Mr. Howard: I should like to point out, before getting onto your specific point, senator, that we have already very broad investigation powers under the present Canada Corporations Act. They were also introduced in 1970 or at least considerably strengthened at that time. The major difference between the present law and this one is that we have taken the actual adjudicatory power away from the Re-

strictive Trade Practices Commission and given it back to the court. You will see throughout this bill that we have expressed great confidence in the courts to deal with these problems of corporation law, and this is another example. Thus it is no longer possible to get an order for an investigation from an administrative tribunal but only from a court.

What I would like to underline, Senator Walker, in reply to your specific question on subsection (1) of section 222, is that, of course, this must necessarily be an *ex parte* order. What we are going in for, and asking, for is a search warrant; and, of course, it is utterly pointless if we have to show our hand as investigators in these cases.

However, we are quite prepared to go before any court that is totally objective and illustrate that we have a prima facie case. I do not like always to get back to IOS Ltd., but it is a federal corporation with which we have had some very bad experiences. There is a good case where had we investigation powers of this type, we would certainly have tried to invoke them and moved to block Vesco in his take-over of this, and to arrest the outflow of funds that was actually happening. We had inadequate investigative powers and, what was the greater problem, because many of his corporations were offshore corporations deliberately set up in havens where we could not effectively investigate, we were never quite sure what was going on.

Senator Walker: I am interested only in the shareholder. I appreciate that the director has to have broad powers. But to have a small or large shareholder getting in here, getting an *ex parte* order and going to a judge all by himself would completely upset the whole apple cart. There may be merit or there may not be merit in this.

Senator Godfrey: The shareholder cannot go to the judge by himself. If he wants to get an *ex parte* order he must give the directors notice and a director goes along to represent the company.

Senator Walker: That is quite true, but he is making the application himself.

Senator Godfrey: But he is not there by himself.

Senator Walker: No; the court officials are in the room also.

Senator Cook: All he has to do is give notice.

Senator Walker: All he has to do is give notice to the director, who may or may not appear.

Senator Godfrey: But there is someone there besides the shareholder, to represent the public interest.

Senator Walker: Not if he does not turn up. This chap could go there *ex parte*.

Senator Godfrey: I am saying that it is not just the shareholder alone. There would be the director who had notice; so there would be some kind of safeguard.

The Chairman: Let us get on some common ground here. Section 222 says:

> A shareholder or the director may apply, *ex parte* or upon such notice as the court may require, to a court having jurisdiction in the place where the corporation has its registered office for an order directing an investigation to be made of the corporation and any of its affiliated corporations.

So a shareholder or director can make that application. I think your point, Senator Walker, is that there could be risk of damage to the market position of the company if there is material presented on an *ex parte* application by a shareholder.

There are two ways in which you can deal with it. One is, if you make the proceedings *in camera*, that information is not disclosed until you come into court, when the corporation has the right to be in court to answer in connection with the investigating order. Or you can strike out the *ex parte*. There may be sound reasons for having an *ex parte* provision. Speed may be required in order to check certain situations.

Senator Walker: Cooking the books.

The Chairman: Yes, or putting the money in a suitcase and running away. So the *ex parte* would appear to be a justifiable inclusion. In order to avoid serious damage to the company which might result from some of the supporting material, which could be answered at a stage when you have a right to answer it, perhaps it should be in camera.

Senator Desruisseaux: Mr. Chairman, I see, at the bottom of page 179, subsection 222(3):

> If a shareholder makes an application under subsection (1) he shall give the Director reasonable notice thereof, and the Director is entitled to appear and be heard in person or by counsel.

Senator Godfrey: That is what I was pointing out.

Senator Desruisseaux: There is time involved there.

Senator Walker: We have known all along that is in the act, subsection (3). But still, if the director does not turn up—he may have all sorts of such short notice—and the shareholder gets in there and has not a bona fide application—it is *ex parte*—the judge will hear what he says and will not hear what the company says. It seems to me to be manifestly unjust and could do a great deal of harm to the whole system.

Senator Desruisseaux: There is something else, Mr. Chairman. At the top of page 180 it says:

> An applicant under this section is not required to give security for costs.

Which seems to be unreasonable in a case of this sort.

Senator Walker: Quite so.

Senator Connolly: I wonder whether the officials are impressed with the argument, and, if so, whether they separate the rights conferred here upon a shareholder from those conferred upon a director? Most of the complaining might be made on behalf of the shareholder and might not apply to be director, who presumably is acting in the public interest.

The Chairman: Mr. Howard, perhaps I am wrong, but I do not see any provision in Part XVIII whereby the corporation would be entitled to appear and resist the order for an investigation.

Senator Walker: Nor would it know that the application is being made. It would have no idea.

Mr. Howard: Certainly under the law there is no question about that. Under section 223, particularly subsection (1), you will see that the court has very broad powers to deal with these. We must remember that whether a share-

holder or director of the Corporation's Branch applies to initiating investigation, there are two safeguards here, particularly in the shareholder case. The first is that the director of the Corporations Branch, if he thinks it is unjustified application, will get in there to find out what is going on and determine whether he should be joining in, and perhaps making the investigation at public expense. In short, public interest is expressed in that way. In addition, under subsection 223(1) we have the court itself as a safeguard. Under paragraph (c) the court at any time requires notice to be given.

The Chairman: You say we have the court itself, but remember that this proceeding starts with an *ex parte* application. Where is there any checking, or review, of the allegations that are contained in the affidavit material? Ordinarily, in a case of affidavit material, there is the right to cross-examine on the affidavits; but it simply means here that the shareholder can apply for an order to investigate, he gives the supporting material, and there is no way to get the other side of the picture, if there is another side, unless someone has the right to appear on the proceedings.

Senator Walker: Exactly; and there are no regulations as to what the shareholder is required to bring before the judge. Of course, the judge may tell him to go back and get more information.

Senator Connolly: All he can do is put in another affidavit.

Senator Walker: That is right, with no chance to reply.

Senator Connolly: Yes, unless the court so orders.

Senator Walker: Yes.

Senator Godfrey: Surely section 223(1)(k) permits the company to go back to the judge for a discontinuance.

Senator Walker: But all the damage is done.

The Chairman: Senator Godfrey, this is at the stage where an order to investigate has been made, an inspector appointed, and an investigation commenced.

Senator Godfrey: Taking IOS as an example, the investigator swoops in and grabs all the documents he can with probably no publicity, because it would be *in camera*, and then the company goes back to the court and says, "This order should not have been given," and under section 223(1)(k) the court has the authority to say, "Whoa!" and at that point cross-examinations would be permitted on the affidavits.

Senator Walker: That is not the point. You are talking about the ultimate result of this. The damage is done in the meantime on what could be the application of a very ignorant sharehlder. That is the objection. Certainly, later on the matter can be gone into more fully, but the company is damned in the meantime.

Senator Godfrey: I am sorry, I thought you said that once the order had been made there is no provision for cross-examination and discontinuance.

Senator Walker: No, we are talking about the method of obtaining such an order.

Mr. Howard: I should like to make two brief points, Mr. Chairman. First of all, we have assumed that the courts provide adequate safeguards. Secondly, because you are applying for an investigation, normally you would want to go into the judge's private chambers. In short, you want it *in camera* so that the person being investigated will not hear anything of the impending investigation. Surprise is of the essence, as Senator Godfrey was implying. Quite frankly, we have no objection to a mandatory requirement that such applications, particularly on behalf of shareholders, or instituted by shareholders, always be *in camera*, because it is logical that they should be done that way.

Senator Connolly: An application of this kind normally is a chambers application.

Mr. Howard: It could be. It is made in the judge's private chambers when no one else is around.

Senator Connolly: Normally, the rules of practice in all the provinces, presumably, would call for this to be done in chambers, so it is not a court motion.

Mr. Dickerson: But it would be open chambers.

Senator Connolly: It could be in weekly court, presumably, in the common-law provinces.

Mr. Howard: We have all come across the paranoid shareholder who wants to sue everyone for $10 million. There is nothing stopping any shareholder from issuing a writ tomorrow alleging that the directors and officers of a corporation conspired in some massive fraud and he wants $10 million in damages. Such individuals can go to the news media and publicize such allegations to any extent they wish.

Senator Walker: With a writ, nothing happens for months. What we are talking about here is an *ex parte* order that could be obtained without anyone knowing except notice to the director.

Mr. Howard: First, the individual has to convince the judge. To do so he has to show that he has a prima facie case and the allegations have to be set out in an affidavit. Of course, to provide false information in an affidavit constitutes a very serious offence with severe sanctions.

Senator Walker: Some shareholders do not care about that.

Senator Desruisseaux: Such a move by a shareholder could upset the whole market situation and could then be withdrawn at a later date.

Mr. Howard: I can only offer a commonsense reply to that, senator. There are very few investigations initiated in any jurisdiction. They are most common in England and Australia. I know of some three dozen investigations of this type that have gone on. I know of no case where the market was somehow unjustly interrupted because some strange shareholder came in and asked that an investigation be initiated. That is the only empiric evidence I have to give by way of illustration. It simply has not been a problem, and we do not see it as a problem in the future because of the judicial safeguards provided. Judges are not in the habit of giving anyone a search warrant simply because they ask for one, especially police officers.

Senator Walker: Have you ever practised law?

Mr. Howard: Yes, both common law and civil law.

Senator Walker: And you have had this experience, have you?

Mr. Howard: Which experience is that?

Senator Walker: That judges are not in the habit of granting orders.

Mr. Howard: I did not say they do not grant orders; I said they do not do so readily.

Senator Walker: It depends.

The Chairman: Mr. Howard, I think the statement you made is subject to very serious criticism.

Senator Walker: That is an understatement.

The Chairman: My experience has been entirely different. The material on which some search warrants under some statutes are granted is very perfunctory in form and in disclosure, although they do follow the language of the statute in making such an order.

I cannot look at this from the point of view that judges are there to protect. Judges are there to adjudicate and can only adjudicate on the material before them, and they do just that. They do not always ask to have the auditors or the manager of the company before them. Therefore, if you are going to investigate, I think there should be some way by which all the material facts are disclosed. If they are not, and even if the investigation is subsequently discontinued by order of the judge, how are you going to catch up with the harm that may have been done in the meantime? This is the trouble with newspaper interviews or newspaper statements by columnists and editorial writers. You can never catch up with what has been circulated.

Senator Walker: The harm is done.

The Chairman: I think we have given clauses 222 and 223 quite a shaking.

Senator Walker: It was only in fairness to the department that I raised these points. The Canadian Bar Association will be here next week and we will get their side of it.

The Chairman: The Canadian Bar Association, as well as other witnesses, may have something to say about these clauses, and the committee itself may want to give further consideration to them.

Senator Connolly: Will Mr. Howard and the other departmental officials be here for our subsequent hearings?

The Chairman: I would expect so. If there is any doubt about it, we invite you to be present during the committee's entire hearings on this bill—not when we are deliberating, but otherwise, yes.

I think we have dealt with Part XVIII. The fact that you are putting the jurisdiction in the courts and taking it away from an administrative body, I think, is a good thing. That is the substantial difference, is it not, between the present law and this bill?

Mr. Howard: Yes, Mr. Chairman, that is the substantial difference. I wish I had excepted myself from the tax matters earlier. Mr. Dickerson is the tax specialist and he will be jabbing me in the ribs pretty soon.

The Chairman: You will find such investigative powers in the Combines Investigation Act.

Mr. Howard: Of course. The point is—and this is the quandary in all of these statutes—what we have tried to do under this bill is to minimize the investigatory type of power. If we do not have these self-help remedies under these statutes, and if the public servants are responsible to administer the law and to actually enforce the law, they must have relatively broad investigatory powers. Otherwise you pass a law with sanctions in it but which is, in effect, unenforceable. That is the quandary we have always had in the competition legislation. If we did not have the civil remedy in the competition legislation whereby an individual complainant can invoke an action, then if the law is to be enforced it has to be done by "policemen" with investigatory powers.

The Chairman: We stand those two clauses, clauses 222 and 223. Following through our plan that I outlined earlier this morning, is there another part?

Mr. Howard: If we have time I would like to get through Parts XV, "Prospectus Qualification," XVI "Take-over Bids," and XVII "Liquidation and Dissolution."

Part XV is on page 147. This is everybody's favourite part of this bill. It is only one clause long. This deals with prospectus qualification. What this clause does is to reflect reality. We have some rather verbose provisions under the present Canada Corporations Act which seem to imply that we go through a prospectus qualification routine similar to that conducted by securities commissions. In fact, we do not carefully scrutinize and qualify prospectuses at the federal level. We never have. What Part XV does is to reflect that reality. It only requires that anybody who does qualify a prospectus in any other jurisdiction file a copy with us so that we will have it on the corporations file in the Corporations Branch.

The Chairman: That is in the present law.

Mr. Howard: That is the real effect of the present law. We have just boiled it down to one short clause and taken out the unnecessary and misleading frills of the present law.

The Chairman: I would say we can approve of this, subject to any discussion that may develop by any persons who appear, and subject to our own consideration of the whole bill later.

Senator Cook: What is the penalty if they do not comply?

Mr. Howard: It is just a general penalty that can be enforced by summary conviction. Normally we do not have to do that; we just chase it up and get a copy without difficulty.

Senator Connolly: A prospectus is filed, of course, to give information about the company, and when it is done in a provincial jurisdiction under the appropriate law, if there is anything misleading, inaccurate,—or false—there are remedies provided under the provincial law. Are there remedies in the event that there is falsification in the copy that is filed with you? Are there remedies you can invoke?

Mr. Howard: Yes. There is a general clause stating that where a corporation is required to file a document under this statute there is a penal sanction that can be imposed against the corporation, and against its directors and officers if they knowingly filed that document with a misrepresentation, or if they were not duly diligent in taking care that the information was correct.

The Chairman: What clause is that?

Mr. Howard: Clause 243.

Senator Connolly: Are those penalties more onerous than the ones that apply in the provincial jurisdictions, can you say?

Senator Walker: They are pretty much the same, are they not?

Mr. Howard: I believe they are roughly the same. We have attempted to be very consistent with all these penalties. They are very weak in some provincial statutes. Ontario is not. Quite frankly, we have attempted to follow the tougher jurisdictions in this area. We feel it is a very serious offence.

Senator Connolly: If action were taken by the provincial authority and the full remedy available under the law were applied, would you likely try to duplicate that?

Mr. Howard: No. It would be pointless to prosecute twice.

Senator Connolly: Of course.

Mr. Howard: If they did not act, we would, if we felt strongly about it. This does happen from time to time under the Bankruptcy Act and the Corporations Act.

Senator Connolly: But you do not subject anybody to double jeopardy about the same thing?

Mr. Howard: No. As I say, if he had been charged by a province, say, and tried, he would plead *autrefois acquit.*

Senator Connolly: It would be a criminal charge.

Mr. Howard: Yes, sir.

The Chairman: Can we now move to the next one.

Mr. Howard: The next one is Part XVI, on page 148, "Take-over Bids." I will try to be brief on this, just highlighting the points that are material changes.

Senator Walker: Before you begin, let me ask this. Is this not pretty well a take-over from the Ontario act?

Mr. Howard: To a very large extent. I will point out the differences. We have here this morning Dr. Anisman, who is the author of the leading textbook in Canada on take-over bid legislation. Perhaps, if you agree, Mr. Chairman, specific questions could be directed to him. I will simply try to outline the points that are substantial changes.

Senator Connolly: We should have had Dr. Anisman here last spring when we were dealing with the take-over legislation.

Mr. Howard: Well, we have him here today, sir.

Senator Connolly: We were looking for a good lawyer in those days.

Mr. Howard: The first thing I would like to underline is on the definition of "exempt offer". Even while we were testifying on this before the house committee, there was a lot of controversy in the newspapers about so-called exempt take-over bids taking place across the floor or through the facilities of a stock exchange. By doing this the bidders were succeeding in completely evading the take-over bid rules. These rules in the better jurisdictions across Canada, and across the federal level, have been accepted law for some years. Ironically, I believe it was the Government of Alberta in the *Pacific Western Airlines* case that first exploited this loophole in the law, which shows that even governments act like entrepreneurs sometimes when it comes to legal compliance.

We came to the conclusion at once that any take-over bid that evades these take-over bid rules should not be allowed, and that we should amend the bill in order to bring such take-over bids clearly within the rules and ensure that the disclosure provisions here would apply to such take-over bids. We did not have any consensus on that at the time. The exchanges had one point of view, the provincial securities commissions had another point of view, we had a third, and there were other views expressed in the house committee. As a result, we asked in the house committee that they give to us real regulation making power with respect to this very, very specific topic, so that we can discuss this with all interested parties, hear their views completely, and then make a regulation with respect to this specific issue, to try to harmonize this law.

Senator Connolly: I did not quite understand this. Perhaps I just missed it and did not hear you. It is not that I am deaf; I may not nave been paying proper attention. Are you talking about cases where some outsider, or perhaps even some shareholders, will on his own, without any arrangement with the company, simply go to the market and buy shares to the point where he has control? You are not talking about that, are you?

Mr. Howard: No. This is where a bid is made publicly, where an offering is made to all shareholders to tender their shares so that effective control of the corporation can be taken over.

Senator Walker: It is defined at the bottom of the page.

Mr. Howard: It is defined as a take-over bid, and it must of course fall within that definition before the rules apply. What we are concerned about is this loophole being created in the definition of "take-over bid."

The Chairman: You mean buying control on the market?

Mr. Howard: You can buy control on the market, of course, without making a general offer to all shareholders. If you do not make a general offer it is not a take-over bid by definition.

The Chairman: That is right.

Senator Connolly: Although it may result in a take-over.

Dr. Anisman: The distinction is between the acquisition of control by a variety of methods. One method is a take-over bid, which involves a formal offer made to all shareholders to pourchase their shares at a fixed price. The problem that Mr. Howard is discussing is that there is a gap that was not foreseen in the definition of "exempt offer," which is in clause 187(b). That clause previously stopped at the word "market" and permitted purchases of shares through the facilities of a stock exchange or on the over-the-counter market. What it contemplated was the type of market acquisition where a person, an outsider or an insider, goes out and purchases shares on the open market in order to acquire control. What was never contemplated was a formal offer made through the facilities of a stock exchange where trading is stopped, and in effect it is a take-over bid, which is exempt. However, the exchanges permitted some of them. The first publicized one was, as Mr. Howard said, for Pacific Western Airlines by the Alberta government. That indicated to us the gap, because what was in effect a take-over bid, as defined, was

being made without needing to comply with any of the take-over requirements in the act. That is the type of gap we are talking about. Does that help? That was one that occurred a while ago.

Senator Cook: Power Corporation did the same.

Dr. Anisman: Exactly the same.

The Chairman: Dr. Anisman, I noticed the additional words that have been added:

> ... in such circumstances as may be prescribed.

Of course, "prescribed" means by regulation.

Dr. Anisman: Yes, sir.

The Chairman: My concern is to know whether there is sufficient in the way of regulation or conditions relating to a take-over in this part without needing regulations.

Dr. Anisman: The regulations, sir, do not go to the conditions of making of the bid. The regulations permitted by the word "prescribed" would permit the department, after discussion and hearing representations of all affected parties, to make regulations defining the scope of that part of exempt offer.

The Chairman: And these would be the terms on which you would decide either it is an exempt offer or it is not?

Dr. Anisman: Within paragraph (b) of the definition, yes.

The Chairman: And if it is not, they would have to comply with the part?

Dr. Anisman: Then they must comply with the statute.

The Chairman: But you may be getting pretty close to legislation in such a regulation.

Dr. Anisman: That is a very fine line, senator; it is possible that we would be getting very close to legislation.

The Chairman: As you know, we endeavour to prevent any legislation by regulation.

Dr. Anisman: If I recall correctly my administrative law definition, regulations are simply delegated legislation, sir. It would seem to me that all regulations are legislation of one sort or another. We have recognized and, in fact, Mr. Howard stated it quite clearly in the committee on the other side, that this is an abnormal situation which developed very quickly while the bill was proceeding through the house. This solution was adopted simply in order to give the affected parties an opportunity to make representations so that we would not arbitrarily jump to a solution.

The Chairman: Why do you not word this paragraph to read "in respect of any such circumstances as may be prescribed"? Paragraph (b) provides an exemption; why could you not use the expression "other than" and then include words to cover the situation you have in mind?

Dr. Anisman: We could, except that that would have precluded the possibility of receiving representations. At that time before the house our first reaction was to draft the section, which did say "except" and then attempt to define the types of situations which should not fall under that section. That occurred prior to the bid by Abitibi for the Price company. However, as a result of the publicity which ensued upon that bid, the provincial commissions began to take action. We received representations from the exchanges that they would like to have an opportunity to comment on what we did and to prepare their submissions before we introduced that type of amendment.

As a result of that, in order to give ourselves time to see what the provincial solution is—and we have opened the opportunity of retaining uniformity to some extent—and to give the exchanges and other affected parties the opportunity to make representations, we moved to this solution, which would permit us to draft regulations after receiving those representations. In fact, the exchanges are at this moment preparing their submissions on this matter.

The Chairman: How long do you think it would take to draft regulations?

Dr. Anisman: That would depend on what the regulations were; anywhere from 10 minutes to a day.

The Chairman: I was about to say, "six months or a year."

Dr. Anisman: In my opinion, sir, that depends on how quickly we receive representations on this. At the moment "in such circumstances as may be prescribed", I think limits the exemption. Therefore, no bid could be made through the exchange at the moment of the type we are discussing. There are no circumstances prescribed until regulations are made.

The Chairman: If we were to require that any such regulations provided by this section should be incorporated by way of amendment to the section at the next session of Parliament, that would meet the point I have in mind.

Mr. Howard: Mr. Cafik, speaking on behalf of the minister, did give an undertaking in the House committee that wherever possible under these regulations, because we are dealing with a very new piece of law, if the concept has become crystallized and we have general agreement on how the law should be, it should be moved out of the regulations into the statute. From our point of view, we could introduce an amending act, say one year from now, as was done in Ontario, in order to clear up any mistakes we have in here.

This bill has been gone through more thoroughly than any other bill I think in Canada. However, there will still be technical errors in it. We would like to come in to clear up those technical errors. We would also like to come in to add to the statute those areas which have become crystallized as a matter of policy.

The Chairman: Then the question is one of resolving the language to be used, because simply to make an undertaking to this committee, while it may be sincere, honest and everything else, reminds us that we have been given undertakings previously which have yet to be implemented, even though made eight or 10 years ago.

You are about to do something which in connection with one item may honour that undertaking. When we were dealing with the bankruptcy bill years ago and wanted to introduce a certain provision, the minister asked us to please not to do so as he needed that power immediately in order to deal with certain outstanding and horrible situations in Montreal, which he explained. He stated that the situation would continue for only a short time because he intended to introduce a new bankruptcy bill the following

year. We have not yet received it, and that was eight years ago.

Mr. Howard: I hope, Mr. Chairman, to have that before you within a few weeks. I am not giving you an undertaking on that. Quite frankly, we have lost 14 months on its translation. These are the problems we face in connection with these bills.

The Chairman: We will take a good look at section 187(b) and decide, if that is the undertaking that is given, the words which should be added, even if they are "other than", or "provided that", or something of that nature. So we will know that within a period of time you will return to us, and when we decide on that we will tell you, and, should you have anything to say, we will listen to you.

Mr. Howard: Yes, sir.

The Chairman: Are there any other points in connection with Part XVI?

Senator Connolly: I am sorry to be so obtuse about this, but I gather that an exempt offer does include a case in which a company is operating some outside interest, besides being a good company to own. They go to the market and start buying quietly and privately, through various agencies and agents.

The Chairman: No, that is not covered by the bill.

Senator Connolly: That is not covered by this, no, and that is a matter of a company having to say that it does not want to be taken over: "Buy up your own shares, or have someone in your interest buy them."

The Chairman: No, the situation which this is attempting to cover is one in which a corporation may announce that it is seeking to acquire controlling interest through the market, and the question then it whether it is exempt.

Senator Cook: An offer could be made for all the shares and 24 hours given to accept the offer. Then it could be said if all the shares are tendered they will only take 53 per cent.

The Chairman: I read in the paper an offer that was made recently in which certain interests had acquired a substantial block of stock in a well known company with a large public shareholder's list. They said as part of the acquisition of large blocks from present holders in private deals from such a date to such a date they would buy all the shares which were offered, up to a limit of so many hundreds of thousands at such-and-such a price. We are considering such a situation in terms of paragraph (b), are we not?

Mr. Howard: Yes, sir; in other words, we want to make sure that offers of this type are subject to the general rules and that all the sharesholders are treated equitably.

The Chairman: They would not all be treated equitably, except to this extent: "The limit is, for instance, 500,000 shares; the price is $5, $6 or $7 per share; the time is a period of 10 days from this date. All shares offered in that period up to this amount we will take at that price."

Mr. Howard: Yes, or, "We will pay for them later to the extent that we will pick them up, if we are only picking up 53 per cent."

The Chairman: Yes. Therefore I would like assurance with respect to paragraph (b) that we will have another opportunity to look at this language, and we should stand section 187(b) for further consideration.

Are there any other points with respect to this?

Mr. Howard: I repeat, sir, that, of course, the Joint Committee on Statutory Instruments will certainly have an opportunity to scrutinize these. There are other institutions to review this, and I would suggest that you keep that in mind. We have very consciously designed the regulation-making powers under this bill to exploit the mechanisms that have been set up in the federal government to review this regulation-making power, in order to check us from overreaching, or where you think we are overreaching. We have done that very deliberately and consciously. There are other points, but certainly that is the most sensitive point of all in this take-over bid part.

The other one is that we have made the directors' circular mandatory. Under the present law, the directors of the target company are not required to state their view of the take-over bid. Here they must take a position. They can say, "We neither consent nor object." They could say, "We think the shareholders should not accept this offer because the terms are not fair; the shares are really worth more." Or they can come out in support of it. But they must make a decision.

The Chairman: Or they can say, "As directors, we intend to offer our shares."

Mr. Howard: Yes, they can say that too, which means, in effect, that they think it is a good offer.

In short, they are convinced that it is a good thing. There are one or two other points. One is that concurrent market trades will now form part of the bid here. In short, if, during the time of the take-over bid, the offeror goes into the market and, through the stock exchange, pays a higher price for shares than he is offering to people who have tendered their shares, he has to offer everyone that higher price. It seems like common sense, but this has been a peculiar anomaly in the law, and we want to clarify that.

The next point is that we have tried to clarify the withdrawals. Where there is a partial bid, after 35 days, if the shares are not taken up, there is no doubt about the shareholder's right to withdraw, and he can go and deal with his shares however he wants. That is continuing the present law. With respect to a bid for all shares, right now the date of termination and the point at which a shareholder is entitled to get his shares back is unclear. We have put in here a 60-day rule. At the end of 60 days, if through extensions and so on, the bidder has not definitively taken up the shares, the shareholder can go in and withdraw his shares—after 60 days.

The final thing is—this is something that has arisen very recently in the United States because of the generally depressed stock markets—a number of very large corporations have gone into the market and have re-acquired their own shares. They can do this under this bill.

Going one step further, a number of corporations have made formal take-over bids for their own shares from all their shareholders. We are only making clear, here, that such a re-acquisition by a corporation of its own shares by way of a take-over bid is subject to these take-over bid rules, and they must make all of the same kinds of disclosure.

Senator Beaubien: Does this bill allow a company to go and buy its own shares? That has always been against the law in Canada.

Mr. Howard: Yes, it has. It is a very complicated thing. We have tried to equate it with the redemption safeguards here. In addition, there are a number of accounting safeguards to preclude abuse of this. But it is now the law in Ontario, and has been since 1970, and an analagous provision is put in here, coupled with more safeguards than they have in the Ontario law.

The Chairman: If that covers part XVI, then we have the same understanding. We have stood 187(b). As to the rest of the part, at the present moment we approve, subject to whatever further representations may be made, and subject to our consideration when we look at the whole bill. This is a good time to break. We are sitting on Wednesday; we shall have a busy morning and afternoon. We are also sitting on Thursday morning, and certainly we shall be busy on Thursday morning. Part of the time will be spent on this bill.

Mr. Howard: For our information, Mr. Chairman, should we be here both Wednesday and Thursday morning, prepared to go on?

The Chairman: Yes, at 9.30 a.m. I tried to make it earlier, but the committee would not agree.

We shall now adjourn. If there are any more headings of the nature that we have been dealing with today, where there is not much in the way of substantial change, we shall take them first.

Mr. Howard: There are a number of issues, Mr. Chairman. I will list them. I would not call them areas without substantial change, but I would call them non-controversial areas.

The Chairman: Thank you.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 25

WEDNESDAY, FEBRUARY 19, 1975

Second Proceedings on Bill C-29, intituled:

"An Act respecting Canadian business corporations"

(Witnesses: See Minutes of Proceedings)

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THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker—(19)
Haig	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, February 4, 1975:

"Pursuant to the Order of the Day, the Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill C-29, intituled: "An Act respecting Canadian business corporations", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, February 19, 1975
(31)

Pursuant to adjournment the Standing Senate Committee on Banking, Trade and Commerce met this day at 10:00 a.m.

Subject: Bill C-29—"An Act respecting Canadian business corporations".

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Buckwold, Connolly, Cook, Desruisseaux, Everett, Flynn, Gélinas, Laird, Macnaughton and Walker. (12).

Present; not of the Committee: The Honourable Senators Benidickson, Lafond, Manning and Sparrow. (4).

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Witnesses:

1. *Canadian Bar Association:*
   Mr. D. L. Campbell, Q.C., Toronto, Chairman of the Special Committee; and
   Mr. R. C. Merriam, Q.C., Executive Director.
2. *Canadian Manufacturers' Association:*
   Mr. G. E. Eastman, Q.C. of Clement, Eastman, Dregar & Meunier representing Electrohome Limited;
   Mr. D. W. Montgomery, Legislation Department, C.M.A.; and
   Mr. D. H. Jupp, Ottawa Representative, C.M.A.
3. The Honourable Herb Gray, P.C., M.P.
4. *Department of Consumer and Corporate Affairs: Bureau of Corporate Affairs:*
   Mr. J. L. Howard, Assistant Deputy Minister.
5. *Department of Justice:*
   Mr. J. W. Ryan, Assistant Deputy Minister, Legislation.

Mr. Ryan submitted a written statement to the Committee regarding Clause 4 of the above Bill and it was agreed that it be distributed to all members of the Committee.

At 12:30 p.m. the Committee adjourned until 2:00 p.m., Tuesday, February 25, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, February 19, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-29, respecting Canadian business corporations, met this day at 10 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable Senators, we will now proceed to further consideration of Bill C29, respecting Canadian business corporations.

Appearing before us is Mr. D. L. Campbell, Q.C., of Toronto, chairman of the Special Committee of the Canadian Bar Association. They have filed a brief, which I believe has been distributed.

Mr. D. L. Campbell, Q.C., Chairman of the Special Committee, Canadian Bar Association: Mr. Chairman, I am aware, as is everyone else, that Mr. Turner's off-the-record remark that this has been going on for six years is true. I would have thought it had been forever. I have worked on the proposals, Bill C-213 and this legislation and, in my opinion, there has been a steady improvement in the legislation as we have proceeded. I believe that the bill should be pushed ahead, enacted and put into force without any real delay at this point, except for the purpose of getting the regulations together.

The Chairman: Without any undue delay.

Mr. Campbell: Undue delay. We would favour seeing it come into force. We think it is a good piece of legislation as it stands. However, there are a few points in connection with which we feel very strongly, or in all likelihood we would not be present today. However, one of the reasons for our attendance is that we do feel strongly that the act should be put into force. I would also like to say that the department has been very accommodating with respect to all the changes we had proposed all along. I would hope that you would feel that I have been persuasive, but I do not think that that is entirely the case. I believe that the department knows what it is doing and has done a good job with this bill.

Senator Walker: Do you intend to discuss clause 4 now?

Mr. Campbell: I would like to discuss clause 4.

Senator Walker: Thank you; that is good. We would all like to hear you.

Mr. Campbell: I am not a constitutional lawyer. If I have any expertise at all, it is in the area of corporation law and, possibly, a little bit of common sense. With respect to clause 4 I have filed a brief with the committee from our British Columbia subsection dealing with the law as they see it, which I believe to be persuasive. As I say, I have no real expertise in constitutional law, but on a common sense basis it seems to me that there is no way that by saying a thing is so we can make it so. Mayor Drapeau was the last person who said one of these things. He said there was no way the Olympics could cost us any money. I suspect he may be proved wrong. I do not think, for instance, that by saying a cow can jump over the moon that the cow therefore can jump over the moon. I do not think there is any help in a piece of legislation to say that it is within the competence of the federal government if it is not within the competence of the federal government.

Therefore, on that basis, I would recommend the total elimination of clause 4. I know that the Department of Justice feel there is some reason for leaving this in the act. If they are so determined, I think the words in the act which have to be eliminated are:

> ... applicable to business corporations incorporated for objects other than provincial,

The Chairman: What is the difficulty that you see in operating under this legislation, when it becomes law, if section 4 remains in its present form—I mean as to corporations making security issues, and lawyers having to give advice in connection with that? What difficulties do you see there?

Mr. Campbell: The main difficulty that will arise here is that you will have a corporation that possibly has objects, or which is operating in a field such as mining, retail merchandising, or something like that, where you have a sort of local establishment in many places. When an issue of securities is going on, the profession is very much pressed for time and they have to give opinions which go to the validity of the corporation, the ability of the company to give the security, and so on.

The Chairman: And the validity of the proceedings under which the securities were issued.

Mr. Campbell: That is right. That being the case, you are asked for this opinion, and if you are faced with words in the act such as those which are here, you are left with some doubt.

If you are a constitutional lawyer, that is fine. You may be able to resolve these doubts for yourself, although we have some reservations about that. But you have to give these opinions possibly to a New York lawyer who knows enough about the situation that he looks at the act and says, "Well now, what about these words?" You then have to convince someone sitting down in New York, who does not have to advance any money, that you should have money advanced to you on the proceedings of this company. There are only moments to spare. There is not

time to argue long legal proceedings, opinions, and so on. You are faced with time, you are going to be very badly embarrassed, and your company may end up with no money being loaned to it because of what I would call a useless piece of wording in the act.

Senator Walker: Do not worry about constitutional lawyers. We do not know that we have any. We have only one constitutional authority and he is not a lawyer. The main point here, is it not, is that this does not make sense. It does not add anything. It only adds a question mark. It is unnecessary.

Mr. Campbell: I do not think there has really been any question about the validity of the federal government to incorporate companies, for many, many years, and I do not think that this section, or these words, will add to the authority of the federal government or detract from it. When I say "or detract from it," I do not—

The Chairman: Mr. Campbell, the problem which bothers me is that it talks about "incorporated for objects other than provincial". When this bill becomes law, one has to make an application and has to disclose in that information a whole series of things required under the statute. But in relation to objects, if there is going to be any limitation of the field of operations, those restrictions must appear in the application for incorporation. There is no requirement in the bill to set out the objects.

How am I going to measure it? Don't I have to fall back on what is the general law? The general law is that the federal authority has a right, under the "peace, order and good government" residuary clause of section 91 of the British North America Act, to incorporate companies which could operate throughout Canada and elsewhere. The provincial authority has the authority, under section 92, to incorporate companies having provincial objects.

This is the area in which I must look for an answer to try to interpret clause 4. If the federal authority has that residual power, why is it necessary to suggest any guidelines or testing, as it does in clause 4?

Under clause 4, as I see it, if you want to determine whether a federal company is validly incorporated under the bill, when it becomes law, you have to ask yourself these questions which appear in clause 4. How are we going to answer them? The general law says that the federal authority incorporates a company and it is validly incorporated.

Mr. Campbell: I feel that this can only detract from the authority of any federal corporation.

The Chairman: Do you see that it would limit, or destroy, or adversely affect in any way the ability of the federal authority to incorporate a company if we remove clause 4?

Mr. Campbell: No, I would think it would help it.

Senator Connolly: The other day I raised the question as to whether or not in writing clause 4 the draftsman was making it clear that it was a question of federal against provincial jurisdiction—perhaps the word "against" is too strong as distinct from provincial jurisdiction.

Perhaps the difficult wording is "objects other than provincial". The determination of what you mean by provincial objects as opposed to federal objects is perhaps not a very easy matter.

Let me try this: say, instead of those words, the following words were used, "... applicable to business corporations not incorporated under provincial law." In other words, perhaps what was in the mind of the draftsman—although I do not know this—was that corporations can be incorporated under provincial law and under federal law—we all agree on that—but the rules may not be exactly the same under the corporation laws of the various provinces, and the rules under this proposed legislation may be somewhat at variance—even, indeed, in a minor detail—from the provincial statutes.

Is there any virtue in saying the rules that we are posing here are rules that are only to be applied in respect of corporations incorporated pursuant to federal law? In other words, simply because you have a corporation in Canada, you cannot look only to this law for a determination as to whether or not it is empowered to carry out certain functions?

The Chairman: Senator Connolly, you used a few words that struck a response in me right away. If instead of the words "objects other than provincial," you had—and I think you used part of this language—"pursuant to the legislative authority of the Parliament of Canada,—"

Senator Connolly: We have used that language in statutes before. That is the positive way of saying it.

The Chairman: What comments have you on that, Mr. Campbell?

Mr. Campbell: I think that is really the result anyway.

The Chairman: I agree.

Mr. Campbell: I do not see any point in putting words like that into a statute just for the sake of having them in there.

The Chairman: You will have noticed I prefaced my remarks by saying, "if it is felt by those who are putting forward this bill that they would be more comfortable if there was some language in there." Certainly, I would prefer "pursuant to the legislative authority of the Parliament of Canada," than the words that are there. I suppose you would go that far, too? The words I suggested would appear to be a reaffirmation of the authority that exists in the Parliament of Canada. Do we need to re-affirm it?

Mr. Campbell: I would say "No."

Senator Connolly: I agree. I do not think we need to re-affirm it. The jurisdiction is there. I am just taking the position, really, of the devil's advocate, because it is only by contrasting phraseology that you ultimately get what you need. Because there are two jurisdictions, is there any virtue in saying: These are the rules that are going to apply to companies incorporated pursuant to the legislative authority of the Parliament of Canada, and if you want to determine whether a given corporation operating in Canada can do certain things, although it is provincially incorporated, you do not look to this statute to get the rule?

The Chairman: Would you not put a question to yourself something like this, Senator Connolly: If the fed-

eral authority incorporates a company, can there be any challenge to that authority? Secondly, if the provincial authority incorporates a company that may be in excess of the provincial objects, there is an opportunity to challenge?

Senator Connolly: That is so, although there are limitations.

The Chairman: Why should we in any way, by putting in these words in clause 4, derogate from the undoubted authority of the federal Parliament to incorporate companies under a federal statute?

Senator Connolly: You remember the old days when we used to be concerned about mortmain. We used to talk about that a lot. Canadian corporations incorporated federally could avoid the mortmain requirements if they went to the provincial jurisdiction for their charters. I do not think there is any question about the right of the federal authority to do that.

Senator Walker: I think it should be eliminated because it is absolutely unnecessary; it is uncalled for. The federal act speaks for itself; it does not need to define its objectives. To my mind, having this extra clause in the act downgrades the federal government's claim to be entitled to legislate widely, just as widely as it wants in this field.

The Chairman: It should not have to justify its right to incorporate.

Senator Walker: Not at all, and I would respectfully suggest that the words "for objects other than provincial" should be eliminated.

The Chairman: Have you anything to add on that point, Mr. Campbell?

Mr. Campbell: I would only add, Mr. Chairman, that I would be concerned if, as Senator Connolly suggested, the words "not incorporated under provincial law" were added, because there might be some suggestion that there was authority to legislate for those provincial corporations. In my opinion, you would be putting the fat in the fire on that score also.

Senator Connolly: I withdrew mine because it is a negative in favour of what Senator Hayden suggested.

The Chairman: Are there any other points, Mr. Campbell?

Mr. Campbell: Again dealing with clause 4, Mr. Chairman, as you say, the corporation needs to have no objects. It is stated in the act that it has all the powers of a natural person, and under those circumstances it seems unnecessary to put in words such as appear in clause 4 which, presumably, are merely repetitive of the fact that they do have these powers. I fell that the whole thing is contrary to the spirit of the act.

The Chairman: Is it your suggestion that we should eliminate the clause in the bill that makes that statement?

Mr. Campbell: I would take the whole clause out, if I had my way.

The Chairman: On the question of the powers of a natural person?

Mr. Campbell: No, no. I think that clause is essential to the bill. This is one of the things we struggled for to keep away from *ultra vires* and that type of thing.

The Chairman: Clause 15(1) on page 12 reads:

> A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

I suppose when they say, "subject to the provisions of this Act," it may particularly refer to the right to put some restrictions on the scope of the exercise of the authority by a federally-incorporated company?

Mr. Campbell: Yes. If you leave that clause in the bill you also make it subject to clause 4.

The Chairman: Yes. Have you anything further to add?

Mr. Campbell: Not on clause 4, Mr. Chairman. I do have some comments to make on clause 222, which appears at page 179 of the bill, dealing with investigative powers. This clause would permit a disgruntled shareholder or director under the act to apply *ex parte* to a court for an order directing an investigation of a corporation or any of its affiliated corporations. This means, in the event that anyone is unfamiliar with it, that neither the court nor the applicant has to give notice to the corporation which is to be investigated. *Ex parte* means that the applicant does not have to give notice to the corporation which is about to be investigated. In other words, you apply to the court and you do not have to give notice to the corporation that you are making this application. Therefore, when the judge hears the matter he does not have before him both sides of the question. The court has the power, however, to direct notice, but they are not obligated to direct notice.

In my view, since this is model legislation, we should not leave this kind of loophole to stand there until some judge has to make the decision whether or not to give notice or decide that there should not be notice given. The Canadian Association makes the point that it is quite reasonable to go in and make seizure of documents if you feel that a corporation is going to destroy documents. I think the department is being overly suspicious, but possibly not so far overly suspicious that we should not go to the extent of permitting the seizure of documents on an *ex parte* application. However, I do not think the investigation should go one step further without the corporation being allowed to say, "This is a disgruntled shareholder. He has given you his side of the story. Now let us give you our side of the story."

The Chairman: The explanation given to us the last day we were hearing departmental officers was that this is intended to deal with a case where you have to move quickly or somebody may raid the till. In these times, I think we have all either had experience with that sort of thing in the practice of law or heard about it. It seems to me that the *ex parte* provision is broad enough that a shareholder who may be interested in the acquisition of shares, and therefore would be concerned about depressing the market, could use this machinery as a method of bringing that about; he could make allegations that subsequently, when all the machinery of the clause comes into force, would not be established as a matter of

law, and the court would then discharge the inspector who was to be appointed under these provisions and stop the investigation, at whatever stage it had reached. It seems to me, however, that the *ex parte* application, where there is no notice, is useful in certain situations; that is, it is useful to preserve the assets until the question that has been raised has been decided. I think there should be limitations on it. I do not think there should be any publication of the subject matter of the proceeding until there has been a hearing on the merits and an investigation ordered.

Senator Macnaughton: That is to give a proper hearing on reasonable notice. You have the same general provisions under the Income Tax Act, and that has been protested for years by the Bar Association and others.

The Chairman: I don't like to jump from one statutory situation and take it as a precedent for another, because I know there are many views that would not support the provisions in the Income Tax Act.

Senator Macnaughton: That is true.

The Chairman: Nor the *ex parte* authority they have there. I would rather look at this on the merits of this particular case. It seems to me that if you divided that clause in two and had the *ex parte* application, which would only give the right to hold and preserve and, to the extent necessary, administer the affairs of the company without any publication of this purpose at that time, then you have taken care of the problem that we have some concern about. However, where there is an order made on an application for an investigation and notice is given, then I would say all the provisions under this clause would become operative. I think you have to make a difference between the scope of the court on an *ex parte* application and the scope of the court on an application where there has been notice.

Mr. Campbell: I think the Bar Association would be happy with that solution.

The Chairman: That is the way we are looking at it. Are there any questions on that?

Senator Walker: Perhaps I might develop that point. Would you include the shareholder who could on his own make an *ex parte* application, or would you confine it to the director? I am speaking about for a seizure.

The Chairman: I think if a shareholder feels that the assets are being dissipated, or that fraud is being perpetrated, or that there is mismanagement, he should have some rights to have an investigation. However, to check against the possibility that he has ulterior motives, I think we have to circumscribe the *ex parte* application which is made without notice, so that there is no publicity at that time. The shareholder, if he can prove his case, can always get the full benefit of this part of the bill by giving notice.

Senator Walker: Otherwise he could sell short and then raise hell on this *ex parte* application.

The Chairman: Or he could start an action and apply for an interim injunction. Are there any other questions on this?...Have you any other points, Mr. Campbell?

Mr. Campbell: No; that is all I am putting forward on behalf of the Canadian Bar Association.

Senator Laird: There are a couple of questions that I think it very appropriate to get your advice on from the Bar Association, Mr. Campbell. If you look at Part X, dealing with insider trading, you will note the definition of "insider" in two clauses, clauses 121 and 125. There is included in that definition a director of a subsidiary. This, of course, means that the information would have to be obtained from all directors of all subsidiaries and then a disclosure made as to holdings. I admit that numerically there are not too many corporations involved in this problem, but they do exist in Canada and they are mighty important to the economic wellbeing of the country. I suggest to you this is a rather unnecessary requirement, because the chance of a director of some subsidiary in, let us say, the Argentine or Germany having any real knowledge of what the holding company in Canada is doing so that he could be said to be an insider is so remote as to be ridiculous; it would involve a monumental amount of paper work, which I suggest to you is unnecessary.

Before you give me your views, I admit that there is an appeal to the Director and a further appeal to the court. However, again, it is just another case of multiplying the nuisances which exist for corporations and compounding the mass of work they must carry out. I would like to hear your views as to whether that is necessary, or should be eliminated?

The Chairman: I believe the first point should be as to whether Mr. Campbell considers this information is required under provincial securities law.

Mr. Campbell: It is my understanding that at this moment it is not required under provincial securities law in all cases. However, I am somewhat influenced in my thinking by the fact that I was asked the other day whether an officer of a subsidiary who had an option on shares in the holding company was an insider. I agreed that he was not an insider, but I did feel that he should be, because I think he is in a better position to garner information and use it. He should not be let off the hook just because of the paper involved.

Senator Laird: Well, you are being a careful lawyer, but let us consider the case of a director, and such cases exist, of a subsidiary of a company with its head office in Canada, who is living in Argentina. What does he know about what goes on that would make him in any sense a real insider?

Mr. Campbell: In my opinion that is correct and the only method of excluding such a man would be to have him attend and really prove that he was not an insider. I believe such orders are made by the Securities Commission.

Senator Laird: In this case it is ordered by the Director, subject to appeal to the courts?

Mr. Campbell: It occurs in such cases as large United States corporations which are insiders by definition, in any event, of Canadian corporations whose shares are on the market. Orders are made saying that at a certain level no further filing need be made, or made by certain people.

Senator Laird: You do not seem to be very sympathetic to my complaint.

Mr. Campbell: I guess not.

Senator Laird: I have not, of course, analyzed every section of this bill, but nowhere can I find any provision that the secretary of a subsidiary in Canada of, let us say, an American company, must be a resident Canadian, such as applies in the case of a majority of directors. As a practical proposition—I do not know what your experience is in Toronto, but I am thinking in terms of my own city of Windsor—we find that this militates against the best management of the Canadian subsidiary. So often the American lawyer for the parent is also secretary of the Canadian company. Have you had any experience of such cases and any comment to make in connection with the inclusion of such a provision in this legislation?

Mr. Campbell: Yes, I have had such experience and, yes, I have pushed very hard to have the secretaryship brought up to Canada. Sometimes, as a result, I have been that secretary. However, I agree that it is a problem and usually under those circumstances, whether legitimately or not, the books remain in the United States. Such situations do take place. I am not sure whether I am quite prepared to say that all officers should be Canadians.

Senator Laird: No, just the secretary.

Mr. Campbell: Just the secretary—it could be a difficult position in a very small corporation, but I find it difficult to be definite in this respect. I might say that, with regard to all these matters, when I speak I am not speaking for the Canadian Bar Association but for myself. I must do that.

Senator Laird: Yes, but your experience is valuable. Would you like to see a provision covering such situations included in the bill?

Mr. Campbell: I would hope that if there were a majority of Canadian directors this would be one of the first things that would happen, more of the officers becoming Canadians.

The Chairman: Except, Mr. Campbell, that the secretary carries out administrative duties.

Mr. Campbell: Yes.

The Chairman: How far down the line would you go?

Mr. Campbell: You start with the president?

The Chairman: Yes.

Mr. Campbell: And you say, should he be a Canadian. I am not sure where you end up.

The Chairman: Why should you not go down the line to the secretary?

Mr. Campbell: I find it is not a point on which I have a firm view.

Senator Walker: Mr. Campbell, with reference to the clause providing that any new corporation formed under this legislation which we are considering must have a majority of directors Canadian, what is your opinion as to the five-year period allowed for corporations already incorporated to change to the majority number of directors being Canadian?

Mr. Campbell: This five-year period is, in my opinion, a very reasonable allowance on the part of the department for bringing this legislation into force with regard to existing Canadian corporations. From my point of view, particularly in dealing with this Canadian resident director situation, I would like to see that provision brought into force much sooner. I would think that two years would be a reasonable period for existing corporations.

Senator Walker: That is the requirement for resident Canadian directors under the old corporation becoming effective within a period of two years?

Mr. Campbell: This would be my view. It is, again, a personal view and not necessarily that of the Canadian Bar Association. I have not canvassed this point with them.

Senator Macnaughton: But five years is not going to upset you?

Mr. Campbell: Five years disappoints me. Although I feel that saying you must have resident Canadian directors is very much a token type of provision, I do believe, if it is to be included, it should be effective with regard to all corporations at this time, or within a very short period afterwards. In my opinion five years is unduly long.

The Chairman: Maybe it is easier to forget if you have five years in which to deal with something than in two years, and maybe it is also better for the public. I do not know.

Mr. Campbell: If I might say, Mr. Chairman, I have some concern personally, in that for five years the old Business Corporations Act has been applicable to all these companies and there will obviously be very little improvement in that within that time. It therefore seems rather wasteful to have it all sit over that period of five years.

Senator Walker: Particularly the non-resident Canadian directors.

Mr. Campbell: Yes.

The Chairman: Are there any other questions? Thank you, Mr. Campbell.

I believe the representatives of the Canadian Manufacturers' Association are now present. We thought for a while that you might not make it, due to travel difficulties.

Honourable senators, we have with us representatives of the Canadian Manufacturers' Association. They have submitted a brief. Mr. G. E. Eastman, Q.C., will make the opening statement. Mr. D. W. Montgomery, of the Legislation Department of CMA, is also here. Mr. Younger is a victim of the "no flying" situation this morning out of Toronto, so we shall not have the benefit of his experience. Mr. Eastman, would you please open the discussion?

Mr. G. E. Eastman, Q.C., representing Canadian Manufacturers' Association: Mr. Chairman, the CMA appreciates the opportunity of appearing before this committee. I am sorry that Mr. Younger, who would have been principal speaker and the head of our subcommittee on this problem, is unable to be here. He has done a great deal of work on it, in which some of us have participated.

I should like to echo some of the things said by Mr. Campbell, in that it would be desirable to get this piece of legislation through. We do have more reservations on it than those referred to by the Canadian Bar Association.

Our submission is rather lengthy, but not quite as lengthy as the first presentation which was made to the minister, because some of the things have been dealt with and resolved. I apologize also because in the bill as passed by the House of Commons there have been some further changes which eliminate some of the points we have raised. I should like to point out a few of the items with which we are particularly concerned, and I would invite the committee's reading of the brief.

Likewise, we support the Canadian Bar Association's representation with reference to clauses 4 and 222, as the committee will see from our brief. We do not think that clause 4 is at all necessary, and even in trying to shore it up it could run into difficulties—although I must say, Mr. Chairman, that your proposal was much better than that first proposed. We could have trouble with foreign corporations licensed to do business in various provinces, and so on. It might be quite troublesome.

With reference to clause 222, concerning *ex parte* orders, while it may be that a court would not make the order, there should at least be some further restriction, that it should be representative of shareholders so that a person who might hold one share and represent some political or similar type of view should not be able to go to the court and obtain an *ex parte* order. It might put a corporation in a very bad way indeed.

The Chairman: I know that in the good old days a person would equip himself with one share and involve a company in all kinds of proceedings. There was one person that I can recall who acquired the nickname, "One-share."

Senator Walker: "One-share Sweeney."

The Chairman: Yes. Perhaps there is some good reason in acquiring a stake in the company. What kind of stake would you suggest?

Mr. Eastman: That is a difficult question. It should indicate to the court that there is substantial interest in the corporation.

The Chairman: What do you mean by "substantial"—5 per cent, 10 per cent?

Mr. Eastman: Five per cent, to start with. That would at least indicate substantial interest. We have suggested 10 per cent. The other point is that we feel there should be some provision for directing security for costs. I know, Mr. Chairman, you do not like comparisons with other legislation, but it seems only fair to point out that in recent years there has been a furore over *ex parte* labour injunctions. Surely a corporation should be treated at least as fairly. I do not want to press that.

I refer the committee to the brief, where we have outlined in more detail the duties and responsibilities of directors, with particular reference to the matter of penal provisions. We are concerned, as will appear in the brief—again, I do not want to labour this—with the power of the director, where no shareholder may necessarily be concerned. Particularly in the case of corporations not offering their securities to the public, it seems to us that the powers are too broad. We are concerned with the limitation on the right of nominees to vote shares.

Our information is—we gather this from transfer agents—that in many large corporations, as much as 20 per cent of the issued capital of a major corporation is in shares registered in the names of nominees. We accept that it is only proper that the nominees should bring the problems to the attention of the beneficial holders, but there are many cases where beneficial holders have very little interest beyond saying, "You do whatever is right," and so on, but they may not provide the necessary authority in writing that could be filed or would be in compliance with the bill as it stands.

We feel there should be something comparable with the Ontario act, which allows us, within some five days of the meeting, to vote on the shares, and the nominees may exercise their discretion.

The Chairman: Under this bill there is provision that the registered holder, with respect to any third person dealing with him, may presume he is the owner. I cannot recall the clause.

Mr. Eastman: Clause 147 is the one which gave us the problem.

The Chairman: I do not quite appreciate your position in respect of nominees. If they are shareholders, they have rights as shareholders, whatever their capacity underlying that may be.

Mr. Eastman: Our problem, Mr. Chairman, is that it may be very difficult for nominees to get the necessary instructions in order to comply and to be able to vote. There is a very serious penalty on the registrant if he fails to comply with the proposed section.

The Chairman: The effect of clause 147 is that if the person is the registered holder of shares but not the beneficial owner of them, he must not vote those shares without getting approval.

Mr. Eastman: That is right, Mr. Chairman, and that is what concerns us.

The Chairman: Yes, Mr. Howard?

Mr. J. L. Howard, Assistant Deputy Minister, Department of Consumer and Corporate Affairs: Clause 41, I think, is the one with which you are concerned. It deals with the registered holder.

The Chairman: What is the next point, Mr. Eastman?

Mr. Eastman: Dealing with clause 184, we are concerned with the right of a dissenting shareholder in a corporation which does not offer its securities to the public. Most other comparable legislation as, for example, in Ontario, limits the right to offer their shares to companies which

are, as we used to call them, private companies. We feel that the right is not necessary. The market takes care of the situation adequately, we feel.

The Chairman: Clause 184 deals with the right to dissent.

Mr. Eastman: That is right, and the right of a dissenting shareholder to have his shares purchased. It is our feeling that where the shares are listed on a stock exchange and there is a ready market for such shares, there is no reason to have a provision allowing a dissenting shareholder to put the corporation through a very expensive exercise to determine the fair value and to force him to buy the shares, and so forth.

The Chairman: I understand your point is that where approval is provided for in respect of the holding of a dissenting shareholder, the sections mean exactly what they say: that is, that the shares are appraised or valued. What you are saying is that if there is a market for such shares, then the value should be the market value.

Mr. Eastman: We feel it is an unnecessary and, possibly, burdensome provision to put on a public company.

Senator Everett: Mr. Chairman, will we be coming back to general questions? I am most particularly interested in the directors' clauses starting at clause 91 through to clause 128. I am quite happy to wait until the witness has finished the points he wishes to raise.

The Chairman: I had intended letting Mr. Eastman run through the list of points on which he wanted to state the position of the Canadian Manufacturers' Association. Questions may certainly be developed on any points he raises.

Senator Everett: Thank you, Mr. Chairman.

The Chairman: What is your next point, Mr. Eastman?

Mr. Eastman: We are concerned with the definition of "offer" and "invitation to offer" in relation to take-over bids. The problem that we are concerned with in that respect is that it is difficult enough to have preliminary discussions which, inevitably, precede a transaction. A majority shareholder, of course, under any provision we have had to this date, has to be very careful both in regard to giving information and taking any position, and so forth.

If a person holding a majority shareholding is approached and he says, "Well, make us an offer," that, technically, is an invitation to make an offer, and the fact that he tells anyone to make him an offer is something he should disclose. This is already a pretty sensitive area and any preliminary discussions are pretty delicate, and should be delicate, but this might even make such discussions almost impossible.

The Chairman: You are now referring to clause 187?

Mr. Campbell: That is right.

The Chairman: And you would prefer, whatever the connotation of "offer" is, that it not be expanded in its meaning?

Mr. Eastman: To include "an invitation to make an offer" seems to make it very broad, and we feel it could be very dangerous.

The Chairman: You are now talking about the type of case where a shareholder of a block of shares may, in talking to some person who expresses an interest, say, "Well, make me an offer."

Mr. Eastman: Exactly, Mr. Chairman. Should he then make a public disclosure of that?

The Chairman: There may not be anything more to it.

Mr. Eastman: There may not be. Such an offer may come at the end of a card party, or something like that, and yet, technically, it should be disclosed.

The Chairman: Also, the person who wants to buy in might invite the holder of shares to make an offer.

Mr. Eastman: Quite right, Mr. Chairman. That is even worse.

Senator Gélinas: What is the suggested amendment, Mr. Chairman?

The Chairman: I believe it is that we do not need to define "offer", especially to say that it includes an invitation to make an offer.

Senator Barrow: Is that not covered under the definition of "exempt offer" where an offer means no fewer than 15 shareholders?

Mr. Eastman: Not necessarily, senator. That might be fine for a small company, but I am talking about a large company where there might be several hundred or even several thousand shareholders, and there might be a controlling shareholder nevertheless.

Senator Desruisseaux: Mr. Chairman, I am a bit hazy about some of the results of this. Let us take the hypothetical example of a stockbroker who wants to speculate on the value of shares. If he cannot make an offer, can he not have someone else do it for him?

Mr. Eastman: Exactly.

Senator Desruisseaux: I am not sure that this would be good for the shareholders as a whole.

The Chairman: It seems to me, if you read further in the definitions, that while you have the offer including an invitation to make an offer, the offeror is defined as a "person other than an agent who makes a take-over bid". The offeree means a "person to whom a take-over bid is made".

Now you have to correlate the three of those things. To say that an offer is an invitation to make an offer, but, with respect to the person who invites you to make an offer, the offer must be in the nature of a take-over bid—it may be well to have a good look at this when we have Mr. Howard and his assistant before us later. We will also have other witnesses so that we do not have to approve of this particular definition at this time. We are just learning what the problems are, as presented by Mr. Eastman.

What is the next point, Mr. Eastman?

Mr. Eastman: Again, Mr. Chairman, in that section with respect to the definition of "share" as including options and rights, from a practical point of view I suppose the employees who have stock options might not be such a tremendous problem although you could be considering an offer where the price is much less than the current market value. I mean the option price might be greatly in excess of the current market value. So that is a problem. Similarly, that could quite distinctly apply to rights.

The Chairman: What is the difference between making a takeover bid to a shareholder and making a takeover bid to acquire an assignment of an option which somebody else has on shares of the company?

Mr. Eastman: As I said, I am not quite as concerned about the matter of options, because they are known, but when you get to rights, that is a different matter. I suppose you would have to advertise, would you not? I mean they are bearers, and you do not know who would own the rights.

The Chairman: There would have to be disclosure somewhere in the securities law of the existence of outstanding rights to acquire shares.

Mr. Eastman: Yes, quite right. But who are the people who own them? We have no idea. The corporation has no idea who has rights which are covered by bearer warrants.

The Chairman: No, at that stage the person may be dealing with another person who has a right to acquire shares, but the right may either be a right granted by the company or a right granted by a shareholder of the company.

Mr. Eastman: I suppose it could. However, I do not know whether that is what the definition means. I suppose that would apply under the definition, and that makes it even worse, I would say. How would the corporation know? It would never know of that unless they were dealing with a party of the takeover.

The Chairman: Are there any questions on that?

Senator Desruisseaux: Mr. Chairman, with respect to the ownership of rights, is there not a record kept of that by the transfer people or the company itself?

Mr. Eastman: They are transferable on delivery. All warrants of this character are transferable on delivery, and after a period of time you have no idea who owns them.

Senator Desruisseaux: Yes, that is right. That would be the case for a great many of them.

The Chairman: What is the next point?

Mr. Eastman: It was felt, and perhaps this is not quite as major a point, that the requirement that a takeover bid circular be sent to all shareholders could be rather burdensome under clause 191 (1).

The Chairman: Yes. What is the objection to that?

Mr. Eastman: Well, the objection here is not the fact of the sending of it, but the definition under which power is given here to define how it is to be done. May I read from page 26 of our brief on this point, Mr. Chairman:

> The actual form of the takeover bid circular is to be prescribed in the regulations. It is suggested that this sub-section be made uniform with the Ontario Securities Act. Furthermore, we submit that it is undesirable to require a takeover bid circular to be sent to all shareholders. It should only be sent to offerees.

Senator Desruisseaux: May I ask at this time why it is undesirable? Will you please clarify why you say:

> ... we submit that it is undesirable to require a takeover bid circular to be sent to all shareholders.

Mr. Eastman: The offereor may not wish to make the offer to shareholders resident in a particular province. The example given here is that offers are not generally made to shareholders in the U.S.A., and it may be undesirable to make the offer in some of the provinces by reason of the legislation which they have in those particular provinces. Therefore, and this is without any exclusion, it says, "to all shareholders". But the offer may not be made to all shareholders, and the question is why should it be submitted. I suppose the answer is that even though the offer is not made, the circular could be sent to them for their information.

Senator Desruisseaux: Yes, that is the point.

The Chairman: I suppose the question is that if you are only dealing with a number of the shareholders, you are making an offer to them and you say that you are excluding from the offer any offer to a shareholder who lives in Quebec or in Saskatchewan, then there should be no requirements that you send a copy of that offer to those shareholders to whom you are not making the offer.

Mr. Eastman: That is exactly our point, Mr. Chairman, and it is not required presently under the Ontario legislation. As a matter of fact, the example cited in the brief is an offer by the Canada Development Corporation for the shares of Texas Gulf Sulphur. It was not sent to all shareholders.

The Chairman: That offer was only made to the U.S. shareholders.

Mr. Eastman: Yes.

Senator Desruisseaux: Yes, but there may be reasons for some of the shareholders to be informed as to what is going on, Mr. Chairman.

The Chairman: There may be, but what Mr. Eastman is stating is their position in relation to some of these items. We still have to continue our examination of the departmental officers and get their explanation for making this provision so extensive.

What is the next point, Mr. Eastman?

Mr. Eastman: I am afraid I will have to refer to our brief, dealing with clause 231, the definition of the term "complaint". This deals, Mr. Chairman with the matter of bringing a derivative action, and who may bring it, and it is suggested that the definition should be limited to a person who was a registered shareholder or a beneficial owner of the security at the time when the cause of action arose.

The concern of the association is the observation of the number of derivative actions by shareholders in the United States. "Burdensome" would be a very light word to use with regard to their effects on the corporation. In many cases one could say that they are very harmful to the corporation.

The Chairman: Well, you are not satisfied with the limitations in sub-clause (2) of clause 232.

Mr. Eastman: Well, if you once allow a complainant to be anybody who acquires a share for the purpose of bringing the action, and perhaps a person who is a man of straw, and so on, you can really cause an awful lot of trouble with quite irresponsible actions. This is what we are afraid of, namely, irresponsible proceedings which could be harmful to the corporation.

The Chairman: Well, are there any questions on that? We can certainly question the departmental officers as to the potential for irresponsible actions. There is a provision in sub-clause (2) of clause 232 that the court must find that the complainant is acting in good faith, and must also find that it appears to be in the interests of the corporation.

Mr. Eastman: Yes, that is true, but by the time the court finds that out the corporation has been put to quite substantial expense, and perhaps very adverse publicity, and the harm may be done by that time.

The Chairman: No, but the sub-section says:

> (2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that...

Anl then there are these provisions.

Senator Flynn: No action may be commenced.

The Chairman: If a shareholder first has to apply to the court for leave to bring an action, the question will arise on that application.

Mr. Eastman: Well, that is true.

The Chairman: Yes. What is the next item?

Mr. Eastman: This is a matter of the possible constitutional problem in regard to prospectuses, in clauses 186, 187 and 189, on take-over bids, and the civil liability of insiders under clause 125 (5). I think, basically, what he is saying there is that this is already covered by securities legislation in all the provinces, and that the public is adequately protected thereby. I think that is really at the root of his point on this. It is one more thing that is already amply covered; and coupled with that, also, is the objection to the double liability imposed on insiders, both to the corporation for its losses and in addition to the individual concern.

The Chairman: Yes. What are you suggesting?

Mr. Eastman: That really much of the material dealing with prospectuses, take-over bids and the liabilities of insiders could safely be left to provincial legislation, and where there is an abundance of it, it is not as if the field had not ben covered.

The Chairman: Remember that this bill only applies to federally incorporated companies.

Mr. Eastman: Yes, nevertheless the other legislation also applied to federally incorporated companies who are selling their securities within that province.

The Chairman: Well, what are you suggesting—a saving clause that where there is provision for the same remedy, or where the same penalty is provided under provincial securities legislation?

Mr. Eastman: I would not go even that far, sir. My suggestion would be that where the matter is covered by provincial legislation this should not be required, because it is primarily a question of property and civil rights. It may be an adjunct to federal corporations which, if the field were not covered, might be desirable.

The Chairman: That clause you were referring to is what?

Mr. Eastman: Well, it covers the ambit of clause 186, and then 187 to 199, and the civil liability of insiders, clause 125 (5). These are all, as we say, matters of property and civil rights, where the matter is quite adequately covered, we feel, by the provincial legislation.

Senator Flynn: In every province?

Mr. Eastman: I think that is fair to say. Generally the pattern of the Ontario Securities Act has been approved, although now we are finding a little trouble with British Columbia, I guess it is.

The Chairman: Well, there is a new act in the mill in Ontario.

Mr. Eastman: Yes. Quite right.

The Chairman: But your main concern is that where you have what you might call penal provisions in provincial law, and in the federal law, there should be some provision by which the offender is not subject to judgment under both actions.

Mr. Eastman: Yes. You speak of penal provisions. You mean civil liability for breaches or offences.

The Chairman: "Penal measures" was the wrong expression. I should have said "civil liability".

Mr. Eastman: Yes, quite right. That is the position of the association on that.

Then, again, there is the question—and this is perhaps a matter of provincial law—of the right of the corporation to operate under a name other than its own. Of course, there is a provision allowing the corporation to—

The Chairman: Could you illustrate that? Let us assume the name of the company is the Jones Smith Machinery Company.

Mr. Eastman: Yes, and it has acquired a little business that has been known for a long time by the name of Jones Building Machines. So it carries on under that name. Now there is provision, for example, in Ontario, under the Corporations Information Act—and this would apply to federal corporations as well—a company can register, and if it registers and complies with that act, and the public can make the necessary searches, it does not need to indicate, even on its invoices or any of those things, the name of the corporation. Now, this purports to take away that right.

The Chairman: What clauses are you talking about now?

Mr. Eastman: Clauses 10(5) and 10(6). I suggest that if they were made—and, again, it is a matter of jurisdiction—subject to any provincial law in that regard, then that would take care of it. I think it is fair that if there is no provincial law which requires them to register and which would give the public a chance to know with whom they are dealing, then they should put their name on everything—for example, contracts, invoices, negotiable instruments, orders for goods and services, and so on. But if there is a provincial law governing this, then it seems to me that clauses 10(5) and 10(6) should say, "Subject to any applicable provincial law in that regard."

The Chairman: Well, all that clause 10(6) on page 9 says is as follows:

> (6) Subject to subsections (5) and 12(1), a corporation may carry on business under or identify itself by a name other than its corporate name.

Mr. Eastman: But under 12(5) even if it does carry on a business, it still has to have it on practically every paper that it issues; it has to put its full name on.

The Chairman: Well, it must put its full name on all contracts, invoices, negotiable instruments, and orders for goods and services.

Mr. Eastman: Which is not required under Ontario law if the corporation has registered its business under the Corporations Information Act.

The Chairman: So you would suggest a change in subclause (6)?

Mr. Eastman: And in subclause (5).

The Chairman: Something to the effect that, "unless the provincial law otherwise provides—

Mr. Eastman: —and has been complied with", even. Something along that line.

Then there is some concern about the question of name in clause 12(3). Perhaps I could read on that. Under clause 261 continuance is mandatory within a relatively short period of time. Compulsory continuance should not interfere with the status quo and a corporation that is seeking continuance under this act should be permitted to retain its existing name.

The Chairman: There seems to be something there that may require some tidying up. If a corporation has been incorporated under the Canada Corporations Act, the name has been approved and some other person comes along and manages to incorporate under this bill, when it becomes law, and gets the same name, then the loser would be the earlier corporation when it applied for a continuation of its operations. It is hard to conceive that the department, with all the information before it, would permit that to occur.

Mr. Eastman: Yes, but right now Ontario has issued a directive that they are not going to bother making searches for corporations outside the jurisdiction, because they say they are about 5 per cent anyway. But the point is that if it is continued, then we feel it should be continued under its own name. I think this is something that could be tidied up.

Senator Flynn: What is the remedy at present if there are two companies operating with names that may be confusing? What is the solution? There is one way of correcting this, I know, and that is that you can go before the court.

The Chairman: Quite apart from what the bill says.

Senator Flynn: Yes, so if there is a remedy existing, then you do not need that clause at all.

Mr. Eastman: I think that is right. But it is troublesome in its present form.

Senator Connolly: The remedy, I suppose, is a passing-off action on behalf of one of them. That has always been in the law.

The Chairman: We follow your point on that, Mr. Eastman. What is your next point?

Mr. Eastman: Well, unless there are any questions arising out of the brief, that is all I really wanted to emphasize.

The Chairman: I should like to refer to page 2 of your letter accompanying your brief. As you have said in some other places where you have referred to it, you seem to find some agreement with Mr. Dickerson's task force as against what has been incorporated in the bill. This is one of them, where you say:

> We concur in the view expressed by the Dickerson Task Force that "a corporation act shoud be largely self-enforcing by civil action initiated by the aggrieved party, not by severe penal sanctions or sweeping investigatory powers". Contrary to the advice of the Task Force, Bill C-29 confers upon the Director very wide powers to intervene in company affairs. There are no fewer than 15 sections under which notices have to be given or material filed with the Director and in most of these cases he is entitled to commence or intervene in court actions involving the company. These provisions go far beyond anything now contained in the Canada Corporations Act. In addition, we have counted no fewer than 23 sections creating quasi-criminal offences enforced by criminal penalties. Not only has the number of offences been substantially increased but the penalties provided are much larger than those under the present Act. For example, the penalty under Section 25 for failing to keep accounting records in Canada has been increased from $20 per day under the present Act to $5,000 per day which, as a result of Section 245(2), is deemed to be a separate offence for each day on which the offence is continued.

That expresses your point of view?

Mr. Eastman: Yes, Mr. Chairman, and we could perhaps held a little, but I am sorry I do not have enough copies of this to give one to every member of the committee. This is a list of places where the director may intervene, and there are lists of penal offences, all of them carrying penalties of $5,000 or six months in jail, or both in some cases.

The Chairman: Does the committee agree that we can Xerox these and distribute them?

Hon. Senators: Agreed.

The Chairman: Do we need to go over these item by item now?

Hon. Senators: No.

The Chairman: As and when we are studying the bill, and possibly when we are continuing our examination of Mr. Howard and his panel, we will have this record before us and we can question him on that. Then we will see how it is supported.

Senator Connolly: In any event, I am sure he would need to have a copy.

The Chairman: We will see to it that he does. Is there anything else now?

I notice you refer to the brochure put out by Mr. Justice Hartt of the Law Reform Commission on the meaning of "guilt" and on the strict liability provisions that the government seems to like to include in its legislation, and it seems to be leaning more in that direction. It is true that it makes the administration simpler for the prosecutor, but it makes defence impossible for the person who is charged. Now you have raised this issue as well.

Mr. Eastman: Yes, indeed, Mr. Chairman, and in the brief we have also pointed out a number of cases where we felt that directors should be able to rely on statements of fact, for example, whereas I think the only relief that is given is something about an auditor's financial statement or a financial officer's statement.

The Chairman: What Mr. Justice Hartt has suggested is that the test should not be the simplicity of administration so as to have an offence which is to say that if you have done it you are guilty, and he suggests the "due diligence" test. In other words, if the person charged can establish that "with all care and due diligence", which he applied, he could not foresee that particular thing with which he is now charged or, in other words, that he has not been guilty of negligence, then he should have the opportunity of defending himself. That is to say that he should be able to state, "there was no negligence and I applied all due care and due diligence." Would that answer the question as far as you are concerned?

Mr. Eastman: In my opinion, it would go a long way toward it, sir. The word "negligence", which is also always difficult to define, could be left alone and it could be indicated that if the man has exercised due diligence that would cover the point. However, the association is certainly not asking for the excusing of any flagrant breaches of trust or fiduciary duties.

The Chairman: But you added the qualifying words yourself with respect to "flagrant". Mr. Justice Hartt suggests the due diligence test. We have received other briefs adding the word "negligence", not to replace "due diligence", but simply to include sufficient words that the rights of a person who may be charged with an offence could be protected were he to establish either of those situations.

Senator Everett: Reference is made at page 1 of the letter accompanying the CMA brief to clause 97(1). It is stated that clause 97(1) of Bill C-29 should be changed to follow the language of section 35 of the Model Business Corporation Act. Could you tell us why that suggestion is made?

Mr. Eastman: Basically it amounts to the fact that in practice the directors as such, do not, as I think everyone will agree, carry on the day-to-day management of any business. The executive officers, even subordinate officers and certainly the general manager, do that. Many corporations are able to get along with quarterly meetings of their directors. So to speak of management it to use a rather broad term. The suggestion is that corporate powers shall be exercised by or under authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors. In other words, the directors, I think we all agree, set the policy but the actual management is not carried on by the directors.

Senator Everett: What do you consider then, to be the effect of clause 97(1)?

Mr. Eastman: The suggestion is that the directors may be responsible for every single action of management, which may prove to be an undue burden on them if those words were to be taken literally.

Senator Everett: Does this increase the responsibility of the directors?

Mr. Eastman: In effect it does.

Senator Everett: Would you say that it would have an effect on clause 117(1)?

Mr. Eastman: Do you mean when reference is made to this in our brief or even in the letter reference should also be made to clauses 117 and 118?

Senator Everett: I am referring specifically at the moment to clause 117(1). Is the responsibility of a director as defined by clause 117(1) in your judgment, in any way affected by the definition of the obligation of a director contained in clause 97(1) to manage the business and affairs of the corporation?

Mr. Eastman: If you couple that with the theory discussed by the chairman earlier—the general fixing of responsibility for everything that is done and all that would need to be proven is that something was done which constituted an offence—you will be going a long way in that direction. This is especially so in view of the fact that some corporations have the misfortune even to have a dishonest manager on occasion which could, in my opinion, tar every director with the same brush.

Senator Everett: So clause 117(1) is affected by clause 97(1), in your judgment?

Mr. Eastman: It might well be affected by the definition contained in clause 97(1).

Senator Everett: Would you care to be more definite?

Mr. Eastman: I do not think I would. I would have to say that a court would probably bend over backwards in an attempt to find some manner by which to release an honest director from responsibility for a dishonest man-

ager. Nevertheless, in my opinion the wording could be improved.

Senator Everett: How would the suggested amendment to incorporate the language of section 35 of the Model Business Corporation Act affect the operation of clause 117(1)?

Mr. Eastman: Were those words to be used: "All corporate powers shall be exercised by or under authority of, and the business and affairs of a corporation should be managed under the direction of . . ." and the directors then give the appropriate authority, direction, policy and supervision, it seems to me that is all they are required to do. That is clearly established. If you leave the two together, it might be said that the directors are responsible for everything the management does. I think it makes it clear, really, what we have always accepted in practice.

Senator Connolly: Mr. Chairman, would not the provisions of clause 117 still be valid even if you made the change in clause 97?

Mr. Eastman: I agree; yes, they would.

Senator Connolly: You want a high standard of performance on the part of directors.

Mr. Eastman: That is right.

Senator Connolly: It seems to me that what the witness is saying about the possibility of a director being charged with items of misfeasance, that kind of thing, on the part of management, and it necessarily being fixed immediately upon a director, who then becomes subject to these penalties, is not part of the real world. It does not happen that way.

The Chairman: Misfeasance would involve some action or conduct which was knowingly embarked upon by the director.

Senator Connolly: I am talking about misfeasance on the part of the officer, about which a director knows nothing. All of a sudden he gets fixed with it, because, as the witness has said, the provisions of clause 97 would seem to charge him with the management of the business affairs of the corporation.

The Chairman: Clause 117 would relieve a director of that responsibility.

Senator Connolly: That could be termed standard of conduct. That is an appropriate section to be included in a companies act.

Mr. Eastman: There is no quarrel with that.

The Chairman: We should have a look at that when we have the departmental officers back.

Senator Everett: Yes. So that we have something to talk to the departmental officers about, I gather this is a serious matter with the CMA. The amendment to clause 97(1) does not properly affect the obligation of a director.

Mr. Eastman: How serious it is, I hate to suggest. All we are saying is that it seems that in the light of modern experience the definition of this Model Business Corporation Act is preferable to that used in clause 97. I do not know that it would necessarily make any difference to the outcome of a suit against a director, but I think it is more appropriate language. That is all we are saying.

Senator Everett: Moving to the second page of your letter, you deal with clause 118(4). Again, you suggest the change be that suggested in the Model Business Corporation Act. Again I would ask you to give us reasons for suggesting this change.

Mr. Eastman: That is also referred to in our brief.

Senator Everett: Where in your brief do you refer to it, Mr. Eastman?

Mr. Eastman: No, it is fully dealt with in the letter; I am sorry. This is the point that I raised earlier when speaking about reliance upon financial statements made by a corporate officer or the auditor. The suggestion with regard to section 35 of the Model Business Corporations Act is that a director should be entitled to rely not only on financial statements, but on factual information, opinions, reports or statements, including financial statements, and other financial data. There are many things that are brought to a director's attention other that simply a financial statement on which you rely.

Senator Connolly: It would be hard to prove, would it not?

Mr. Eastman: Reports would not be difficult to prove.

Senator Connolly: A board of directors has information communicated verbally at periodic meetings. Sometimes a group of directors are disposed to say, "These are the officers of the company, they know the business and what they say sounds sensible." It then turns out to be something that creates problems later. It is pretty hard to prove that.

The Chairman: Senator Everett, you will notice clause 116 (a), which provides that:

> the directors may designate the offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business of the corporation;

I would think that clauses 97, 117 and 116—there may be others—should all be tied together, to lay out a chart of the duties of directors and their responsibilities; because it cannot possibly be intended—if there is any possible way in which it could be so interpreted, we should correct it—that because you are directors and you hire a general manager with the capacity to do the job, but who proves to be a failure, you as directors have the responsibility for what he did and there is no way of getting out of it. That could never be. You could not run a business if it were capable of that interpretation.

Senator Cook: Looking at clause 116, I am wondering why it says "unanimous shareholder agreement,"

The Chairman: There is a provision in the bill, as I explained in the Senate, that you can have a unanimous shareholder agreement specifying whatever the parties agree to, which could deal with management, et cetera.

Under that, the directors may be shorn of all their authority, but they are still directors. The question is, even though they are shorn of their responsibilities, they have liability as a director. Has that been protected?

Senator Connolly: Yes, Mr. Chairman, you did raise that.

The Chairman: They do not have the responsibility in those circumstances.

Mr. Eastman: That is another reason for amending clause 97.

The Chairman: You have to make a correlation in all of those clauses, to make it clear as to what is the limit on the liability of directors.

Senator Everett: Mr. Eastman, you do not deal with clause 117(1) in your brief. Does that indicate that you are happy with that, subject to the problem we previously discussed in respect of clause 97(1)?

Mr. Eastman: There is no complaint about clause 117.

Senator Everett: Coming now to clause 119, subsections (1) and (4), which is dealt with on page 12 of your brief—

Mr. Eastman: I think a change was made in the bill which met most of our objection on that. I think in clause 119(1) it does now allow him indemnity also for including an amount paid to settle an action or satisfy a judgment—which was what we asked for. I think that amendment has been made in clause 119(1).

Senator Everett: The first problem you mention was the problem of derivative actions—the indemnity could only be extended in the event of a court order. Has that been taken care of in the amendment?

Mr. Eastman: No, I guess that it has not. What we were mainly objecting to is that even with a court order there was no means of indemnifying against the payment of an amount required to satisfy the costs.

Senator Everett: And you are satisfied with that, are you?

Mr. Eastman: I think we would accept it.

Senator Everett: Then you go on to the second point with respect to subclause (4), and that is that corporations may purchase insurance to cover a director against liability incurred under clause 117(1)(b).

Mr. Eastman: We are not complaining about subclause (4) at all. What we were complaining about is that under subclause (1) we were not allowed to provide any indemnity, whereas under subclause (4) we could go the whole hog in getting indemnities. In this respect, I have to say it is better than the Ontario act.

The Chairman: I think in Ontario the directors have to pay the premiums on their own insurance.

Senator Everett: Let me read from your brief:

> It is also peculiar to note under subsection (4) a corporation can provide indemnity by way of insurance which goes beyond the indemnity which the corporation itself can offer. This is an expensive and rather unsatisfactory way of indemnifying directors and officers. At the very least, a corporation should be permitted to grant an indemnity as broad as the most favourable insurance policy which could be purchased.

Mr. Eastman: Which could be purchased by the corporation, yes.

Senator Everett: You have two criticisms, then, in respect of subclause (1), have you not?

Mr. Eastman: I think we are satisfied now, senator, because what we were complaining about was that although we could insure against liability, we could not indemnify without insurance.

Senator Everett: So, you are satisfied now with clause 119(1) and (4)?

Mr. Eastman: Yes. We never quarrelled with subclause (4); we merely pointed out that we were allowed to take out insurance for something we were not allowed to do ourselves. That is not a complaint. It was merely that we were not allowed under subclause (1) to indemnify, even with court approval, against the amount of a judgment paid.

Senator Everett: On page 11 of your brief you recommend that paragraphs (b), (d), (e) and (f) of clause 113(2) be deleted.

Mr. Eastman: Yes, and I think some members of the committee felt that they should be in there. Perhaps I should read the note I have on it; it is, "I can't get excited about this!"

Senator Everett: That completes my questioning, Mr. Chairman.

The Chairman: Senator Laird.

Senator Laird: Mr. Eastman, your brief deals with clause 125, the matter of insiders. Did you overhear my question to the Canadian Bar Association about including directors of subsidiaries in the definition?

Mr. Eastman: Yes.

Senator Laird: And do you feel that that would be somewhat superfluous, unnecessary?

Mr. Eastman: I do not know what to say. It is a rather difficult one. I suppose one could be pardoned for using names, but Brascan, which is a large Canadian company operating in Brazil—and this is a company which I know little about and in which I hold no shares—could view it as vitally important in respect of a director of some Brazilian company which is a wholly-owned subsidiary of Brascan. I cannot go too far.

Senator Laird: You have a lot of members, you know, and I can name names.

Mr. Eastman: I know. I am only speaking for myself in that respect, not for the Canadian Manufacturers' Association.

The Chairman: Have you anything further to add, Mr. Eastman?

Mr. Eastman: No, Mr. Chairman.

Hon. Mr. Gray: Well, I put 2,000 in, but on reflection I

The next witness will be the Honourable Mr. Gray. Do you have an opening statement you wish to make, Mr. Gray?

Hon. Herb Gray, M.P.: I do have an opening statement, Mr. Chairman, and I have made copies available to the clerk for distribution to members of the committee.

The Chairman: Before you begin your opening statement, Mr. Gray, I want to say that we will sit until 12:30. We will not be sitting this afternoon because there is no room for us in the inn. Proceed, Mr. Gray.

Hon. Mr. Gray: First of all, Mr. Chairman, I wish to thank this committee for giving me a means of expressing my views in a parliamentary forum as to whether the Canadian directors provisions of the Canada Business Corporations Act, Bill C-29, will, in fact, provide any immediate help in solving the problem of the intrusion of foreign law into Canada.

I want to begin by explaining why I am taking what, I gather, is the somewhat unusual, if not unique, step for someone in my position of placing my views on this matter before this honourable committee of the Senate. I am doing so because, although they did so subsequently, at no time during any of the bill's consideration in the House of Commons were the Canadian directors provisions ever put forward by government spokesmen as being something which would help provide an immediate solution to the problem of intrusion of foreign law into Canada.

If you look at the background papers issued by the Department of Consumer and Corporate Affairs when the bill received first reading, the speeches of the Parliamentary Secretary to the Minister of Consumer and Corporate Affairs on second reading and in committee, you will see that they say only this about the purposes of the Canadian directors provisions, and I quote briefly from the Parliamentary Secretary's speech on second reading:

> Some of the major initiatives of the government in this area in recent years have been introduction of the foreign investment review bill and the revision of the acts regulating financial intermediaries and some resource corporations in order to restrict foreign ownership and control. It was decided that the corporation law could usefully reinforce these policies by ensuring that the Canadian viewpoint will be expressed in all meetings of directors and committees of directors.

The idea that the Canadian directors provisions in the bill had some meaningful and immediate relationship to the foreign law issue first came up around December 24, and particularly around December 25 and 26 of last year.

The Chairman: You mean even on Christmas Day?

Hon. Mr. Gray: The *Globe and Mail* was published on Christmas Day. It had been reported in the press that Cole Industries would not be able to carry out an order for the sale of furniture to Cuba because it was a wholly-owned subsidiary of Litton Industries of the United States, which took the position that such a sale would be contrary to the United States Trading with the Enemy Act.

Then came the reports like those in the *Globe and Mail* for December 25, which state:

> (Mr. Gillespie) admitted that Canada can only complain and negotiate with Washington until proposed amendments before a Commons committee are made law.
>
> A trade department spokesman said later that the amendments had top Government priority before and will be hurried even more because of the blocked Cole contract.
>
> The proposed Business Corporations Act would require that a majority of directors of all federally incorporated companies be Canadians. The Cole division of Litton Business Equipment Ltd. has all Canadian officers—none of them on the board—but all U.S. directors.
>
> Amendments to the Combines Investigation Act would bar Canadian companies from obeying foreign laws if Canadian trade suffers as a result . . .

A similar quotation appeared in a number of other papers, for example, in the Winnipeg *Free Press*, on the following day.

The House of Commons justice committee had already completed its hearings on the bill several days previously, on December 17, and reported it back to the House of Commons on the next day, December 18, where it went on to the Order Paper to come up when called for that purpose by the Government House Leader. As we know, Parliament adjourned on December 20 for the Christmas recess and did not resume until January 22.

On Thursday, January 23, the Government House Leader, as is customary, announced the business he intended to call for the following week. He did not mention Bill C-29, that we are studying today in this committee. However, on Monday, January 27, immediately after question period had ended, and without any previous notice to members generally that he would do so, he moved the report stage of Bill C-29, and immediately thereafter moved third reading. There was no debate on either of these stages. The bill passed, therefore, in a minute or so and the house moved immediately on to consideration of the housing bill, Bill C-46, the business that had been expected for that day.

The Government House Leader and his counterparts in the other parties understandably felt they were hastening passage of a bill that would help deal with a currently pressing problem and, which in a way, would relieve public concern about it.

However, the procedure followed meant that there was inadvertently no real opportunity for consideration in the other house to be given to the question as to whether this bill could make any real and immediate contribution to solving the problem of the intrusion of foreign law into Canada. While this issue is something of long-standing concern, it has become of particularly current interest because of the Cole situation and several others that have recently come to light.

Government spokesmen, particularly in the Department of Industry, Trade and Commerce, apparently believe that this bill will be immediately helpful in dealing with the foreign law issue. Their reasoning seems to be that,

if companies have boards, the majority of whose directors are Canadian citizens, these directors will not be subject to prosecution by the American authorities and will not, therefore, hesitate to vote approval of deals with Cuba or other countries to which the United States Trading with the Enemy Act now applies or may apply in the future.

However, I must say with regret that Bill C-29 is most unlikely to provide any solution, either immediately or in the near future, for this problem of extraterritoriality. This is because the bill says that no company which is presently federally incorporated has to comply with any of its provisions for a period of five years after the bill is proclaimed. In other words, such companies have up to five years to modify all their existing corporate structures, and as Mr. D. L. Campbell, Q.C., representing the Canadian Bar Association, told the Justice Committee of the House of Commons, and as he confirmed here this morning, and I am quoting what he said: " . . . therefore in the ordinary course of events we would expect that most Canada corporations would not choose to be continued until...in effect, the five years have gone by.

Bill C-29 does not become compulsory for five years from its proclamation and there is no incentive for existing companies to continue themselves under it any sooner.

Secondly, the bill applies only to federally incorporated companies. At persent, only some 23,000 of the 270,000 corporations in Canada are incorporated under federal law, although federal companies include some of the largest enterprises in Canada. Only some 2,500 companies are incorporated under federal jurisdiction each year.

Senator Walker: Twenty-five hundred or 2,000?

Hon. Mr. Gray: Well, I put 2,000 in, but on reflection I gather 2,500 may be more correct.

There is no obligation in our present federal law for any new enterprise, even though foreign controlled, to seek federal incorporation, rather than provincial incorporation. Only two provinces—Ontario and British Columbia—now have Canadian directors provisions in their corporation laws. So any new entreprise whose owners did not want to meet the Canadian directors requirements of our new law could easily find another province in which to incorporate—one whose law did not have these requirements. Also there is nothing in the new law or in our existing company law to prevent controlling shareholders of existing federal companies who did not want to comply with the Canadian directors provisions from having the assets and operations of these companies conveyed, during the five-year period, to provincial companies, which they would control and which would be set up in provinces not requiring Canadian directors.

Let me go on to mention another reason why these Canadian directors provisions in Bill C-29 are unlikely to have any meaningful effect, either in the short term or in the longer term, in helping solve the foreign law issue.

While Bill C-29 is just about identical with its predecessor in the last parliament, it is different in one important respect. The present cabinet, if I may say so, watered down the Canadian directors provisions from what they were in the original bill. The original bill proposed that, where a company incorporated under it was foreign controlled, employees of the company could not be counted as making up the required majority of Canadian directors. In other words, for such companies the majority of the board had to be composed not of directors who were employees, but of outside directors. This proposal caused some concern on the part of some Canadian executives of foreign controlled companies here. They believed wrongly that the proposal would have made them totally ineligible to serve on their companies' boards. This was not correct, although the provision could have limited their opportunity to be directors somewhat, unless their parent controlling companies, in effect, agreed to an appropriate restructuring of the size of the boards of the subsidiary companies.

The concern of these executives is understandable. They claimed they were already striving to urge a Canadian point of view in the decision-making involving their companies, and in addition, it was unfair, they said, to deprive them of the chance of serving on their companies' boards. I am sure that what was said about their efforts in regard to a Canadian point of view was, and is, correct in a number of cases.

However, I do not think that the government's information on this was so complete that it should have generalized about it for policy-making purposes. Also, executives may retire or go on to new positions and this bill is to be a law speaking generally and applying for many years to come.

In addition, the matter takes on a somewhat different cast if the measure is now intended to be used to help block the intrusion of foreign law into Canada. If a company, newly incorporated or continued under the new law, can have a board composed of a majority of Canadian directors who are employees, these directors would not, themselves, run the risk of prosecution under the U.S. Trading with the Enemy Act, if the company carried out an export order to Cuba, or any other country in which the law applied. Unless, of course, a charge was laid against them in the United States for doing this and they happened to fall into the clutches of the U.S. authorities while visiting that country.

However, unlike outside directors, the entire livelihood of these employee directors would come from their employment with the subsidiary company. Realistically speaking, they would be subject to more potential or actual pressure than outside directors to follow the instructions of the officers if the U.S. parent company of the subsidiary if they did not want the subsidiary to enter into a deal with Cuba. Or at least, they would be very sure that they would not do anything which could bring the officers and directors of the U.S. parent within the sanction of the U.S. law.

This U.S. law says it is an offence for officers and directors of foreign subsidiaries of American companies to trade with a country described in proclamations made under it as an enemy; but, more important, it also says it is an offence for the officers and directors and even employees of the parent company to permit such a transaction to be carried out. Canadian executives of subsidiary companies are highly aware of this, and its implications.

Turning to another aspect of this, there may be those who question the general value of outside directors.

In August, 1973 the Conference Board published a study by Morris Heath on the size and composition of boards of directors in Canada. This study was based on returns from a representative group of 126 companies. The report states:

> Among the 79 manufacturing companies, outside directors constitute a majority in 66 of them (83 per cent)... This apparent trend to a higher ratio of outside representation on corporate boards is similar to that taking place in the United States.

In the Canadian survey, and I continue my quotation:

> ...about one-third of all outside directors are executives of firms holding major interests in the survey companies...—(With regard to) the percentage of inside directors on the boards of 47 non-manufacturing firms.... Representatives from outside constitute a majority of corporate board members in 43 of these companies (91 per cent), a considerably higher proportion than found in the manufacturing sector.

So, honourable senators, one could argue on the basis of this kind of information that if the original proposal for outside directors for foreign subsidiaries were to be reinstated, the effect would not be to displace Canadian employees who are directors. Instead, the result would be to replace some of the outside directors who are not Canadians with those who are.

Also, according to the *Harvard Business Review* for July/August, 1974:

> For almost 20 years the New York Stock Exchange has required at least two outside directors for companies applying for listing privileges. While the SEC has not yet made any definitive statement on the subject, the NYSE has recommended a minimum of three outside directors for all companies listed on the "Big Board".

Senator Connolly: Regardless of the number of directors?

Hon. Mr. Gray: That is right.

One could also argue that outside directors could be especially important on the boards of foreign subsidiaries in Canada, most of which are wholly-owned by their foreign parents, such that none of their shares is available to Canadians. Because of this, the opportunity for public awareness of corporate activity that comes through shareholders exercising their right to attend and vote at shareholders' meetings, and otherwise properly gain information about their company's activities, is not available with regard to a very sizeable quantity of Canadian business activity.

Of course, one could also ask what real value having any Canadian directors on the boards of subsidiary companies can have as a way of dealing with the foreign law issue, even if the majority were composed of outside directors. After all, the boards of directors do not get involved in the day-to-day administration of their companies' business—included therein being the accepting and rejecting of export orders. Generally speaking, I would think that such orders would not ordinarily come to their attention. They would be dealt with by the officers and other senior employees of the company as a matter of daily administrative routine. These officers and senior employees would, I think, have more contact with officers of the foreign parent company on matters of day-to-day business and would follow their lead, or at least be sensitive to what they would think would be the wishes of these officers.

Therefore, export orders to countries covered by the U.S. Trading with the Enemy Act could be rejected in a number of ways without ever coming formally to the attention of the board of directors as such or the government, for that matter.

Let us remember that it was only because the Cubans went to our Department of Industry, Trade and Commerce with their orders and it then referred these orders to Cole and the other companies in question, that the adverse impact of the U.S. Trading with the Enemy Act on them ever came to light. If they had gone to the companies directly and had been rebuffed, the Canadian public and the Canadian Government might well never have been aware of it!

I should add that the officers of the Canadian subsidiary —if they are American citizens, as is often the case— would themselves be subject to the sanction of the American law in question, no matter what the citizenship and employment status of the directors may be.

In addition, even if companies developed boards composed of a majority of Canadian directors in less than five years, and even if they were outside directors, it is likely that the foreign parent company could frustrate anything this might do to solve the extra territorial law problem because of another clause in Bill C-29. This is clause 140(2), which makes possible a unanimous shareholder agreement to be entered into forbidding the directors from approving a transaction with a country to which the United States Trading with the Enemy Act applies. It refers generally to the unanimous shareholder agreements but, as you know, it could limit the authority of the directors in any way whatsoever.

I believe, therefore, that a more immediate, practical and relevant way of dealing with the issue is found in Bill C-2, the Stage I Competition Policy Bill, which is presently under study in the House of Commons Finance Committee, and, I believe, informally under study in this committee.

One provision in this bill would authorize the Restrictive Trade Practices Commission to issue orders preventing persons or companies in Canada from taking action or not taking action in compliance with foreign laws, judgments or policy directives. It would then be a criminal offence to fail to comply with these orders. This provision would apply as soon as that law was passed and declared in force to all companies and persons in Canada, whether the companies were federally or provincially incorporated, and irrespective of the citizenship of the persons concerned.

While I believe the Canadian public interest requires the speedy passage of the entire Bill C-2, this is unlikely to happen in the next few weeks. Therefore, there is a case to be made for having provision in it to block the intrusion of foreign law presented as a separate bill at an early date since such a bill is more likely to get speedy approval from Parliament than is Bill C-2.

To conclude, if it is desired that the Canadian directors provisions of the Canada Business Corporations Act make

any real contribution of an immediate nature to deal with the foreign law issue, the following steps should be taken:

First, the bill should be amended so that the Canadian directors provisions would become compulsory for all federally incorporated companies by their next annual meeting, or within six months—or some similar brief period—rather than only at the end of five years.

Secondly, the original wording with regard to Canadian directors found in the version of the bill presented to Parliament before the election should be restored, so that only outside directors could be counted as making up the majority of Canadian directors where the firm is foreign-controlled.

Thirdly, clause 140(2) of the bill, permitting unanimous shareholder agreements to restrict in whole, or in part, the powers of the directors, should be amended so that they could not prevent the director from approving a transaction because the shareholders fear that it offends the U.S. Trading with the Enemy Act or any similar foreign law.

Fourthly, federal legislation should also be developed and implemented making it compulsory for all companies even though provincially incorporated to have boards with a majority of Canadian directors. Now, I recognize this could not be done under federal company law, but Parliament might well do this using the authority given the federal government under the BNA Act with respect to aliens. Another alternative, although I think a less satisfactory one to this, would be for the federal government at an early federal-provincial meeting to encourage those provinces which do not already have Canadian directors provisions in their own corporation laws to enact them as soon as possible.

Fifthly, a monitoring program should be developed by the federal government to enable it to have information on an on-going basis as to what export orders are being received and what disposition is being made of them by foreign-controlled subsidiaries. I recognize there are administrative issues that would have to be worked out here. The program might have to be limited at least initially, to gathering information on orders from countries covered by the United States Trading with the Enemy Act or similar laws in other countries.

Sixthly, furthermore, if acquiring Canadian citizenship of directors is a useful way of helping prevent the application of the United States Trading with the Enemy Act, it could be argued that logically the Canadian citizenship of senior operating officers of a company is also useful for the same reasons. Therefore, consideration could be given to the utility on these grounds of legislation calling for Canadian citizenship of certain senior operating officers of all foreign-controlled companies in Canada.

Also, of course, the government could now come forward and say it got carried away in an understandable desire to respond to public demands for immediate action to deal with the foreign law issue. Because of this, the government encouraged the erroneous idea to be conveyed to the public during the last week of December, 1974 that Bill C-29 could provide some immediate solution to this kind of problem.

The government could now agree that any such relief would not come at best for a period that likely would be as long as five years, and at most it would be tentative and very limited in its effect. The government could also say that the most practical and immediate way of dealing with the matter would be through speedy implementation of the clauses I have mentioned in the Stage I Competition Policy Bill as a separate bill.

Honourable senators, you, of course, have the opportunity and right to ask government spokesmen at the policy-making level to come forward and respond to these points if such is your desire.

The seeking by Canadian authorities of exemptions from the U.S. Trading with the Enemy Act is not a valid solution to this problem of extra territoriality for Canada. It is not valid, since it implies some recognition that the United States government has the right to exercise jurisdiction over subsidiary firms in Canada and other countries because they are controlled by United States parent firms. The application of United States law, or any foreign law, to foreign-controlled subsidiaries in Canada is incompatible with Canadian sovereignty. The government, therefore, must not delay taking the steps necessary to confirm this sovereignty, to prevent the intrusion of foreign laws into Canada and to ensure that all firms and individuals in Canada base their decisions and actions on our law and policy and not on those of some other country. But these steps must be ones which are meaningful and immediate in their effect. Bill C-29 is an important reform of federal company law, and as a whole it deserves the support of Parliament. However, the Canadian directors provisions in it, in their present form, will not meet the objective of helping block the intrusion of foreign law.

If Bill C-29 is to play any role in helping achieve this objective, I think Canadians generally would want to have the kinds of changes in the Canadian directors provisions that I have mentioned to be made without delay.

Thank you for your attention.

The Chairman: Thank you, Mr. Gray. We will take this submission of yours under consideration. There is one question that you could think about, not necessarily answering it today. if you have a majority of shareholders Canadian, outside directors, there is no way, short of putting a compulsory provision in this law, or somewhere, that these directors must vote for an order or an agreement, say to be made with Cuba, and to approve execution of the contract. Short of compulsion, the outside directors can exercise their own freedom of thought, and if they sort of look out of the corner of their eye and realize who the shareholders are—and they might be creating embarrassment for them—they might very well not approve of the order, and then the machinery breaks down. This is something we have not time to go into today, but I want you to think about it, because I might want your views on it.

Hon. Mr. Gray: Perhaps I might in a preliminary way say something in a couple of sentences, because I know the time for adjournment is nigh. You have raised a very valid point, and that is why I say that the priority way of dealing with the issues should be through the relative clauses in Bill C-2. That is why I was concerned when the view was put forward, after the House of Commons as a practical matter completed its detailed consideration of

the bill, that Bill C-29 would play some real role, not simply in enabling or giving a better opportunity for a Canadian point of view to be expressed at the board room level than was otherwise the case, but rather would also make a real contribution to dealing with the foreign law issue. I felt that really was placing a characterization on this measure that had not been originally intended. In any event, if it were to make such a contribution, at the very least the changes I have suggested should be made. Even with them being made, the type of concern you have raised is certainly a very valid one.

Senator Macnaughton: Could I make a suggestion, Mr. Chairman? It would be very useful if when the witness comes back, or presents his views in any way possible, he let us know whether he has done any research into what other countries have done in connection with ensuring national directors, and what the result has been.

Hon. Mr. Gray: I would be very happy to give further information on another date. I suspect that officials of the Companies Branch of the Department of Consumer and Corporate Affairs might assist you. In addition to national directors provisions, some countries—Holland is an example—have laws similar to the provision in our Bill C-2 making it unlawful for decisions to be made on the basis of compliance with foreign policy directives, judgments and laws.

The Chairman: Mr. Gray, I do not think the answer you gave to my question in a preliminary way really answered it.

Hon. Mr. Gray: I do not say it does.

The Chairman: If it does, let me say here is the reason for it. The majority outside directors Canadian could vote not to enter into an agreement; that is their opinion; they do not have to say it is because of some foreign directors or some foreign law, because they turn down the business.

Senator Cook: One could see some good reason for monitoring a program, as you suggest on page 16 of your brief, if it were possible to do it. Outside that, would a director be an agent of the department? His company gets an order. Does he have to go and tell the department that the company has turned it down or is trading with the enemy? It would put the director in a very awkward situation.

The Chairman: Directors do not have to give reasons for turning down contracts.

Senator Cook: Or give information about their company to anybody.

Hon. Mr. Gray: That is why I have just said it is very possible for transactions of this type never to come to the attention of the directors, because it comes under the day-to-day administration of the company.

The Chairman: There is nothing you can do about it.

Hon. Mr. Gray: I am not disagreeing with the general points you have raised, because what you are saying is similar to the point I am making, that it was incorrect and inappropriate for a government spokesman at the end of December to convey the impression to the Canadian public that this bill, by itself, would be a major contribution to solving this problem. It might provide some help if the changes I have suggested are made, but for the real solution I think we would have to look elsewhere. I am really agreeing with you and your colleagues, Mr. Chairman, with respect to the reservations you have expressed here today.

The Chairman: I do not want you or anybody here, or the press if there are any reporters present, to think that I am taking a position which would approve of the United States legislation in this regard, reaching out their hand to pressure Canadian company operations, because I do not approve of it; I think it is wrong in principle. We have done it before in income tax areas, where the United States hand reached out and tried to attack Canadian citizens. I do not approve of that, but the question is finding a way to deal with it.

Hon. Mr. Gray: That is right. I did not interpret your remarks in that way, and I felt you were expressing your disapproval and raising the question as to what would be the most effective means of solving the problem.

Senator Connolly: May I ask one short question? If the witness cannot answer it now, perhaps he can give us the answer to this question later: Is there any way of determining the economic impact of the influence of foreign law on our economy?

Hon. Mr. Gray: I do not think it has been possible as yet to take a complete measure of this. A number of cases have come to light which would indicate that, if they are only samples of a much larger number of cases, the impact could be adverse; but without a monitoring procedure—and I agree with your colleague who mentioned the problem—without some kind of monitoring procedure, a more complete indication would be difficult. However, I would say that even if there was no adverse economic impact—and I think there is—this type of situation, as the honourable chairman has suggested, would be intolerable from the point of view of the maintenance of Canadian sovereignty. It is totally inconsistent with our existence as a national state to allow foreign law to be a basis for decision making within this country.

The Chairman: Bill C-29 may not be the vehicle; there may have to be something else.

Hon. Mr. Gray: That is right.

Senator Laird: Perhaps it could be Bill C-2.

The Chairman: It may be that there would be pressure within the second part of the Foreign Investment Review Act on the ability of foreign capital to come into Canada to acquire businesses, or, secondly, for existing Canadian companies who are foreign-owned to expand their facilities in Canada. There may be pressure within that area.

Hon. Mr. Gray: That is another area, but just let me say that, while Bill C-29 may not be the most appropriate vehicle, it could make a better contribution than it can in its present form, if the type of amendments were adopted that I have suggested with respect to limiting or cutting down the five-year period, restoring the outside directors provision, and cutting down the ability to make unanimous shareholder agreements. Other areas require separate consideration but are worthy, I think, of parliamentary, governmental and public attention as well.

The Chairman: Thank you very much, Mr. Gray. We may want some further views from you.

Hon. Mr. Gray: I will be happy to comply with your request to any extent that I can.

Senator Walker: It was a pleasure to have you before us, Mr. Gray.

The Chairman: Just before we adjourn, I should like to have some documentation put in from Mr. Ryan.

Mr. J. W. Ryan, Assistant Deputy Minister, Legislation, Department of Justice: In lieu of speaking today, perhaps I can leave a memorandum with you which could be circulated at your convenience, and then on some future occasion when I am invited here I will present my further views on the matter.

The Chairman: You will certainly be heard at the next sitting, Mr. Ryan, because we have certain questions we want to ask you as well.

Mr. Ryan: Thank you.

The Chairman: The committee adjourns.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 26

LIBRARY

TUESDAY, FEBRUARY 25, 1975
WEDNESDAY, FEBRUARY 26, 1975

Third and Final Proceedings on Bill C-40 intituled:

"An Act to amend the Excise Tax Act and the Excise Tax"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

28683—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker—(19)
Haig	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, February 12, 1975:

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Macnaughton, P.C., seconded by the Honourable Senator Fournier (*de Lanaudière*) for the second reading of Bill C-40, intituled: "An Act to amend the Excise Tax Act and the Excise Act".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Macnaughton, P.C., moved, seconded by the Honourable Senator Fournier (*de Lanaudière*), that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

After debate, and—
The question being put on the motion, it was—
Resolved in the afirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, February 25, 1975
(32)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade & Commerce met this day at 2:00 p.m.

Subject: Bill C-40— "An Act to amend the Excise Tax Act and the Excise Act."

Present: The Honourable Senators Hayden, (*Chairman*), Buckwold, Cook, Desruisseaux and Macnaughton. (5)

Present, not of the Committee: The Honourable Senators Bourget and Forsey. (2)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Witnesses:

Canadian Association of Equipment Distributors:

Mr. J. S. Thorp, Executive Director; and

Mr. J. Grant Woolsey, First Vice-President and Vice-President of General Supply Co. of Canada, (1973) Ltd.

Following further testimony by Mr. Thorp, the Committee adjourned further consideration of the said Bill until Wednesday, February 26 at 9:30 a.m. and then proceeded to the next order of business.

Wednesday, February 26, 1975.
(36)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade & Commerce met this day at 11:35 a.m. *in camera* and *resumed* consideration of the said Bill.

A quorum being present, the Committee proceeded to study the subject matter further.

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Following discussion and upon motion duly put, it was *Resolved* to report the said Bill without amendment, subject to certain observations upon the Bill being incorporated as part of the report of the Committee, the details of which can be found by reference to such report immediately following these Minutes.

At 11:55 a.m. the Committee adjourned until 9:30 a.m. Thursday, February 27, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, February 26, 1975.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-40, intituled: "An Act to amend the Excise Tax Act and the Excise Act", has in obedience to the order of reference of Wednesday February 12, 1975, examined the said Bill and now reports the same without amendment.

Your Committee, however, considers it important that the following observations be made.

It appears that some unlicensed wholesalers of construction type equipment have been refused sales tax refunds although the Government has seen fit to grant such refunds for the distributors of transportation equipment who are in an identical position. As well, such wholesalers are unlicensed for sales tax purposes, which mean they must pay sales tax on the importation or purchase of such construction type equipment whereas competitors who are licensed for sales tax purposes pay such tax only at the time of the sale of such equipment. This situation arises in the administration of the sales tax by reason of the fact that competitors who can show that at least 50% of their business over a specified period has been with tax exempt end users have an advantage.

The result of being in the position of unlicensed wholesalers because they cannot meet the above test is that on Budget night, November 18, 1974, these unlicensed wholesalers had substantial tax-paid inventories for which the sales tax could not be recovered from customers when on that night such construction type equipment became exempt from sales tax. Their competition, namely licensed wholesalers, had little or no tax-paid inventory on hand. To be competitive, these unlicensed wholesalers must absorb the amount of tax or lose substantial sales.

Your Committee did not have the authority to amend the Bill being reported on to correct this situation. However, you Committee considered that this situation should be called to the attention of the Senate.

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, February 25, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-40, to amend the Excise Tax Act and the Excise Act, met this day at 2 p.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, this afternoon will be devoted mainly to the business corporations bill. Mr. Thorp, who appeared on Bill C-40, to amend the Excise Tax Act and the Excise Act, has asked for the opportunity to answer the evidence the minister gave the other day. You have a copy of it before you. I told him, as chairman, that I thought he had that right. I think he will take about ten minutes to make his reply.

Then what I was proposing to do was this. You will remember Senator Flynn had raised a question and proposed an amendment. I told him that in my view, which was confirmed by the Law Clerk, we did not have any authority to make the kind of amendment he was proposing. In view of that, however, I told Senator Flynn, who will not be in until tonight, that we would finish our consideration of Bill C-40 first thing tomorrow morning. We then have for consideration Bill C-2, on which there are two substantial submissions. If we have any time left during the morning we will go back to the Canadian business corporations bill and, if the flesh is able and the spirit willing, we might even sit in the afternoon, or part of the afternoon.

You have a copy of Mr. Thorp's statement, honourable senators.

Mr. J. S. Thorp, Executive Director, Canadian Association of Equipment Distributors: Mr. Chairman and honourable senators, I am accompanied today by Mr. J. Grant Woolsey, First Vice-President of the Canadian Association of Equipment Distributors. Mr. Woolsey is a Vice-President of General Supply Company of Canada Limited, who are distributors of main lines of equipment in Ontario and Quebec.

In regard to Bill C-40, amendments to the Excise Tax Act and Excise Act, the committee heard the Honourable John Turner at its meeting on February 19, 1975. The representatives of this association were present and were disturbed about several points made by the minister, which, in our opinion, indicate that several aspects of the problem have not been made clear to him.

First, the minister brought up his department's position that our unlicensed wholesaler members had adequate notice of the intention to remove sales tax on construction equipment to permit them to order their affairs to avoid the impact. He seemed to imply that we had not taken full advantage of the opportunity. We were, indeed, well aware of the government's original intention not to grant refunds, and so advised our members on July 15 and October 31, 1974. Had these warnings not been given, we have no doubt that the problem on November 18, and since, would have been considerably greater than it is. We can say with certainty that our members did take such avoidance action as was open to them in face of the realities of the market and of their contractual obligations to their suppliers, both domestic and foreign. However, for the several reasons already stated, it was commercially impractical, if not impossible, for the unlicensed members, a list of whom has been distributed, to escape the tax consequences of continuing to do business and remain in the competitive market between the budgets. We would like to hear from the minister what steps he considers our members failed to take, thus apparently leaving us unqualified for the refund relief he has given to the transportation equipment industry.

The Chairman: Perhaps I might interject there. Honourable senators will recall the distinction that occurs between a licensed wholesaler and distributor and an unlicensed wholesaler and distributor, and how the incidence of tax applies differently.

Mr. Thorp: Secondly, Mr. Turner's reference to bonded premises indicated that their use seemed more practical to the department than it really is. Of course, the cost of moving large and heavy equipment of this type into public bonded facilities and holding it there for indeterminate lengthy periods, and then taking it out again, would eat into the potential tax saving. But, furthermore, in many cases our members were not themselves the importers of record. The importing had been done and tax paid by their suppliers, and was billed to them with the goods. Thus the distributors in those cases had no control over putting such goods into bonded yards or taking them out again.

Thirdly, the minister disturbed us considerably with his comment that we could have used the *pro tanto* payment provisions of section 27(a)(ii) of the act whereby dealers could have somehow arranged with their suppliers to make low instalment payments and thus low tax payments on their purchases whilst awaiting the new budget. It is perhaps not widely known that this provision applies only to goods manufactured or produced in Canada, and since probably 90 per cent of the goods in issue are imported, this facility was of little, if any, effect.

Fourthly, in explaining the relief granted on transportation equipment the minister observed that units in the price range of $50,000 were involved. We assure senators that there are many units in the inventories of our members with values much higher than this. Larger power shovels, tractors, etc., are in the cost range of $150,000 each. Since relief to transportation equipment distributors was given on units as small as 3-ton trucks, selling in the $7,000 to $10,000 range we suspect that the average value per unit in construction equipment inventories was considerably

higher than in those of transportation equipment distributors. The listing distributed indicates the tax burden being carried by our members and illustrates the dimension of the problem, which remains a very costly one for these firms.

Fifthly, Mr. Turner noted that some of the transportation equipment was custom built. It seems to us that, in such cases, it must have been subject to formal contracts which transportation dealers could, theoretically, enforce. No doubt, however, transportation equipment buyers, even of custom-made goods, were just as ready to cancel their orders and refuse delivery of tax-included goods as our customers have proven to be.

Sixthly, Mr. Turner made a point that when taxes are increased a reverse situation occurs—to the advantage of unlicensed wholesalers. Here we must note that the last increase occurred eight years ago and amounted to one per cent. The previous increase was 15 years ago, also one per cent. And 24 years ago there was an increase of two per cent. Thus, unlicensed wholesalers have, in theory, benefitted by four percentage points over a period of almost a quarter of a century—poor recompense, we suggest, for a 12 per cent penalty recently dealt to them in one blow. We can say that if the tax reduction now having to be absorbed were only one or two per cent we would not be taking your time with these representations.

Lastly, we readily agree with the minister's point about the administrative difficulty—indeed, impossibility—of making refunds in respect of unidentifiable consumer and supply items such as clothing, footwear and building materials. We assert, however, that this is not a good reason for declining to correct a glaring inequity where it can be accomplished with no administrative problem.

We appreciate this opportunity, Mr. Chairman, to offer rebuttal to seven reasons advanced to the committee by the honourable minister for declining to extend to our industry the same relief given to transportation equipment dealers, although there can be no doubt that conditions are identical in all essentials.

The Chairman: Does your associate have anything he wants to say?

Mr. Thorp: I do not think so, unless there are any questions by honourable senators.

Mr. J. Grant Woolsey, First Vice-President, Canadian Association of Equipment Distributors: Except possibly to emphasize the selling values of the equipment in greater detail, on which we have additional information available.

Mr. Thorp: If that should be required.

The Chairman: I take it, Mr. Woolsey, you subscribe to all the views expressed here by Mr. Thorp?

Mr. Woolsey: Definitely.

The Chairman: Are there any questions?

Senator Buckwold: I do not have a question, but I have a statement. I did comment after the minister's submission last time. Although I must have every sympathy with an industry that is taking a significant financial reverse, I would have to say that if the government is going to move in this direction, it will have to do so for all who suffer the sales tax lowering losses. This would represent literally tens of thousands of businesses. When you lightly gloss over the fact somehow administratively, although you agree it would be difficult, it could be done, I just don't know how you could. We have seen the removal of sales tax on all clothing, on all footwear—and by the way, there are people who have very large inventories of these commodities who have taken just as severe a financial reverse as members of your industry, and who feel exactly the same way. I have had representations made to me. Now, if you can tell me how they are going to get around this whole business of being able to say, "Fine, you have 'X' hundreds of thousands of dollars' worth of goods in stock on which tax has been paid, and you are now going to get a rebate", I would be interested in knowing how it would work.

The Chairman: Senator, the problem, as I see it, is this. One of the things the minister stressed the other day was administrative difficulty. Now, in this area, as I understand it, the determination of those who might be entitled to it does not present an administrative problem.

Senator Buckwold: That is not the point I am making, sir. My point is, how are we going to handle these other industries that have been affected? As I say, the building supply industry, which, granted, only went down from 11 to five, taking a six per cent beating, is screaming just as strenuously. My point was, if you do it for one, and it is administratively possible, as you indicate it might be, for this industry, then how are you going to satisfy the literally tens of thousands of claimants that would also be entitled to such a rebate?

The Chairman: The only answer I see to what you say—and I may be being the devil's advocate at the moment—is that if you compare the transportation equipment industry, where they have been given the rebate concession, and they are closely parallel in the kind of equipment, and the value of the equipment, that is carried by this group, now—

Senator Cook: I think, with all deference, Mr. Chairman, that there is another difference, and that is this: In the case of the clothing importers and the building importers, they are all on an equal footing. All of them suffer or benefit equally. But there is a marked difference here. For historical reasons there is the licensed wholesaler and the unlicensed wholesaler, and in this particular case where it can be done, if it is not done it gives one class of taxpayers dealing in exactly the same goods a marked advantage over the other, or, put the other way, we penalize one class of taxpayer, dealing in exactly the same equipment, in direct competition with another, and penalize him very severely. I think it is a great injustice, myself.

The Chairman: There is something else, too. The clothing industry and the shoe industry were treated by order in council, and the basis of remission of sales tax—taking you right back to the May budget of 1974—was that there is a season to develop your different fashions and types. If you are past that season, of course, then that volume of business has gone. In regard to other industries the suggestion was made by the excise tax department, which was very concerned and anxious to help in any way they could, to follow the instalment basis, because then your tax would only apply when you sold; but the difficulty here is that if you are unlicensed wholesaler, the tax applies when you buy.

Senator Buckwold: But I would point out that there are unlicensed wholesalers in a wide variety of fields, not just in the construction industry. They apply also in the build-

ing supply industry and in the clothing industry. There are those who handle their affairs in an unlicensed way.

Mr. Thorp: With respect, sir, also, I assume, in the transportation equipment industry.

The Chairman: Yes. Well now, if there are no other questions—

Senator Macnaughton: Mr. Chairman, I thought it might be good for the record—although this will probably be filed in it—just to re-state something. Do I understand that the amount of tax paid totals $3,475,649?

Mr. Thorp: Yes, senator. Mr. Chairman, the list you have before you is the list of those of our members who have advised us of their difficulty. There are undoubtedly a few other distributors who are not members of our association, so I would not want to hold out that that is the total problem that would have to be faced. It may be a few hundred thousand dollars, or even $1 million more than that, but I had no way of knowing. Probably the departmental officials would be more aware than that, sir.

Senator Desruisseaux: In the way of clarification, when the minister was here he explained that your industry—your companies—had been prewarned about the change in taxes. Was there any reason why this was ignored, in a sort of a way, or the inventories put down? This is just for clarification purposes.

Mr. Thorp: We had been pre-warned, sir, inasmuch as the May 6 budget had introduced a total relief of sales tax on construction equipment. As you know, the budget was defeated, and the government was defeated, but with the undertaking that if and when it was re-elected, this would be re-introduced. However, in the interim I think it may be said that we did not know that this government would be re-elected until the July 8, so there was a good portion of our nominal six months that melted away right there. Then we did not know for sure that Mr. Turner would necessarily re-introduce this relief in exactly the same form, because he said, very wisely I think, that what occurred to the national financial position in the interim would necessarily colour the issue of what he would re-introduce when he was re-elected.

Senator Buckwold: One last question, Mr. Chairman. Of this list that we have here in front of us, of equipment which was apparently in inventory, and on which a loss was taken—you may not be able to answer the question, I do not know—have you any figures as to how much in fact was sold to the purchaser in which . . .

The Chairman: You mean between May and November?

Senator Buckwold: No, of this list of tax dollars paid.

The Chairman: Oh, yes.

Senator Buckwold: A good part of this—and I say this in quotation marks—"may" have been sold under the regular original tax, and the purchaser did not get the advantage of a sales tax rebate. I know this happened in mnay cases because of the shortage of equipment, and the distributor said, "Look, we have ordered this for you. If you cannot pay the tax, and you do not want it, we will give to someone else."

Mr. Thorp: I can make some comments on that. The information I have is that the difficulty remains with several of our members. It is true that some of the equipment, the tax elements of which are listed here, has been disposed of through tax-exempt applications by users who are tax exempt by virtue of the nature of the end use, and in those cases, of course, the Department of National Revenue has granted tax refunds, and that will have tended to reduce these figures, unquestionably.

Senator Buckwold: Let me just finish this. I can understand the tax-exempt people and the credit being authorized, and that would reduce that; but what about the non-tax-exempt people who in fact, because of the very shortage of the equipment, in spite of the fact that they may not have been very happy about it, took the equipment at the original price, which was taxed?

Mr. Thorp: I have a letter here. I must admit that I do not have any complete survey of our whole organization on that point, senator, but I do have a letter here which is typical of the sentiments conveyed to me by many of our members, to whom I have spoken on the telephone.

This member says: "The past two months have confirmed the fact that customers will not accept delivery of units from our inventories which bear sales tax amounting to thousands of dollars per unit; but they are prepared to place orders with us, and await delivery of tax-free goods. This becomes an extremely serious problem when, in view of certain shortages in an industry, suppliers are attempting to allocate products to those dealers without inventory. Those dealers receiving these allocations, because of the tax exempt situation, sell at a much more faviourable price than dealers who are left with tax-paid inventories. On a continuing basis, those dealers receiving tax exempt equipment continue to receive and sell, while those dealers with tax paid inventory continue to sit with their higher priced equipment."

Senator Buckwold: I am not going to argue about that, but I do know of cases in which—

The Chairman: It depends on need.

Senator Buckwold: —people literally were forced to take it. They were not happy about it, but the fact is, the distributor did not lose the tax.

The Chairman: The only question I wanted to ask, Mr. Thorp, was that I understand some of the licensed distributors and wholesalers who enjoy the tax exempt status are competitors of your unlicensed distributors and wholesalers, so they are competing in the same market. Is that right?

Mr. Thorp: That is right. Right across the street, in one notorious case in Newfoundland, yes.

Senator Buckwold: One comment about licensed and unlicensed people. There is a very significant advantage to being an unlicensed wholesaler, in that such a dealer does not have to finance the amount of the tax until the goods are in fact sold. This, I presume, is basically the reason for so many wholesalers desiring to be in an unlicensed position?

The Chairman: They must meet the statutory requirements.

Senator Buckwold: It has been a very significant advantage for many, many years, and will continue to be, in financing inventory.

Senator Cook: As a follow-up to Senator Buckowld's observation, can the situation arise in which if the refund is granted a dealer would obtain such in respect of a piece of equipment which he has already sold and for which he has been paid his inventory price?

Mr. Woolsey: Yes, sir; I would say that that could happen, but we would expect that any such refund would be made with the condition that it be passed on to the buyer.

Senator Cook: What safeguard would there be that it would be passed on?

Mr. Woolsey: I would assume that the audit, which I take it the Department of National Revenue would carry out, would ensure this.

Senator Cook: That is my question: The tax refund can be followed, as it were, to its ultimate end.

Mr. Woolsey: Yes, sir.

Senator Cook: So there is no danger of a dealer receiving, for instance, a double benefit, having sold his tax-paid inventory at his inventory price and subsequently obtaining a refund from the department.

Mr. Woolsey: I would say he would take a great risk, knowing the enthusiasm of the Department of National Revenue, if he were to do such a thing.

The Chairman: As was agreed earlier, we will adjourn further consideration of this bill until item No. 1 on the Order Paper tomorrow morning. Is that agreed?

Hon. Senators: Agreed.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE
STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 27

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TUESDAY, FEBRUARY 25, 1975
WEDNESDAY, FEBRUARY 26, 1975

Third and Fourth Proceedings on Bill C-29, intituled:

"An Act respecting Canadian business corporations"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

28685—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker—(19)
Haig	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, February 4, 1975:

"Pursuant to the Order of the Day, the Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill C-29, intituled: "An Act respecting Canadian business corporations", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, February 25, 1975
(33)

Pursuant to adjournment the Standing Senate Committee on Banking, Trade and Commerce met this day at 2:35 p. m.

SUBJECT: Bill C-29—"An Act respecting Canadian business Corporations".

Present: The Honourable Senators Hayden (*Chairman*), Buckwold, Cook, Desruisseaux and Macnaughton. (5)

Present, not of the Committee: The Honourable Senators Bourget and Forsey. (2)

Witnesses:

Department of Justice:

Mr. J. W. Ryan, Assistant Deputy Minister, Legislation; and
Mr. M. H. Pepper, Legislation Section.

Department of Consumer and Corporate Affairs:
(Bureau of Corporate Affairs)

Mr. J. L. Howard, Assistant Deputy Minister; and
Mr. P. Anisman—Director, Corporate Research Branch.

Following an explanation of Clause 4 of the Bill by Mr. Ryan, the Committee then proceeded to further examine the said Bill with the assistance of Mr. Howard and Mr. Anisman.

At 4:45 p. m. the Committee adjourned until 9:30 a. m. Wednesday, February 26, 1975.

Wednesday, February 26, 1975
(35)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 11:15 a. m. to *resume* consideration of the above Bill.

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Buckwold, Cook, Desruisseaux, Flynn, Hays, Laird and Macnaughton. (10)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

Witnesses:

Osler, Hoskin & Harcourt, Barristers & Solicitors:

Mr. H. Purdy Crawford, partner; and
Mr. L. D. Hebb, partner.

At 11:55 a. m., following discussion upon the above Bill, the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, February 25, 1975.

The Standing Senate Committee on Banking, Trade an Commerce, to which was referred Bill C-29, respecting Canadian business corporations, met this day at 2:35 p.m. to give further consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, the next item is the continuing consideration of Bill C-29. Appearing to speak to this is Mr. Ryan. Members of the committee have received a memorandum from Mr. Ryan dealing with section 4 of the bill.

Mr. J. W. Ryan, Assistant Deputy Minister, Legislation, Department of Justice: Mr. Chairman and honourable senators, I have been privileged to appear before your committee on a number of occasions in the past as the draftsman of some legislative measure or other. These occasions have always been stimulating, and sometimes I have been stimulated beyond my ability to cope with the questions. On this occasion I should point out, however, that the situation is somewhat different. I am not the assigned departmental legislative draftsman for Bill C-29. That is Mr. Pepper, who is here beside me. Mr. Pepper has worked with the department concerned in preparing this bill over a period of many months and years. I think they have all together done a very competent job.

My earlier association was with Mr. Turner's first task force and, later on, in a review of Mr. DIckerson's report on which the bill was based before it was introduced into the last Parliament. My participation as draftsman has been consultative and back-up, rather than active, in the last two years. However, the suggestion for clause 4 of the bill was put forward by me to resolve a difficulty, which I conceived to be a constitutional difficulty, that the form of the bill created, in my view.

My purpose, therefore, is to speak to Bill C-29 as to clause 4 only; I am not now competent to speak on other matters of the bill since I have been away from its actual preparation for too long and too many changes have occurred. Mr. Pepper will remain, if you wish Mr. Chairman, for that purpose.

In giving evidence to you on Thursday, February 13, 1974, Mr. John Howard, of the Department of Consumer and Corporate Affairs, left the impression that clause 4 was introduced by the Department of Justice very much over the objections of the Department of Consumer and Corporate Affairs. He suggested that he, at least, took the formal position that he neither consented nor objected to clause 4 as he considered it utterly meaningless as a matter of law.

This I might refer to as the "airy nothing" approach from "A Midsummer Night's Dream" and—

Senator Buckwold: Is that common?

Mr. Ryan: Wherein the poet or, in this case, the legislative draftsman, "gives to airy nothing a local habitation and a name." It is, I hope, not common.

The intent of clause 4 was to sum up the purposes or objects of the bill. In reverse order they can be described as follows:

> (1) to permit an orderly transferring of certain federal companies incorporated under various Acts of the Parliament of Canada to the new Business Corporation Act, the present bill; the internal uniformity purpose.
>
> (2) to give encouragement to uniformity of company law in Canada at least in the business sphere—to advance the cause of uniformity among the various jurisdictions within Canada; the early hope of the Uniformity Conference;
>
> (3) to revise and reform the business company law that falls within the legislative competency of Parliament.

On this clause the Canadian Bar Association memorandum commented:

> Section 4, In our view this section serves no useful purpose and should be deleted from the act entirely. If for some reason the government considers it vital, then delete the words in the third and fourth lines "incorporated for objects other than provincial" because a corporation may have to have an object which falls within the provincial sphere. This may seem un unnecessary concern but we may have to give an opinion from time to time that the company is duly incorporated and this opinion may have to be satisfactory to foreign counsel who know little of the B.N.A. Act and these words have some suggestion that it is not proper to incorporate companies under this act which will only be working within one province. Mining or oil production might very well be in this category. We feel that the very least that can be done is to remove this phrase. It is our view however that the whole section is unnecessary and therefore objectionable.

It is necessary for me, therefore, to speak to clause 4 from four points which I consider to be somewhat important. First of all, from the point of view of policy as it affects the legislative draftsman. Secondly, why a purpose clause at all? Thirdly, why the three statements in that clause? Fourthly, the constitutional consideration.

So far as clause 4 is a clause of a government bill it is assumed to be a matter of government policy. Unfortunately, comments made at the last meeting may have confused this situation and raised a matter concerning legislative drafting that I feel bound to explain. That is, the draftsman is not a policy maker. Indeed his position is best summed up by an American expert on legislative drafting.

Mr. Reed Dickerson, in "Legislative Drafting" 1954, at page 14, said this of legislative draftsmen in the United States—who, as you know, work for the Congress of the United States and not for governments there. However, it is generally applicable to the field of legislative draftsmen, even in the common law world.

> Just as it is untrue, at the one extreme, that the draftsman merely frosts the legal cake, it is also untrue, at the other extreme, that as draftsman he writes the recipe.
>
> While it is important to be in on policy making at the earliest possible time, it is also important to avoid officious meddling. Draftsmen who make this mistake soon impair their effectiveness. Beaman must have had this in mind when he said, with some justification, that the successful legislative draftsman is an "intellectual eunuch."

I interrupt the quotation here to point out that Mr. Beaman was legislative counsel for the Congress of the United States from at least 1914 to 1945 and was quite renonned in his profession. To quote again from Mr. Dickerson:

> Avoding the Scylla of failing to provide needed help while the basic decisions are being formulated and the Charybdis of officious intrusion into matters of substantive policy poses a delicate problem. The client has rarely thought the problem through or even considered all the relevant factors.

The Chairman: Mr. Ryan, from what you have been reading through, does it mean that in the drafting of legislation nowadays it seems to be almost a custon to develop what you might call administrative over-reaching for the purposes of ease in enforcement?

Mr. Ryan: Not at this moment, not at all. I am just trying to indicate, as this quotation says:

> This is not to disparage the client but to point out a crucial function of the draftsmen: helping the client think through his problem in a way satisfactory to the client, without usurping the client's power of decision.
>
> The draftsman's job is to know the problems in detail, foresee the pitfalls, bring these to the client's attention, and present the relevant choices that the client must sooner or later make. But he mustn't forget that he is a legislative midwife; he is not having the baby himself.

That is sometimes a very difficult thing for both client and draftsman to understand, that he is not personally involved in the creation of the baby but only in its introduction into the world.

Clause 4 of the bill was proposed by the draftsman as the best way to solve a legislative and constitutional problem—which I will comment on later—as the draftsman at that time thought; but the choice of accepting or rejecting the solution was the client's, not the draftsman's.

One might ask, why a purpose clause? The three matters stated in clause 4, which I referred to earlier, might have formed the text of a preamble to the bill instead of a purpose clause in the bill. The subject matter of two of the items, the uniformity items, lend themselves to a preamble, as uniformity of company law has been a dream of portions of the legal profession in Canada for almost 60 years.

The effort for a uniform company law began with the first annual meeting of the Canadian Bar Association in 1915 which set up a committee on company law which met in 1916, as well as committees on insurance, conditional sales, and some other matters. It was soon realized by the Canadian Bar Association that it was not constituted to produce model statutes and it persuaded governments to create what was known for many, many years as the Conference of Commissioners on Uniformity of Legislation in Canada. This body began in 1918 and in 1919 one of the first matters taken up by that conference was uniform company law.

Altogether, that conference, which is now called the Uniform Law Conference, attempted on at least four occasions to produce a uniform companies act. In the mid-thirties the federal government joined the Conference of Commissioners on Uniformity of Legislation and sent commissioners to that body. The effort towards a uniform company law was given further impetus by the representation on that body of the federal commissioner. About the same time, that is about the mid-1930s, the federal and provincial governments through the attorneys general, organized a Federal-Provincial Committee on Uniform Company Law made up of administrators of company law throughout Canada. The federal commissioner to the uniformity conference was a member of that administrative committee, Mr. Bill O'Meara. For many years in the fifties he reported to the uniformity conference on progress being made by the federal-provincial committee on uniform company law. Late in 1950s both that body and the Uniform Law Conference attempted the project of a uniform companies act and introduced two revised draft uniform acts, one for letters patent jurisdictions and one for the memorandum and articles jurisdictions. These drafts were not accepted by the profession and the effort of over 40 years appeared at that time to have just about ended.

For more than fifty years, one real stumbling block to uniformity as between the provinces was the basic one of how to incorporate—either by issue of letters patent or by registration of memorandum and issue of a certificate of incorporation. The positions were irreconciliable until quite recently. British Columbia, Alberta, Saskatchewan, Nova Scotia and Newfoundland were registration companies; Manitoba, Ontario, Quebec and New Brunswick were letters patent companies, as was Canada. Each group was convinced and knew that its own method of incorporation was best and no reconciliation could be made between the two in the area of uniformity. Indeed, if I might be permitted to quote Wegenast in 1931 he said, in *The Law of Canadian Companies, 1931,* Preface, paragraph 3:

> Whether or not he (the draftsman of the first Companies Act of 1864) realized the full significance of his work, the system which he designed may be regarded as both indigenously Canadian and essentially English. By a strange turn of legislative history, we find the British Parliament in 1862 adopting the method of incorporation by registration, which had been devised in the American Colonies after the Revolution because of the lack of the Royal prerogative, while two years later the Canadian Parliament definitely abandons the registration system which had been borrowed from the State of New York in 1850 and designs its own system based on the original common law method of incorporation by letters patent. This system, perpetuated in the Companies Acts of the Dominion and five of the provinces, is now of the warp and woof of legal and business life in Canada.

The act of 1864 referred to above contained only eight sections, though there were 34 general provisions set out,

one of which was "The object or purpose for which incorporation is sought." It was a statute of Canada passed at the Second Session of the Eighth Parliament of the united Province of Canada, and I believe it was held in Quebec City. It was entitled "An Act to authorize the granting of charters of incorporation to manufacturing, mining and other companies." The power given by section 1 was for the Lieutenant Governor to grant a charter of incorporation by letters patent to no less than five persons and constitute them a body corporate and politic for any of the purposes set out in ten paragraphs in that section.

Other jurisdictions—and it is the provincial ones I am speaking of now—adopted the English legislation system of incorporating by certificate of incorporation.

From 1920 until 1974 the Uniform Law Conference Proceedings lists more than 36 years in which the subject matter of uniform company law was dealt with or referred to in the Proceedings of that body.

The removal of the single biggest obstacle for so long to a uniform mode of incorporation of companies, a tradition so strongly fought over deserved perhaps to be noted in passing—and it is passing away in the central areas of Canada. However, it is the practice nowadays to use a preamble only in circumstances of the following kind:

> (a) where the subject matter of the legislation is of a constitutional or international importance
>
> (b) when the legislation is of a formal or ceremonial nature, intended to mark a noteworthy event such as a royal visit or the anniversary of an historic event
>
> (c) when the legislation, although consisting of a public Act, has something of the nature of a private or local enactment being intended to remedy an exceptional local problem of such complexity that an explanatory preamble is necessary to an understanding of the Act
>
> (d) where the purpose of the legislation is to notify or otherwise approve an agreement entered into or intended to be entered into by the Government

(In passing honourable senators will probably remember that the Hudson Bay Company Act, which fell within two of these classifications did contain a preamble, a few years ago.) That is to say, the preamble is better reserved for those exceptional cases where an explanation of certain facts provide a necessary setting for the proper understanding of the act. The better function of the preamble is to provide background information, but not with the intention of influencing the construction of the body of the act, nor in such a form as is likely to affect construction.

When we consider clause 4 in terms of its reference to "objects," we enter the constitutional law area and desire a declaration of the essential aims of the act in short form. It is the view of many authorities in legislative drafting in Canada, Australia and New Zealand, and elsewhere, that a preamble is not ncessarily the best vehicle for such a declaration which, supposing it be desirable in the particular circumstances, is generally better placed in a separate provision early in the legislation.

The Chairman: I suppose the answer to that is that a preamble does not speak for ever.

Mr. Ryan: The view given by the draftsmen elsewhere is that the preamble is not a trustworthy instrument. It tends to become too flowery and may be misconstrued and not really carry out its purpose. On speaking about purpose versus preamble, it is to be noticed, I think, that in recent years there are more and more purpose clauses appearing in legislation, both federal and provincial legislation. One of the reasons for this is clause 11 of the Interpretation Act, which has become uniform. If you remember, that clause provides that every enactment shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best insures the attainment of its objects. As the acts become more complicated and more complex the governments are building in concise purpose clauses, to be able to give some direction to a court under that Interpretation Act provision, if they should chose to use it.

The next point I should like to touch upon is the reason for the three statements in clause 4. Put shortly, the three matters stated were intended to indicate succinctly the general purpose of a very complicated and large bill, intended to replace a letters patent system that had existed in Canada since 1864, to replace a corporations act, so far as business companies were concerned, that went back through several general revisions of statutes to 1934, and was intended to draw into its scheme other federally incorporated companies; and to do all of this within those classes of subject matters to which the legislative authority of the Paliament of Canada extends.

Now, if I may, I would like to comment on the constitutional considerations which were in mind in referring to "objects." When in 1867 the present constitution, and division of legislative powers was established for Canada by the British North American Act, section 92, item 11, gave exclusive legislative authority to the provinces in respect of the class of subject therein described as:

> "11. The Incorporation of Companies with Provincial Objects".

The only express authority given to the federal parliament in relation to "incorporation" *per se* is found in section 91, item 15:

> "Incorporation of Banks",

It appears, therefore, that there exists, within the concept of our constitution, a class of company objects or company purposes that can be described as "non-provincial" or "other than provincial", in contrast to provincial objects; which are beyond the legislative competency of the provinces and fall therefore within those matters to which the legislative authority of the Parliament of Canada extends. One has a great deal of difficulty in describing these "other" objects. One can say that they are "non-provincial objects," "federal objects," or "purposes or objects to which the legislative authority of the Parliament of Canada extends," which is the way they were described in section 5(1) of the Companies Act, in 1934—the Act that will be repealed finally by Bill C-29. They could be described by the words taken from *Great West Saddlery Co. vs. The King*, where Viscount Haldane described the federal class of companies in these words:

> a company with effective powers directed to other than merely provincial objects.

A reading of the history of the development of company law in Canada shows a long struggle between the provinces and the federal government regarding areas of competency in company law. Peace has reigned on this front for a number of years now. It is Mr. Howard's fear, from his testimony, that clause 4, as interpreted by a judge to give it some meaning, could be a kind of self-imposed

constraint, unknown to us for at least a generation, in respect of the federal incorporating power.

It should be noted that in reply to a question from Senator Connolly earlier about the uniformity commissioners working closely with the federal and provincial authorities, Mr. Howard said that they do not work very closely nowadays with the federal government, because they do not like what they consider to be our encroachment on their jurisdictional territory.

There is a misunderstanding here that I would like to clear up. Mr. Howard was making reference to the Federal-Provincial Committee on Uniform Company Law, which so far as I know may not have met since some time in the mid-sixties. There are still meetings of the Conference of Commissioners on Uniformity of Legislation, and there is very good co-operation between federal and provincial commissioners on that body. As a matter of fact, in both 1974 and 1973 they made some reference to whether or not they could be useful in the area of uniform company law for Canada. I would not like a misunderstanding to arise about the situation on the Conference of Commissioners on Uniformity of Legislation in Canada; they are still operative.

The Chairman: That is an indirect purpose that you have.

Mr. Ryan: I thought I would mention it.

The Chairman: It is not directly related to our consideration of the bill.

Mr. Ryan: However, there is nothing to allay provincial feeling about the federal power encroachment by the observation of the Canadian Bar Association in its brief on clause 4, where it says that the words in the third and fourth lines, "incorporated for objects other than provincial" should be struck out, "because a corporation may have an object which falls within the provincial sphere."

If senators will have regard to the Ontario Business Corporations Act, which is a new act, they will see that it contains two rather interesting provisions, namely section 3(1) and section 4(2). Section 3(1) reads:

> A corporation may be incorporated under this Act for any lawful objects to which the authority of the Legislature extends, except those of a corporation the incorporation of which is provided for in any other Act.

Section 4(2) reads:

> Contents of Articles—The articles of incorporation shall set out—
>
> 2. The objects for which the corporation is to be incorporated.

Similar provisions do not occur in Bill C-29, but to conceive of a corporation without a purpose or object is about as difficult, at least to me, as to conceive of a charity without a purpose.

The Chairman: Mr. Ryan, I do not want to interrupt what you are reading, but I am wondering if there is a place where we can break in with a few questions, or would you prefer to read the whole statement?

Mr. Ryan: I am just about finished, Mr. Chairman.

The Chairman: Go ahead.

Mr. Ryan: It is my understanding that it is the wish of the government, by Bill C-29, to legislate within Parliament's area of competency in company law, and the bill attempts to say so clearly. It is probably beyond Parliament's power to incorporate or to authorize the incorporation of a company for provincial objects, and a generation of quiet on the constitutional front in this one area has not changed that constitutional position.

If it is felt unnecessary to have a clause in Bill C-29 similar to section 3(1) of the Ontario act, and also unnecessary to require the articles to state the nature of the business to be carried on, one should assume that the bill intends only to authorize the incorporation of companies for objects or purposes to which the legislative authority of the Parliament of Canada extends. Then the question arises, why leave it to the risk of a presumption to be drawn by a court when a legislative statement can make the presumption a declaration of Parliamentary intent?

To sum up, clause 4 of Bill C-29, acknowledges the legislative authority of the Parliament of Canada as set out by the British North America Act; it recognizes company traditions that go back in Great Britain to a period before 900 A.D., so far as I can discover; it recognizes the efforts to get uniformity in Canada made by our more immediate ancestors, and it extends to the Province of Ontario and the other provinces a comity similar to that extended to the Parliament of Canada by the Legislature of Ontario in its Ontario Business Corporations Act, by section 3(1) of that act.

I thank you, Mr. Chairman, for putting up with that lengthy statement.

The Chairman: Mr. Ryan, I would like to ask a question or two. Item 92, subparagraph 11 of the B.N.A. Act gives jurisdiction to the provincial government to incorporate companies with provincial objects. Would you agree if I say that that is a limitation or restriction on the scope of their ability to incorporate companies?

Mr. Ryan: I would say that is a restriction on the scope of the provincial jurisdiction to incorporate companies, because there are three limiting words—"with provincial objects."

The Chairman: And now my second question. The authority of the federal government to incorporate companies does not rest specifically on any item. It rests on the residual power, which the federal government enjoys, under the principle of "peace, order and good government."

Mr. Ryan: That seems to be true, generally. There is also the possibility of the trade and commerce clause having some bearing on that.

The Chairman: Would it not appear to be the case that the federal authority can incorporate a company for whatever purpose it chooses, without even stating the purpose? Just registering it as a company capable of carrying on business?

Mr. Ryan: Mr. Chairman, I have to qualify my answer very carefully here. Let us assume for the moment that the Parliament of Canada wishes to incorporate a company to build a bridge across a river, totally within one province and to operate that bridge. I would have great doubt about whether that fell within parliamentary jurisdiction, because it would seem to be a provincial object, and that exclusive power seems, under our constitution, to be vested in the province. However, that is a legal or constitutional

matter. A practical matter arises now. Can Parliament get around that difficulty? The answer is, it appears to have done so in one case, at least, by declaring the work to be a work for the general advantage of Canada, and then incorporating the company in the same instrument, or the same document.

The same method was chosen with the Cape Breton Development Corporation a few years ago, so for practical purposes one can get around it; but I do not think one can say it has been repealed by ignoring it or getting around it.

The Chairman: Is it your view, then, that if I apply federally for incorporation, and my purpose is to carry on mining operations in the province of Ontario, my authority under that charter could be challenged? That the federal authority had exceeded its jurisdiction?

Mr. Ryan: Mr. Chairman, we have to speak away from Bill C-29 on this point, of course.

The Chairman: I am speaking generally.

Mr. Ryan: I would say that if a company were incorporated under the present Canada Corporations Act with the object of carrying on mining operations in the province of Ontario, that would be a provincial object and if it were done under the Canada Corporations Act it would be suspect, as being *ultra vires.*

The Chairman: Let us change it just the least bit. Suppose I were to apply to incorporate a company federally to carry on the business of mining ores in Canada.

Mr. Ryan: In Canada?

The Chairman: Yes.

Mr. Ryan: Then I would say that that was clearly a non-provincial object.

The Chairman: Yes.

Mr. Ryan: But then, law is built on these fine distinctions.

The Chairman: I might then start my mining operations in Ontario—

Mr. Ryan: Yes, and maintain your total operations in Ontario.

The Chairman: —and maintain all my operations in Ontario.

Mr. Ryan: That is correct.

The Chairman: Well then, in those circumstances, why do you need a statement as to the jurisdiction of a company federally incorporated? Why do you need a statement for other than provincial objects?

Mr. Ryan: Because there are no objects or purposes at all provided for under bill C-29 for any corporation.

The Chairman: Quite so; so I do not know how to interpret "objects".

Mr. Ryan: Well, "objects", I think, can be defined as the thing aimed at, the purpose, et cetera, and "purpose" as the objects one has in view. So "purposes" and "objects" are virtually synonymous in the sense in which they are used in company law. The difficulty, of course, arises with section 5, for instance, Mr. Chairman. One or more individuals may incorporate a corporation by signing articles of incorporation and complying with section 7. The only indication anywhere of what that power relates to is in the title, "A Canadian business corporation", and the term "business" itself has no definite or legal meaning, alghough "carrying on business" may have.

The Chairman: And no geographical limitations.

Mr. Ryan: No geographical limitations. Correct. So one must assume one of two things: either that this is intended to provide for the incorporation of a company for whatever purpose, be it provincial or federal, or, that Parliament intends not to go beyond its legislative jurisdiction.

The Chairman: No. You incorporate for operations wherever, in Canada, you may wish to operate, and whatever you may want to carry on in the way of business.

Mr. Ryan: Mr. Chairman, I have to make a distinction between kinds of operations. Even in the very old chartered companies, going way back to the Virginia Charter, to the Massachusetts charters, and others, there was always a purpose. There was always an object. It was either to settle a colony, or to organize a government, or to trade into a new area such as the Hudson Bay. Presumably the objects of anyone incorporating under this sort of thing would be to carry on a business for profit in Canada; but nowhere does it say that.

The Chairman: Does it need to?

Mr. Ryan: Well, if it does not say so, and if you have a body as distinguished as the Bar Association suggesting we should get rid of the word "objects" because a corporation may have to have an object, a purpose, which falls within the provincial sphere, then one is a little concerned about whether they are not viewing this as an act to permit the incorporation of companies with provincial objects.

The Chairman: Well, I take is that you support section 4 in its entirety.

Mr. Ryan: I support section 4, Mr. Chairman, because it is in the act; but I have no mandate or instructions to do otherwise.

The Chairman: No. Well, of course, you defined your position earlier—that is, as draftsman. If there is a policy involved in section 4, that is beyond your field.

Mr. Ryan: I could not comment on policy, no.

The Chairman: You will not comment on policy.

Mr. Ryan: I cannot, sir. I have no instructions.

The Chairman: That is what I thought.

I seem to be usurping the field here. May I ask a couple more questions?

What is the purpose of including this declaration with respect to uniformity? Of what assistance would that be to courts who were interpreting some situation or other in relation to a company at a future date?

Mr. Ryan: That has always been a problem, Mr. Chairman. Some courts look at the fact that this was intended to be a uniform act, and will therefore look at interpretations given in other jurisdictions, and if it is possible for them, in the circumstances, will find in a manner which will make the law uniform. Now, in Canada this has not worked too well, and the uniform model statutes of the conference of commissioners have dropped that provision

because they found that it was not working in practice. In the United States, on the other hand, the National State Conference on Uniformity of Legislation makes this a requirement, and they find it useful in the States.

The comment here on uniformity is to point out—well, it does point out, and it is of use, perhaps, to the courts—that the biggest obstacle to uniformity of company law in Canada appears to be disappearing in Ontario and in the federal government—two of the strongest areas for letters patent. We are now in the area of what amounts to registration incorporations, whereby the persons incorporating incorporate as of right as long as they are within the law.

The Chairman: Any questions? Senator Macnaughton?

Senator Macnaughton: We are at the foot of the throne here.

The Chairman: Senator Forsey, you know that, because you are not a member of the committee, it does not mean that you cannot ask questions.

Senator Forsey: I have nothing to ask, Mr. Chairman. I have found this a most stimulating intellectual exercise, but I have nothing to ask.

Senator Buckwold: Mr. Chairman, may I ask something for my own information, as a non-legal person? Can the purpose of the Act be part of a case in which judgment is rendered? In other words, you are talking about the sort of purposes referred to in the preamble. Can that be a reason for challenging a particular section of this act?

Mr. Ryan: There is a very old case in the Supreme Court of Canada. I do not have the citation before me and, unfortunately, the parties withdrew just before the decision became effective, and settled outside. However, it was suggested in that case that the company was *ultra vires* the Parliament of Canada. It was a company to develop Anticosti Island, but the case never became an authority on the point of whether the purpose of the incorporation would make it *ultra vires*, if I understood your interrogation correctly, senator.

Senator Buckwold: I would gather, then, that if there was ever any opportunity to overturn an act, or a clause in an act if the purpose was in conflict with the clause it would have gone to the courts, so you do not normally challenge the purpose of the interpretation.

Mr. Ryan: They should not be inconsistent, but if they are found to be so, the court will interpret the Act as it sees Parliament intending it. The inclusion of a provision such as that in Ontario, incidentally referring to the extent to which the legislature has jurisdiction, does not necessarily save an act from being *ulta vires* if the court finds that in law it has gone beyond its legislative power.

The Chairman: You mean because this bill destroys the *ultra vires* doctrine so far as the federal government is concerned that is not the end of that doctrine.

Mr. Ryan: We must be careful with the doctrine of *ultra vires* in this context. There is the company *ultra vires* doctrine, which is just 100 years old.

The Chairman: Yes.

Mr. Ryan: Then we have the constitutional *ultra vires* doctrine. I never second guess a court; it always surprises me. The court could say that the intention of clause 4 is to encroach upon every area of incorporation. I doubt if it would but it is possible.

Senator Desruisseaux: Can it be clarified to remove the ambiguity?

Mr. Ryan: Section 4 assists in making it clear that the real object or purpose of a corporation under this legislation is to carry on business for profit within Canada, I would hope.

The Chairman: Then, if it just said that, that would be sufficient as far as you are concerned?

Mr. Ryan: Yes.

The Chairman: Well, you say "within Canada", but it could be within or without Canada.

Mr. Ryan: Yes, but a corporation carries on its business outside Canada by virtue of the comity of nations, not by virtue of any enforcement we can apply in that order jurisdiction.

The Chairman: So if we change section 4 simply to read as you have stated it, that the purpose is to provide for the incorporation of corporations to carry on operations within Canada—

Mr. Ryan: What kind of operations, sir?

The Chairman: Any operations.

Mr. Ryan: Business or profit?

The Chairman: For profit, yes.

Senator Buckwold: I do not think you could use the words "carry on operations for profit." There may be corporations, for example, co-operatives, to which the word "project" just would not be acceptable. They carry on operations without making a profit.

Mr. Ryan: May I quote the old wording from the western area? It is always difficult to quote from memory: To carry on any business that has for its object the acquisition of gain by the company, association or partnership or by the individual members thereof. Of course, you do get into the difficulty that you have corporations that are non-profit. Not that the corporation does not make a profit, but that the members make no gain from it.

Senator Buckwold: That is the situation I had in mind.

The Chairman: We must also recognize that this bill does not purport to deal with non-profit corporations. We are told that there is to be another bill. Therefore I assume that an application to incorporate a non-profit corporation, let us say for charity, should not be refused under this bill.

Mr. Ryan: I would think that a reading of the whole context of the bill, shareholders, directors and all the rest of it, would indicate that it must be construed as carrying on business for the acquisition of gain for the members. It is so tied into shareholdings, division of shares, dividends and things of that nature.

The Chairman: You say that appears to be the scheme of the bill?

Mr. Ryan: Yes.

The Chairman: Would you say also that the scheme of the bill is the purpose of achieving some uniformity in legislation?

Mr. Ryan: It is doing that because it has at least one aspect that is uniform now, certificates of incorporation, which appears in the western provinces. It is to some extent uniform with the new B.C. Business Corporations Act and it is uniform to some extent with the Ontario Business Act. There is a large measure of uniformity developing. There is only one area in Canada which is uniform in the business of commercial area, Mr. Chairman. That is in the insurance contract field, which is a very delicately balanced area. However, there is uniformity there and that is the only successful uniformity of which I know in Canada.

The Chairman: That uniformity, you said, is very delicate; obviously it is. I believe it was achieved by understanding, was it not?

Mr. Ryan: It was achieved by constant meetings, every year, of the superintendents of Insurance and by very carefully working out throughout Canada any changes before any one jurisdiction made a change. It is very delicately balanced.

The Chairman: Yes, and most of the work is done by the Superintendent of Insurance at Ottawa and the provincial superintendents accept his reports, et cetera.

Mr. Ryan: Senator, this is somewhat irrelevant; I have attended those meetings as a provincial representative and I cannot go along with your suggestion.

The Chairman: Do not answer the question. Thank you very much, Mr. Ryan.

Mr. Ryan: Thank you, sir.

The Chairman: Now we have Mr. Howard. The last day we started out to deal with a list of parts of this bill that had been described by the parliamentary secretary when he was explaining it in the House of Commons as being parts with which he did not propose to deal because substantially they were in accord with the existing law. We went through a number of those and I recall your explanation that this is a new bill and maybe the expression "substantially in accord with the present law" it not the most accurate way to describe it. In any event, you accepted what I meant by my remarks and you pointed out the variations which might be said to be substantially within the sum of those parts. Now, we have dealt with a number of them, but some remain for consideration. Would you care to pick up where you left off last day?

Mr. J. L. Howard, Assistant Deputy Minister, Department of Consumer and Corporate Affairs: Yes, Mr. Chairman. First I would like to apologize for Mr. Cafik, who is a victim of the 'flu today. However, he thinks he may be able to work on Thursday. I had prepared this list pursuant to your instructions and have broken down the parts of the bill into three distinct categories. In the first category are those parts that the committee considered last week. That includes the parts that have not been substantially changed as a matter of policy. They are Part X, Insider Trading; Part XII, Proxies; Part XIII, Financial Disclosure; Part XV, Prospectus Qualification; Part XVI, Take-Over Bids; and Part XVIII, Investigation. You will recall, Mr. Chairman, that the committee largely completed its review of these topics, subject to further consideration of the investigation powers under Part XVIII and the comments of outsiders who presented briefs to the committee.

Another point that will be arising again in respect of other parts of this bill is the regulation-making power under the legislation.

The Chairman: Just to get our bases right, Mr. Cafik, the Parliamentary Secretary, did not explain certain parts of the bill in the House of Commons, for the reasons which he stated and which I hope I have repeated accurately. He listed securities, registrations and transfers, trust indentures, receivers, liquidators, investigations, inside trading, proxies, take-over bids and prospectuses. We did not deal with all of those last day.

Mr. Howard: No. I know have a second category of matters which are essentially non-controversial issues. In the first category are those issues that were picked up out of Ontario law and incorporated in the present Canada Corporations Act in 1971.

In the second category we have essentially the technical, non-controversial issues. That is Part I, the Interpretation and Application, except for section 4, upon which Mr. Ryan commented; Part II, Incorporation; Part III, Capacity and Powers; Part IV, Registered Office and Records; Part VI, Security Certificates, Registers and Transfers; Part VII, Trust Indentures; Part VIII, Receivers and Receiver-Managers; Part XVII, Liquidation and Dissolution; and Part XX, General, excepting, as I mentioned earlier, section 254, which is regulation-making powers.

In the third category that I have broken out are various parts which are not necessarily controversial but reflect very fundamental policy changes. They are:

Part V—Corporate Finance
Part IX—Directors
Part XI—Shareholders
Part XIV—Fundamental Change
Part XIX—Remedies, Offences and Penalties

I do not want to give the impression or even to imply that there has not been a lot of controversy over the past several years with respect to these topics. It is just that we have been out to various committees and groups such as the Canadian Bar Association and the Institute of Chartered Accountants and, having discussed these with them for some years, we have arrived at a reasonable consensus as to what the policy should be.

Not everybody agrees obviously with every provision in this, but they have been characterized by us generally as non-controversial issues and for that reason Mr. Cafik did not expand on them during the hearings by the house committee.

The Chairman: You do not have to ask Mr. Cafik. We are not questioning the fact that he dealt with some things and did not deal with other things.

Mr. Howard: In any event we are here to respond to any questions on any part where we can be of assistance.

The Chairman: We are not ready yet to deal with directors, shareholders, and things of that kind, because that is where there is likely to be some difference.

Mr. Howard: Yes, sir, those are what I have characterized as the issues where we have made fundamental policy changes.

The Chairman: That is right. If you pick up the plan that we started out with the last day, where there may be

said to be a continuation of the present law, with some variations, what subject matters would you start in with now?

Mr. Howard: I would prefer to start in now with what I prefer to call these technical issues:

Part I—Interpretation and Application
Part II—Incorporation
Part III—Capacity and Powers.

The Chairman: Parts I, II and III. All right. Let us look at them. Tell us where there are any changes.

Mr. Howard: Certainly the most controversial section in Part I is section 4. I do not want to elaborate particularly on that, I do not think there is any reason for me to do so. However, if members of the committee do want to hear our comments on Part IV, I will state my position and I am sure Mr. Anisman would be prepared to expand considerably on that—indeed, to state his position, which does not necessarily correspond exactly to mine. That is up to you, Mr. Chairman.

The Chairman: I take it the opinion you expressed the last time is still your view?

Mr. Howard: Yes, sir.

The Chairman: That is, your position is neither supporting or opposing?

Mr. Howard: That is right, sir, because I feel that stating it as it does in very general conceptual language, it does not answer the problem and judging by the discussion I heard here today, it does not satisfy anybody completely. We would be quite willing to agree with the alternative wording that Mr. Ryan suggested, that is, to incorporate business corporations or corporations to carry on business for profit, that will carry on that business throughout Canada.

The Chairman: Or "within Canada"—what is wrong with that?

Mr. Howard: We would prefer "throughout" because "within" might connote one place within Canada and then get back to this one bridge across one river problem.

The Chairman: "Anywhere in Canada"?

Mr. Howard: Anywhere in Canada.

The Chairman: If you want to get really specific "anywhere in Canada" is an exact description.

Mr. Howard: I neither consented nor objected because I felt it was so general that it did not resolve the problem one way or another.

The Chairman: Do you feel that section 4 is needed to state the purpose of the bill as being an effort to cause uniformity?

Mr. Howard: I certainly support Mr. Ryan on that. As a member of the uniformity commissioners he has worked on this problem for years. He has been of enormous help to us in the preparation of this bill. Although he states very modestly that he is only a draftsman and so on, he and Mr. Pepper—because you never focus on a difficult technical issue until you begin doing the drafting—have made hundreds of recommendations to us that we have accepted and for which we have been very grateful.

The Chairman: So that if you said that the purpose of this is to revise and reform the law for the purpose of advancing the cause of uniformity of business corporation law in Canada on the question of uniformity that would be a good statement, would it?

Mr. Howard: I think it would be useful, sir, because we are trying to urge the provinces to accept this bill as a model bill and to develop their own laws accordingly. Several provinces are looking at it and are using it as a cornerstone to develop their own provincial corporation law.

The Chairman: If we agree that there are three things that are set out in section 4 that you want to achieve—one uniformity, that kind of language that I have stated would accomplish that. Then, the scope of federal company operations, the language of the nature that Mr. Ryan has stated and you have repeated and I have repeated, that is, a corporation to carry on business anywhere in Canada for profit.

Mr. Howard: Yes, sir. Mr. Anisman has suggested a solution. We will put that on the actual certificate of incorporation that is issued to the corporation in any event. That will be its charter as issued under the regulations.

The Chairman: Then the third purpose, to provide a means of allowing an orderly transfer to certain federal companies incorporated under various acts of the Parliament of Canada. That language is all right, is it?

Mr. Howard: Yes, sir. That was one of the fundamental goals of the draftsman of the original proposals, to try to simplify what is now a very complex situation at the federal level. There are very few lawyers, as you know, who are specialists in federal corporation law, because it is difficult and complicated.

The Chairman: It may also be that the opportunity has not been afforded, due to lack of applications for incorporation in the last number of years. There may not have been the testing time and place. You required a greater knowledge of federal corporation law.

Mr. Howard: That could be so also. It was so different from the local laws that they did not want to learn a second system.

Senator Cook: This may be a rather naïve question, but when you say "carry on business anywhere in Canada" is it possible it would have a restrictive effect on carrying on business outside Canada?

The Chairman: No.

Mr. Howard: There is another answer to that, if I may, Mr. Chairman. There is a special provision in the bill which states that if jurisdiction outside Canada permits a Canadian corporation to operate there, it may operate there. That is a counterpart of the "Bonanza" clause that is in every provincial corporation law. It is section 15, subsection (2).

The Chairman: Does that answer your question, Senator Cook?

Senator Cook: Yes, thank you.

Senator Buckwold: For clarification, you seem repeatedly to use the words "incorporation for profit" and I am

asking again what would happen if a company wanted to incorporate because they wanted to service their members at cost. For example, if a company decided they would be a buying agency for a group of companies and they wanted to distribute everything at less cost, as part of their objective, could they do it under this act?

Mr. Howard: There is no problem. They are carrying on business.

Senator Buckwold: But not for profit. If they were not for profit, that is the point.

Mr. Howard: This is where you get into this conceptual difficulty. There are no black and white categories to distinguish between the two. There are indeed hybrid corporations that are characterized right now under present law as non-profit corporations, that are actually carrying on business and earn a profit. The litmus test is whether or not they can distribute that profit out in the form of dividends to members, directly or indirectly, whether they do it by cash dividends or discount prices or in some other way.

Senator Buckwold: Your answer is that the use of the word "profit" as outlined by our chairman, would not preclude the incorporation of a company under this act?

The Chairman: Or a co-operative.

Senator Buckwold: Do co-operatives have a special act to be incorporated under?

Mr. Howard: Yes, senator, they have a special federal act, called the Federal Co-operative Associations Act.

Senator Buckwold: It is possible that they may not be co-operative in that sense and yet would object to the use of the word "profit". I just want to make sure they are not precluded.

Mr. Howard: No, they are not precluded, but the test is whether or not they are carrying on business. When we do come up with the complementary bill, the non-profit corporations law, the tests again will be whether or not they are carrying on business. What it happens to do with the profit it earns does not matter.

The Chairman: You are really thinking of three definite groupings. There is the ordinary commercial corporation carrying on business for profit. Then you have the type of co-operative carrying on business. There the question may be whether they are carrying on business for a profit or not. They may have a statutory exemption so far as tax is concerned for certain purposes. Then there is the non-profit corporation. Some of them may carry on business, but what they earn is not profit; it is taxable.

Mr. Howard: No, it is not taxable, but it would be, of course, if it could ever be passed on to their members. Some of them do have difficulty under the law at present, because clearly they are not charitable operations but membership corporations. Under their constitutions there are certain residual benefits that flow through to members in the event of dissolution. That is why we are coming up with a new non-profit corporation law to try to clear up that type of thing.

Senator Buckwold: For instance, would the Saskatchewan Wheat Pool be incorporated federally as a co-operative or would it just be a corporation?

Mr. Howard: It is a co-operative. Whether or not it has been continued or incorporated at the federal level as a co-op I am not sure, but it is clearly a co-operative.

Senator Macnaughton: Another example is the One Thousand and One Nature Trust, which is a part of the World Wild-Life Fund, which is charitable. There you contribute a capital amount; you get nothing for it except a 20-cent pin with "1001" on it; you have the indirect privilege of being in an association with a limited group of people who have contributed capital sums for a charitable purpose, to earn money to pay the expenses of the charity, so there is no benefit in the thing.

Mr. Howard: The real test outside of government, of course, in determining whether a corporation is a business corporation or whether it is a non-profit corporation is whether or not it can get a licence from the revenue authorities to permit deductions from the income of individuals who make contributions to the non-profit corporation. That is really the test outside in the real world. Other than that, we are quite prepared to live with rather general conceptual distinctions, business corporations on the one hand and non-profit corporations on the other hand. It has not caused any great problems, except for the technical difficulties I have mentioned in respect of the residual payments to members of membership corporations.

The Chairman: Are you going to endeavour to achieve some kind of uniformity when the non-profit type of corporation comes up for consideration in relation to the provisions dealing with such corporations in a province?

Mr. Howard: To the extent that the provinces have tried to develop some kind of uniformity with us. We do work closely with the provinces on this aspect of it. The non-profit corporation bill that we are developing is in accordance with the Proposals for a New Profit Corporation Law published by our department last year. It recommends that, as far as possible, a non-profit corporation law should parallel word for word the business corporations law, and should be different only where it must be different in order to take into account the unique character of a non-profit corporation. Immediately after leaving our meeting here last week we had a meeting with an official of the Manitoba Government, who discussed with us the co-operative law they are trying to develop there, and suggested to us that we try to work out uniformity between their proposed new co-op law and our co-op law. We told them that we would be quite willing to work with them at any time, any place, in order to achieve that goal.

Senator Desruisseaux: Was there any objection anywhere in the provinces about parts of this?

Mr. Howard: No, no serious objection. Indeed, we have been flattered that some of them, as I have mentioned, have used this as a foundation document. The British Columbia government, for example, in preparing its new companies bill, although they did not follow this model closely, did take a good many provisions out of it verbatim.

The Chairman: Senator Buckwold, on the point you raised, we are not concluding anything on that at this time, you understand. We will have another look at it.

Senator Buckwold: I can think of any number of corporations in which the word "profit," which I am prepared to respect, may not necessarily be the objective of an incorporated company.

The Chairman: If we do not satisfy you on the point we have to make some changes.

Senator Buckwold: I have a feeling you will satisfy me.

Mr. Howard: May I reply? I just want to say that is why we prefer the general concept "business," so that we do not have to focus on profits, whether they have any profits or whether they pay out any dividends; we don't care; we can live with business in most cases.

Senator Desruisseaux: I was coming to that very term "business," a business corporation. Is there any possibility of confusion over what a business corporation as such is? If there is, there is no definition of "business" anywhere I see here.

Mr. Howard: We have assumed that in our economy there is absolutely no ambiguity about what it means. Obviously, it means to carry on a commercial enterprise with a view to making a profit in a market economy. We have never heard anybody contradict that, or even suggest it was somehow ambiguous in meaning.

Senator Desruisseaux: I hope it stays that way.

Senator Cook: All it has to be is lawful.

Mr. Howard: Yes, sir. Perhaps I could quote Mr. Anisman here, who said that if it is an unlawful business it might be even more profitable, but we do not legitimate that, of course.

Senator Macnaughton: Did I understand you to say there is somebody here who has a contrary view, or a different variation, or different interpretation of clause 4?

Mr. Howard: I just mentioned that Mr. Anisman was here, and he always has a contrary view. However, I frequently accept his views. He has no disagreement with the wording Mr. Ryan suggested, which I said I could accept as clarifying the issue. Indeed, following his recommendation we are going to put that wording on the certificate of incorporation of each corporation we continue or incorporate in any event, to make clear that it may carry on business throughout Canada.

The Chairman: We do not achieve this to often, when we find what we think maybe the working should be those here from the department, supporting the bill and sponsoring it, are ready to accept too. That does not happen too often. It happens at times. However, we may test you further on this before we get through the bill.

Mr. Howard: My toughest problem is always Mr. Anisman.

The Chairman: Part II deals with incorporation, and clause 12, which has the marginal note "Prohibited names", says:

> A corporation shall not be incorporated with, have, carry on business under or identify itself by a name
>
> (a) that is, as prescribed.

Now, "as prescribed" means by regulation?

Mr. Howard: Yes.

The Chairman: So we are starting into the area of the authority you are taking for your regulations. What would be prescribed that would not necessarily be prohibited or be desceptively misdescriptive?

Mr. Howard: There is nothing that will be prescribed that does not fall within those two categories. The regulations set out a number of refined rules, following the analogous rules currently set out in the Trade Marks Act to ensure that, as far as possible, we are complying with roughly the same standards under the corporations law as apply under the Trade Marks Act. However, we do not feel we should try to rewrite the Trade Marks Act or an analog of it simply because we want to try to improve our standards.

There is another point I should mention on this. What we are trying to do under the regulations is confine our own powers. At the present time we have unlimited discretion with respect to corporate names. We are quite willing that those powers should be limited, and that we should make our decisions in accordance with refined legal standards so that lawyers know exactly why we are making those decisions, and if they don't like our decisions, the decisions of the Director of the Corporations Branch, they have an express right of appeal to a court to question that decision.

The Chairman: What I am questioning is the manner in which you set out paragraph (a) of clause 12(1):

> that is, as prescribed, prohibited or deceptively misdescriptive.

You tell me that what will be prescribed by regulation will be a name which is prohibited. Prohibited where?

Mr. Howard: There are two classes of prohibited names, at least. The first class is one that is unqualifiedly prohibited, under a federal statute. For example, there is a recent statute that prohibited the use of "Parliament Hill" and it is called the Parliament Hill Act. We list that in our regulations as being an absolute prohibition. There are a number of federal statutes of that type—about ten of them.

The Chairman: Why do you not say it?

Mr. Howard: Because of course, these regulations cover ten pages—something like that. As I say, we are confining our own discretion to deal with these problems. If we do not have regulatory power, then this bill will have to be a much bigger bill than it is now.

The Chairman: You are not getting the point I am getting at. The basic reason why you would not grant a name as stated in (a), is that it is prohibited or deceptively misdescriptive, as set out in your regulations, or as prescribed. Now, all I want to know is what is the meaning of "prohibited"? I can understand "deceptively misdescriptive", but I do not want the regulations to go further than what amounts to a prohibition.

Mr. Howard: As I say, I should have before me the draft regulations that deal with this. I did not know we would be getting into this today. Basically, what the regulations set out are those names that are absolutely prohibited by federal statute; and secondly, a number of names that are qualifiedly prohibited. For example, anything that implies the approval of a university or a professional association; anything that implies some kind of royal patronage. These are all qualifiedly prohibited. There is, however, some discretion there to permit people to have names that may have the word "royal" in them, such as "Royal Insurance." We would, however, still reserve the right in some cases to say that they are prohibited, because they do imply some kind of royal patronage, and there are a number of these qualified prohibitions. These are set out in the Trade

Marks Act, and the ones we have in the regulations are in the present Trade Marks Act.

There is a third class of prohibited names that are prohibited following a number of general rules that have applied to trade marks and business names for a good many years. One is because the name is too general. I am just mentioning the common cases. Someone, for example, may come up with the name "General Industries." We will not permit that, because it is too general. We will not allow one that is confusingly similar to an existing name, either phonetically or semantically, or in appearance. We will prohibit a name that perhaps conflicts with another existing name for some other reason. So there are these three classes of prohibition.

In addition to that, there are names that are deceptively misdescriptive, and this is where, for example, somebody tries to get a corporate name, again, to give the impression of patronage, and the typical example given is "Eskimo Art Ltd.", which might imply, somehow, that this is an official corporation to market Eskimo art. We would probably prohibit that.

The Chairman: If I owned a trade mark, or trade name, and I wanted to incorporate a company by that name, would you grant incorporation under that name? Under this bill?

Mr. Howard: You have the trade mark, or a trade name?

The Chairman: Yes.

Mr. Howard: And there is no doubt about your exclusive rights to that trade mark or trade name? That is, no one else in Canada has a similar name?

The Chairman: I am taking the case where the trade marks branch has issued a certificate.

Mr. Howard: Yes, sir. Normally we will if a trade mark has been issued, or granted, to an applicant, if he comes in and seeks a corporate name using the same words as in his trade mark. We will grant incorporation then, because by definition it is most unlikely that there can be any conflict within Canada.

Senator Macnaughton: If Canadian Pacific went bankrupt, could I incorporate another railway company with the same name? Could I use the name "Canadian Pacific"?

Mr. Howard: We have suspected that someone might want to do that, so we have added an express regulation saying that there is an absolute prohibition against using such a name for two years after the dissolution of the predecessor corporation. If there is a likelihood of public confusion, that prohibition can be extended for a longer period of time.

Senator Macnaughton: But the terms are general: "Canadian", "Pacific".

Mr. Howard: Yes, but a name like that might still be a distinctive name, and we might permit that even today; but in any event, there is another overriding rule in respect of all name-granting decisions; that is, where a name has a secondary meaning, or has acquired a distinctive meaning through use, even if it might not comply with all our other rules, the applicant is entitled to that name because he can prove secondary meaning.

The Chairman: How would you propose to deal with provincial corporations, if some person applied to you for a name that may incorporate perhaps an essential part of the provincial name of a firm carrying on business there.

Mr. Howard: You are getting to a very delicate topic, sir, and I will explain why. We actually maintain in our corporations branch a file made up of approximately one million cards. These are the names of all of the corporations that have been incorporated and continue to carry on business in Canada. For some three years we have been trying to make up a computerized file so that we can do this searching by computer. We have invested an enormous amount of time and considerable money in this, and have made a lot of progress. We think we are getting very close, first, to a definitive file of all corporations in Canada, all trade marks in Canada, and also of all of the major corporations that qualify prospectuses with the SEC in the United States.

When any applicant comes in to us we want to try to make sure we do not give him a name that could be confused with an SEC corporation, a Canadian trade mark, or an existing Canadian corporation, wherever incorporated. Now, our reason for that is not necessarily to protect these other corporations, but to ensure that we are not giving a name to somebody who will go out and start issuing securities, or selling goods and services, relying on the goodwill that has been built up in connection with a similar name of another firm; so we are trying to develop a very extensive system to protect applicants with respect to their names.

The Chairman: The concern that the public would have would be, "How fast can we get an answer?" Now, this has been a problem up to date, and I know that in one province at least you can get your answers very, very quickly.

Mr. Howard: Would you mind naming the province, sir?

The Chairman: Well, no; it is Ontario.

Mr. Howard: Very well. Now, one of the reasons why Ontario can do this is that it only keeps, now, a file of Ontario corporate names, and more and more pressure will come on to us in the future, because we carry not only federal names, but all provincial names and all trade marks, and people who are really serious about getting a new name will probably want to clear it through us, even if they do incorporate at the provincial level. This is one reason why we want to build up an extensive file.

The Chairman: It appears to me that the only way to get speed on clearing of a name is to use a number, or to coin a word.

Mr. Howard: Yes, sir. There is provision for using a number under this bill.

The Chairman: Yes, or to coin a word. If I coin a word, and I can tell you it is a coined word, and tell you how it is made up, unless you find that exact coinage in your list, you are certainly going to grant it.

Mr. Howard: Yes. That is what we prefer, and the delay is very brief indeed if someone comes to us with a name of this type. All of the difficulties are engendered by names of the type I mentioned—to general. Somebody may want to use the name "Canadian Industries", for example, but we cannot give that to them, and there will be a lot of correspondence with them, until we say, "Go away." We hate to be that flat, but you do not want the public misled by having too general a name. Also, you do not want to

preclude other applicants from having another name, having those words in it, plus some other distinctive feature.

Senator Macnaughton: I am sure you do not say, "Go away." You say, "Do come back again."

Mr. Howard: Yes, sir.

Senator Buckwold: Going back to this question of the Canadian Pacific Railway going bankrupt, which God forbid, you say that you are precluded for two years from using the name of the company that has gone bankrupt.

Mr. Howard: Yes. That is an express rule in the regulations.

Senator Buckwold: What happens if the company re-incorporates—buys back its assets, and uses the same name with, say, the figures "(1975)" Ltd., or "Incorporated", or something, and asks to use the same name. Would that be precluded?

Mr. Howard: We have special rules with respect to putting the year in brackets. This is specifically devised with respect to construction companies, for example—solvent construction companies—that incorporate project by project. However, if one of the construction companies became insolvent, we would not allow anybody to use a confusingly similar name over the next two years; that, however, is not a practical problem. Anybody who has, or who had, a name that is identified as a loser, normally does not want to incorporate with a name that even remotely resembles that of the bankrupt firm.

Senator Buckwold: Not always.

Mr. Howard: Well, it could happen, but we would still have a flat rule prohibiting that for that two-year period.

Senator Buckwold: The other question I was going to ask concerns the difficulty of using the word "Limited" or "Incorporated". You may not want to go to that section yet, Mr. Chairman.

Mr. Howard: Yes, Mr. Chairman. It is section 10.

Senator Buckwold: I would like a ruling from the Chair as to whether I am in order in posing this question when you are still dealing with another area.

The Chairman: You are asking a question with respect to section 10?

Senator Buckwold: I wish to make sure we will not go off the subject we are discussing if I lead into another area.

Why do you have so many terms for an incorporated company? Why could it not be limited, limitée, incorporated, Inc. or corporation? It seems to me it is confusing to the public as it is.

The Chairman: Senator, you know what the trend has been. When companies are incorporated today every often, or most of the time they are incorporated under both English and French names.

Senator Buckwold: I was not really referring to the use of English or French language. I remember being somewhat impressed by the stationery of a person I was visiting, upon which appeared the word "Inc." That word "Incorporated" seemed to be very impressive. My question really is when you are given the authority under section 10 to use a variety of styles to indicate an incorporated company why would you still continue, rather than endeavouring to work down to saying limited, incorporated or whatever it is?

Mr. Howard: Then problem is that, of course, we cannot control other jurisdictions.

The Chairman: No.

Mr. Howard: And other jurisdictions legitimate use of Ltg., Corp. and Inc., to use the abbreviations.

Senator Buckwold: If we are attempting to introduce model legislation to be followed by other jurisdictions, would this not be a good place to start?

Mr. Howard: Yes, it might be a good place to start if it had an substantive purpose. However, there is no magic in any of these terms as far as the public is concerned and people are now so accustomed to the limited liability concept that they assume that every business has limited liability. Since we are not putting up a red flag for the benefit of anyone, why go through the gesture of pretending to do so by requiring the use of Inc., Ltd., Corp. or different words used throughout the world? However, we felt that we would leave a great deal of discretion in this respect, because the public is sufficiently sophisticated to know and, indeed, always assumes that a corporation is a limited liability cocorporation and, believe me, people feel strongly about being allowed to use Inc. Do not ask me why.

Senator Desruisseaux: I am not too sure whether this is relevant, but in the case of partners registering a name for their business, is that name protected in some manner? Some of them become rather important in certain places and my question is if a business is incorporated can the name be used by others?

Mr. Howard: Do you mean can the partners themselves incorporate the business and continue with that name?

Senator Desruisseaux: No; someone else.

Mr. Howard: Normally not, but we do not guarantee that partnership name in our main register. That firm might be required to be registered in a partnership register in a province.

Senator Desruisseaux: But they are all registered.

Mr. Howard: Yes, but we do not necessarily have them in our file. We might have, because we do have many partnerships, particularly when they are substantial, in our files. However, we do not have all of them and we cannot guarantee any kind of protection. Of course, if we do have such a name and a partnership comes in and points out to us that it has prior rights in that name and that the name is confusing, the Director of the Corporations Branch can require the corporation to change its name in order to end the confusion.

The Chairman: Senator Desruisseaux, your question applies to the case of a partnership registered as "Jones and Smith" being incorporated federally under those names.

Senator Desruisseaux: Yes.

The Chairman: Well, I suppose the answer is would there be a name that would be likely to be confusing with respect to one already existing.

Mr. Howard: We run into a number of problems. Normally we would not incorporate that name as such unless we felt that it was distinctive because family names by themselves are distinctive. More normally we would require another element, such as "Jones and Smith Manufacturing Limited" unless "Jones and Smith" was such a famous name and had such a clear secondary meaning that we would not be misleading the public.

Senator Buckwold: Such as Smith Brothers Cough Drops.

Senator Macnaughton: Mr. Chairman, may I ask a simple question? If I incorporate under an English name in Quebec, do I automatically receive a French translation, or must I request it?

Mr. Howard: It is a good question. I believe you are expected to furnish the French name. Indeed, in Quebec you are now required by law to have a French name. You would furnish that, of course, on your application. That must be cleared through a special language division in Quebec and must be grammatically correct. If it is not, it will be referred back to you with the request to furnish a name that is grammatically correct in both languages.

Senator Macnaughton: Supposing I just wanted the English?

Mr. Howard: That would not be possible in Quebec and, quite frankly, we discourage this at the federal level in respect of federal corporations which will carry on business in Quebec. We endeavour as a matter of policy to comply with the Quebec law in order not to upset French sensibilities in respect of their language.

Senator Macnaughton: You are saying that I must conform.

Mr. Howard: If you are incorporating under Quebec law, yes. If you are incorporating under federal law, we have no way of compelling you to conform. However, if someone does apply in French and in English we try to comply with the French rules and ensure that the name as far as possible is grammatically correct. We have a qualification in that respect, that we allow the use of fanciful names. We do not like to corrupt a good fanciful name by requiring that it be put into a more elaborate but grammatical form. That, in effect, militates against having a very good trade name because, as you mentioned Mr. Chairman, often the best kind of trade name is a fanciful, coined word that is a synthesis of two or three other words or phrases. That makes it very memorable and therefore unique.

The Chairman: Could we move to Part III, which is Capacity and Powers, starting on page 12?

I notice there was a point made in the Canadian Manufacturers' Association brief and I would like to invite your comment with respect to it.

Section 15(1) provided that:

> A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

The Manufacturers in their brief said that they prefer the wording used in the Dickerson proposals of has and is deemed always to have had, rather than has. The latter raises a doubt whether the doctrine of*ultra vires* is being abolished by this section or is actually being imported into this section. I invite your comment on that statement in their brief.

Mr. Howard: Having drafted this section at least 50 times in order to attempt to respond to the various criticisms of many people, I must say that I prefer the wording in the present subsection (1). There is no way we could say in the bill that the doctrine of *ultra vires* is hereby abrogated. I do not see how it helps to deal in the past and in the future. Although I was involved in that original draft also, I think this is better drafting language and states the same thing equally clearly.

The Chairman: Except that companies that will be in existence, having been incorporated under the present act, when they apply for a continuance, as they are required to, then thereafter they are subject to this legislation if it becomes law. Is that not right?

Mr. Howard: Yes, sir.

The Chairman: Then I am attempting to understand the Dickerson viewpoint in this respect. It seems to me that in that situation maybe there is some application for his wording.

Mr. Howard: The difficulty is, of course, that in conceptual theory, at least, a corporation incorporated under and subject to the present Canada Corporations Act has the capacity and the rights, powers and privileges of a natural person. In short, we are not changing anything; we are just telling it as it is and how most lawyers think it always has been under Canadian federal corporation law.

The Chairman: It has when? Do you mean if a company applies to be continued under the present Canada Corporation Act and there is some question as to the validity of the incorporation that is all changed and once the certificate of continuance is issued that company becomes pure, wholesome, legal and valid under Bill C-29 if it becomes law?

Mr. Howard: I cannot imagine a case in which anyone could attack the validity of a corporation that has been continued or incorporated under this legislation. Indeed, there are five or six saving provisions in the bill to ensure that no one can ever benefit by attacking validity, assuming that it is within the constitutional powers of Canada.

The Chairman: Even if you assume that the incorporation, up until the moment it has to apply for continuance, may have a position legally that could be challenged?

Mr. Howard: It may have had before it was continued under here, but once it is continued under here it has the capacity of a natural person.

The Chairman: This is the absolution you give?

Mr. Howard: That is the absolution.

The Chairman: Are there any other comments under Part 111?

Senator Cook: I apoligize, because I am going back for a moment. Talking about "natural persons" puts me in mind of a point. In section 5, about the only people you exclude from being entitled to form a corporation—which is quite something when you are incorporated—are people of unsound mind and bankrupts. What about habitual criminals and people of that nature? What power have you got to deal with them?

Mr. Howard: At one time we did have a special provision in here limiting anybody who had been involved in any kind of corporate fraud within the last five years or something like that. However, after much consideration and a lot of comments, we dropped that provision. Everybody pointed out to us that a crook can always come in and incorporate, through nominees or in some other manner, without ever showing what the real source of power is behind the corporation and therefore that is was utterly futile to pretend that we were somehow protecting the public by putting these other barriers in the law.

There is one other element to this. Of course, there are very good cases where somebody who has had a record has legitimate reasons to set up an honest business and to run it free of any criminal record he had in the past, and we could see no reason particularly to prohibit that kind of activity.

Senator Cook: I rather agree, but in that case why put in a bankrupt? He can come in under a nominee, too.

Mr. Howard: There is a very good reason for that. A bankrupt has nothing to lose. He is bankrupt. But a director who is a director under this statute might find himself liable for something, personnally liable, and therefore we want to ensure that we have directors who are not phantoms because it is one of the keystones of the statute that indeed only responsible people will want to be directors under this bill. That is why there is the exclusion of a bankrupt.

Senator Desruisseaux: But a bankrupt, once he has given up everything he has legally, should be able to restart in a corporation.

Mr. Howard: This only states while he has the status of a bankrupt. As soon as he is discharged, he no longer has that status and he can incorporate freely.

The Chairman: Is there any other question?

Senator Cook: No. It seems to me that the status of bankruptcy is a little worse than the position of the fellow in jail.

The Chairman: I read somewhere recently where men who were in prison for long terms, in a country other than Canada, had incorporated companies and were carrying on business, some within the law and some outside the law, even though they were committed to jail for quite a period of time, by the process of using people outside, relatives and friends. They were operating businesses, including drug businesses. Apparently there might be full knowledge of that and yet you say that if that situation occurred in Canada a man who is in prison for a period of time could secure an incorporation?

Mr. Howard: Yes, sir, there is no reason why he could not. There is an interesting case now in New Jersey. There is a man in there I believe who was originally convicted of fraud or theft and he is in for a very long term. It just happens that he is an electronics genius. He runs a very good-sized electronics research and development business from a jail cell. So far as I know, that is an incorporated business and he carries on business quite normally there.

Senator Buckwold: You did raise a minor question in answer to the previous query about people who could use fronts for incorporation. Is there anything in this act that prohibits that? In other words, if I want to get incorporated and I do not want my name connected with it, I get somebody to become a front for me and then I have a private agreement with him that the shares are really mine. Is that prohibited?

Mr. Howard: No, sir, because we do not consider that enforcible law. Indeed, we go to the converse position, like Ontario law. Even a corporation can apply for incorporation of another corporation. Frequently, if you do not have that kind of rule, when you are setting up a subsidiary of a corporation, it has to go through the mythology of application through lawyers or secretaries in the law office, it often has to issue shares which are held in trust by individuals who acknowledge that they are only trustees and that the beneficial owner is the parent corporation. To get away from that mythology, we expressly legitimate the incorporation of a corporation by a corporation. The main reason for that was administrative convenience, but equally important is that, in the real world, there is no way that we can prohibit people from doing dishonest things. If they are determined to do dishonest things they will operate through fronts and will in fact get a corporation set up. Therefore, we emphasize remedies, so that if there is something going on, then the Director of the Corporation Branch or an aggrieved shareholder or a creditor will be able to take action under this stature, in order to block the misconduct being carried out by the corporation or its management.

The Chairman: Dealing with this Part IV, I notice that the Canadian Manufacturers' Association have said, in their submission to this committee this month, at page 3, referring to section 20(1)(b)—and that section 20(1)(b) is on page 14 of the bill and then extends into page 15:

> Section 21(1) requires that records specified in Section 20(1) and kept at a designated office in Canada of a corporation be available for inspection by any person. Included in this list are "minutes of meetings and resolutions of shareholders". We believe that Section 20(1)(b) should be restricted to "distributing corporations" as defined in Section 121(1)(a).

That section 121 says:

> "distributing corporation" means a corporation, any of the issued securities of which are or were part of a distribution to the public and remain outstanding and are held by more than one person;

The CMA had this to say—and I am not saying whether my view is with or against them—is:

> It is inappropriate that minutes and resolutions of shareholder meetings in a company whose shares are not publicly distributed be available for any person to inspect. Their content would, in practice, be confidential and their disclosure could be damaging to the company and would serve no useful public interest. We submit that this sub-paragraph be qualified so as to restrict its application to a "distributing corporation."

What is your comment on that?

Mr. Howard: To all intents what is really required here to be disclosed are insensitive items such as minutes of meetings and resolutions of shareholders.

The Chairman: That is right.

Mr. Howard: Of course a shareholders' meeting only deals with three or four things, that is the approval of financial statements, the election of directors, the appointment of auditors.

The Chairman: I take it they are talking about companies who have not issued any public shares.

Mr. Howard: I understand that but whether it is a public company or a private company that is what the shareholders' meeting is for. The private business of the corporation of course takes place at directors' meetings.

The Chairman: Yes.

Mr. Howard: That is what directors are appointed for.

The Chairman: There is no suggestion here to make the directors' minutes available.

Mr. Howard: That is right. The bill deliberately states that the minutes of directors' meetings are not available. However, we feel rather strongly that these minutes should be made available so that an outsider can, whether he is somebody proposing to buy shares, a creditor, or anybody else find out if the corporation does have an auditor.

The Chairman: Why should an outsider know anything about the business of a company that has not distributed its shares to the public?

Mr. Howard: Because he may be wanting to buy shares from somebody who is a shareholder. He may be a creditor wanting to advance credit and he wants to check the credit of the company.

The Chairman: It seems to me there is something wrong with that.

Mr. Howard: Under the English act for many, many generations you have been required to file lists of shareholders all the time in a public registry. I personally do not feel very strongly about it one way or another, because it is not very damaging information to anybody.

Senator Cook: What information would be available under this?

The Chairman: The minutes of meetings and resolutions of shareholders.

Senator Cook: You say that would contain what normally?

Mr. Howard: Normally an annual meeting of shareholders, or a meeting of shareholders, deals with very fundamental issues—election of directors or removal of directors, appointment or removal of auditor, and approval of financial statements. It is just a matter of having it as public record that a corporation has gone through this.

Senator Buckwold: Would that not in fact include the financial statement, or would it just be that they approve the financial statement?

Mr. Howard: Just that they have approved the financial statement.

Senator Buckwold: You don't have the figures on the financial statement?

Mr. Howard: No, that would not be required at all; just a resolution to the effect that they approved of the financial statement as submitted to them.

Senator Buckwold: What good would it do?

Mr. Howard: It can be useful to an outsider, whether he is a creditor or somebody intending to buy the shares, to make sure that they have gone through the formalities. That is what we are saying; they are only formalities. What are we going to do? Start breaking out exceptions for certain kinds of documents? All we are saying is that because these are non-controversial documents, there should be no question about these being seen to be done correctly, and therefore, give people a right of access to them. It cannot cause anybody any harm. I am not sure it might do anybody much good, except in respect of lists of security holders.

The Chairman: Oh yes, it may expose information that you would find in the minutes of shareholders' meetings and in the resolutions to some person who wanted that information, for whatever the purpose may be. It may not be a purpose that is beneficial to the company, yet no public interest is being served if the company does not, under the description of a distributing corporation.

Mr. Howard: But of course a minority shareholder interest may be very much affected.

The Chairman: A minority shareholder would be entitled.

Mr. Howard: In theory, of course, he is entitled to a notice of the annual meeting, to a copy of the financial statement and so on.

The Chairman: He can go in and look at the minutes and records.

Mr. Howard: Yes, but there are limits on what records he can look at too, even though he is a shareholder. As I say, it is non-controversial data.

The Chairman: Every shareholder can attend a meeting; if he does not that is his own fault. If he does the shareholder knows what is going on. I am talking about any other person interested in a company that has no public distribution, and therefore no responsibility to the public in that sense. Why should the minutes and resolutions be made available to any person who may come in? True, he has to make some kind of a declaration that he has an honest and legitimate purpose for wanting to see these things and make copies of them. There is a provision under which he can require copies to be made on paying a fee.

Mr. Howard: That is correct. That particularly concerns, of course, shareholder lists, because even in non-public distributing companies that can be a very important element, particularly for somebody wanting to make a takeover bid or to solicit proxies or for some other purpose.

The Chairman: Look at the other side of the question. It may be more important that the people who are shareholders of this non-public company do not want the disclosure of who they are. Why are they not entitled to that?

Mr. Howard: It could be, but that is just a matter of general policy under the law, whether or not you are going to somehow shield the incumbent management and shareholders of a close corporation from, say, a takeover bid that may be attractive to most of the shareholders.

The Chairman: You answered me by saying the person asking for this information may want to make a bid or something of that kind. Which side are you going to look at? Are you going to look at the people who are in the company or somebody outside who wants to satisfy his curiosity?

Mr. Howard: Neither side; the law is neutral. All we require is disclosure so that everybody knows what is going on, so that things are seen to be right. If somebody wants to come in and make a bid for a proxy contest he is entitled to a list if he pays for it; he can then solicit the shareholders. If they agree with him he wins, if they don't agree with him the incumbent management wins.

The Chairman: Did I understand you to say that your approach to this clause was concerned and in connection with what I read, was, "Well, either way," that is, whichever way the clause reflects.

Mr. Howard: I don't want to appear ambivalent. I think disclosure is good and healthy in these companies, even the closely-held corporations.

The Chairman: You do not have a monopoly on that.

Mr. Howard: No, sir. I know I am pandering to motherhood here, but the point is that it does compel management to comply with these rules, to make sure that these things are done and seen by outsiders to be done correctly. Everybody has raised this possibility of some kind of snooping. If you want to stop snooping, just don't put any kind of secret or confidential information into the minutes of shareholders' meetings. Normally no corporation would ever do that anyway.

Senator Buckwold: Let us say, for example, you have a family company, a large company; I could name lots of them that have federal charters. They have their annual meeting; the family gathers, and there could be some information in there that would be of a personal nature, a variety of things. They do not meet very often, maybe once a year. Suppose somebody is interested in that company and wants to get all the information they can. Why should that company be forced under this to make that information available? I cannot see anything to be gained by it, and a loss of privacy that is unnecessary.

Mr. Howard: All I am saying is that there is no real loss of privacy unless they want to disclose publicly.

Senator Buckwold: You are going to force the minutes to be non-committal, which will not really reflect that meeting.

Mr. Howard: In 99.999 per cent of all cases minutes of shareholder's meetings are non-committal because they only deal with very specific issues. Confidential business issues are dealt with at director's meetings.

Senator Buckwold: Somebody who may not be a director may ask for information regarding some situation that may come out at that meeting. I am just trying to protect a fairly extensive group of businesses in the country from having information made available to anybody who wants it.

Mr. Howard: It is up to them.

Senator Buckwold: You say the information is not important.

Mr. Howard: They do not have to make any information available other than what I mentioned, those three or four things required to be done at a shareholders' meeting under the act, nothing else. Anything else they may deal with in their directors' meetings, which is a more appropriate forum to deal with the business of the corporation.

The Chairman: Wait a minute now. There are resolutions that the shareholders must approve of before the directors can give effect to certain policies; they need shareholder approval. The disclosure here calls for minutes of meetings and resolutions of shareholders. Senator Buckwold's illustration was a good one. There is a family company; somebody is curious; this bill, and Mr. Howard's support of it on this particular clause, is lined up on the side of somebody who may want to make a bid for shares. On the other side of if, the side I was presenting, are the people who are in the company; they have made no distribution to the public, and therefore have no duty in that regard to the public. Which way do you go? Well, we have shaken it. Shall we mark it to stand and we will consider it?

Senator Macnaughton: Mark it questionable.

The Chairman: Now for the first time we come to clause 20, subsections (5) and (6). This is the first time we have run into this question of strict liability; that is, there is no defence. Subsection (5) says:

> Where accounting records of a corporation are kept at a place outside Canada, there shall be kept at the registered office or other office in Canada accounting records adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis.

That is quite a proper proposition. However, subsection (6), the enforcement part, says:

> A corporation that fails to comply with this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars.

There is no possible defence. Quite conceivably the corporation may have exercised care and due diligence, yet the offence created under subsections (5) and (6) could still happen. The Law Reform Commission talks about these *per se* or strict liability offences. It is a very good brochure, which I am sure you have read. If you have not, I recommend it to your reading.

Mr. Howard: We have it here with us.

The Chairman: It is not enough to have it there; you should have it upstairs in your thinking process.

Mr. P. Anisman; Director, Corporate Research Branch, Department of Consumer and Corporate Affairs: Perhaps I might answer that, senator. The law reform commission study on strict liability expressly excludes consideration of corporate criminality and corporate offences. The law reform commission has, in its program, a study on corporate criminality, and I believe they are preparing that now. Their "due diligence" material, on strict liability, I believe, goes to offences which involve human beings—natural persons—and they may not wish to apply them to corporations. I imagine that that will be dependent on what they recommend in their next paper.

The Chairman: All I am suggesting is that there should be available the right in the corporation to explain why; and if that is a satisfactory reason, then the prosecution under this section should not stand.

Senator Cook: For example, there may be a mail strike on, and they might not be able to get the information in time.

The Chairman: Yes. An infinite variety of things could happen.

Senator Buckwold: A fire might break out.

The Chairman: Yes. Mind you, a mail strike is not in the area of speculation at this time, nor is the occurrence of it in the future in the area of speculation.

Senator Buckwold: I was asking about a fire. It could happen, for example, if your records were in your lawyer's office—if he kept minutes and what not—that there might be a fire in the file room.

The Chairman: If they are not there for a valid reason, then that should be a good answer to any prosecution; but it is not the case under this bill.

Mr. Howard: The defence on that one, Mr. Chairman, is that there are no records. When you bring up a case like that, there is always a defence, and there is no crime committed. There simply are not any records, and what this is driving at is, particularly, the wholly-owned subsidiary of a foreign corporation that maintains all of its records in its head office in such a way that there are no useful records kept in Canada, which is prohibited.

The Chairman: You have misunderstood me. I am not saying you should not require the records to be here. I am not saying they should not have to be maintained here. What I am saying is that there could be a basis, by way of a good and valid reason, for their not being there at that time.

Mr. Howard: Well, one thing we could not do in here was negate exceptions, and admittedly we are arbitrary here, but in looking at all these provisions, we did so carefully to see if there were some kind of subjective element in it. If there was none, it was stated as a strict duty, and if there was a breach of the duty there was a clear penalty imposed. This is a very good example of this sort of thing, where the law is abundantly clear.

The Chairman: Mr. Howard, when we are writing the law, the answer we always give here, in this kind of situation, is, "Well, it is all very well as long as Mr. Howard—" or whoever the witness may be—"in view of his statement of his approach to it, is there, and he is the one that is going to interpret it and is going to say that if there is a reasonable explanation there will not be a prosecution;" but we have got to deal with a situation in which a man with your approach may not be there at the time this problem arises, and therefore we should make some provision for that.

Mr. Howard: Very well. Then the difficulty arises, what "out" do you permit that is not going to be invoked in every case, so that you make it very, very difficult for a prosecutor to enforce what is, really, a relatively simple duty for a corporation to carry out?

The Chairman: Well, it could be done without good and sufficient reason, and then you could go ahead and prosecute. It would be up to the courts in that case to interpret whether the reason that was offered was good and valid. But they cannot even offer that under the section the way you have drawn it. All they can do, is, after they have been convicted, is to offer a good and sufficient reason why the full penalty should not apply.

Mr. Howard: Yes, sir. I get into an ambivalent position here, not just because of my name, but also because I do not have much faith in penal provisions. What we will do if a corporation is not doing this, is to go under this statute into a court and ask for an order compelling that corporation to get its records into Canada. If it does not do so, it will be in contempt. That would be the real remedy we would invoke.

The Chairman: Why do you not take that remedy?

Mr. Howard: This is here because of the prophylactic effect it has. It is a very, very clear warning that, "You had better comply with what is a clear statement of the law, because if you do not, it could cost the corporation—just the corporation—a considerable amount of money."

Now, where a director is involved—where there is an individual involved—or where there is some kind of subjective element in this, where he has to have control over officers, or, say, the secretary of the corporation, then there is a special due diligence exception. Section 243 is the best example of this, and this has to do with false documents filed by corporations. There, before liability is imposed on a director, the prosecution—I should not say the prosecution, perhaps—would have to prove it, and the defence is always available that he used due diligence, but still could not find or identify the false statement.

The Chairman: Let us get away from due diligence. Let us say this section read, "A corporation that fails to comply with this section, without good and sufficient reason therefor, the onus for which is on the corporation—"

What would be wrong with that?

Mr. Howard: It is a straight value judgment of how hard or how easy you want to make it for the prosecution. Again, I neither consent nor object. I prefer this because it is clear-cut from the point of view of the prosecution.

The Chairman: I do not think you should make it easy for the prosecution. I think you should make it fair for the person who is going to be charged.

Mr. Howard: I agree with being fair to the person, but what we are talking about here is the technical duty of a corporation to comply with the law.

The Chairman: I accept your profession of faith in this regard, but I have to proceed on the basis that you may not always be there.

Mr. Anisman: May I try to answer this, Mr. Chairman? There are two problems here. One problem is the ease of providing seemingly legitimate excuses for keeping something away. There would be clear situations where they would not work. There would be many situations where it would be easy to provide seemingly legitimate excuses.

The Chairman: You mean, to a court?

Mr. Anisman: Yes.

Mr. Howard: Let me give an example of that. For example, say I run a wholly owned subsidiary, the parent corporation of which is American, and the records of which are kept in the United States. My excuse for this is that if I have the records here in Canada, under the Canada Corporations Act, I have to make public disclosure of that, notwithstanding that it is a private corporation. I have to make public disclosure, and I have only one other competitor, an Ontario corporation, that does not make public disclosure. I am placed at enormous competitive disadvantage; therefore I do not keep the records here. Is that not a good and sufficient excuse?

The Chairman: It might very well be.

Mr. Howard: This is a very good illustration of the kind of problem of how easy or how difficult you want to make it for the prosecution. This is very much a value judgment for parliamentarians, not for me.

The Chairman: In Ontario they have what they call public information act, or something like that, which would prevent the reverse from happening, unless a judge of the Ontario courts were to make an order for the removal of records from Canada—Ontario—to a place in the United States, no matter what action the American authorities might take.

Now, what I say here is that if there is a Canadian company that has its subsidiary operations outside of Canada, then they are supposed, under this—indeed, they are required—to maintain adequate records in Canada, and I take it that the best way to be sure that they were adequate would be to have duplicate records here. Now, all I am suggesting is that there are many reasons why they might not be able to do that at a particular time, and for a time. There are a lot of them. You only thought of one. I can think of many. For example, the records may be destroyed. They may be burned in a fire. There may be a mail strike. They may get lost. Do you think the corporation, when it gets into court on a prosecution, can offer any of those things as evidence? No. When they are convicted, they can then offer such things as excuses by way of abatement of the penalty.

Senator Cook: The practical result would be the same, because if the person were found guilty and he gave the judge that reason, the judge would either give him a suspended sentence or fine him one dollar. So the result would be the same.

The Chairman: Except that he has got a conviction now.

Senator Cook: Where it would come in is if, six months later he were up again on the same charge and offered the same excuse. Then, the situation would be different.

The Chairman: He would get the $5,000 fine.

Senator Macnaughton: Mr. Chairman, let us dramatize it: Suppose Mr. Howard has gone to the Supreme Court and his 24-year old successor does not like you. He takes you into court and it probably costs you $50,000 to prove you are innocent. By the time you are finished with the case your reputation has been spoiled, you have been plastered all over the press, all because of some simple mistake and there was *mens rea* or anything else. Mr. Howard says it does not matter that we are up against bureaucracy in such a case and have no choice.

The Chairman: It is to make administration easy. However, I have marked these two subsections "stand"; is that agreeable?

Senator Buckwold: A solution might be the use of section 6 to apply for section 5.

The Chairman: That is what they are.

Senator Buckwold: No; and that your interpretation be used for the Canadian corporations, that there could be a reasonable excuse, but when it comes to a foreign corporation, which seems to be the main impact or thrust of the provision—

The Chairman: No; the impact is that there may be a Canadian company with a foreign subsidiary. Subsection 5 requires the corporation in such a situation to maintain adequate records in Canada of that subsidiary's operations. Now, I say that is a wholesome provision.

All I am saying is that to say that if the provision is not obeyed there is no defence and so many things can happen, there could be some measure of defence available.

Senator Buckwold: My question really was: Could there be any differentials, because you seem to be so anxious to move in the direction of foreign-controlled companies operating in Canada?

Mr. Howard: No, sir. Perhaps I could clarify this. There is no discrimination. If you refer to subsection 4, it concerns domestic corporations. They must also keep these records in their registered office.

Senator Buckwold: But I am going back to your verbal evidence, which was that really you are attempting to get foreign-controlled companies to keep their records here.

Mr. Howard: Yes, sir; that is the practical problem. However, the section is broader in scope than that, because under subsection (3) it also requires a domestic Canadian corporation to keep its records in its registered office.

Mr. Anisman: If I may amplify, the reason for Mr. Howard's focussing on the subsidiary of a foreign corporation is that we were directed to and considered subsection (5), which is directed at that problem. However, subsection (4) also deals with Canadian corporations and requires them to keep records at a registered office or other registered place in Canada.

Senator Buckwold: My only concern is whether we could have a different standard of defence for the two types of companies, a domestic company or a foreign-owned company operating in Canada.

Mr. Howard: Personally I would recommend against that. That, again, is a pure value judgment.

The Chairman: We have heard all your reasons in support. We think we understand them, but we have views also, you know.

Mr. Howard: Yes, sir; I have noticed that and I acknowledge it.

Senator Desruisseaux: Assuming that a corporation were convicted, would that mean, as my reading leads me to believe, that they would not have to keep the records any longer?

Mr. Howard: No, sir, because they would be charged again the following day and the following day.

Senator Desruisseaux: But is does not say so.

Mr. Howard: There is a section in the back of this statute providing for that. In any event, just as a matter of law they could be found to be in default over and over again. The real remedy under the statute is to get a compliance order to compel them to comply.

The Chairman: Of course, if you are concerned about delay in producing the records, even if you can offer a good and valid reason you may well require that they shall be furnished within a certain period of time, but the difficulty with that is if they are lost or burnt.

Senator Cook: There are enough offences on the books now, surely. If we want to put an offence on the books,

surely the person accused must have the opportunity to offer a fair and reasonable explanation.

Mr. Howard: Section 245(2) contains a provision for continuing offences which, if not boiler plate, is standard in a great many statutes.

The Chairman: Yes, but we have not reached that yet. We may have some comment with respect to that when we get to it, so you should not quote something as authority for something we are discussing now.

Senator Cook: As a matter of fact, that is even more reason why we should introduce the amendment.

The Chairman: That is correct, because every day after the date on which the adequate records are supposed to be produced an offence develops. Therefore a fine can be imposed for each day on which the records do not come forward.

Senator Cook: We would have to go back to the old days, when every corporation had on its payroll a whipping boy to make an appearance in court and be fined.

The Chairman: They would have to establish a special reserve against this section so as to have money available, and I do not believe it would be deductible for tax purposes.

Mr. Howard: I would like to repeat Mr. Anisman's statement: We would prefer that they comply with the law.

Mr. Cook: So would they, perhaps.

The Chairman: So you cannot put yourself in a different position. We firmly support the requirement that those records should be there. We are saying that we think the form in which you are providing insurance in the direction of penalty, strict liability, is going too far. That is the difference.

I notice it is about a quarter to five. Do you feel like calling it a day? I will tell you about tomorrow. We have two submissions in the morning, starting at 9.30, on the competition bill. We should be through with them by 11 a.m. We have the Coca-Cola submission, which involves some very important principles and the question of franchises and geographical areas of assignment. Following that the representatives of Dominion Dairies will appear. I suggest that after we have heard those groups we return to the corporations bill. We must keep pushing it along.

Our difficulty, however, is that we have three important bills at the same time: The competition bill; the Canada Corporations bill; and the income tax amendments. If you think your bill is thick, you should put together the income tax bill, plus the amendments and it is doubly thick.

Senator Buckwold: Would it be unusual if we met on Wednesday evening? Normally that is a free night.

The Chairman: I suggest that if we have a motion in the Senate that we are permitted to sit while the Senate is sitting, which I think we can obtain, we might consider sitting tomorrow afternoon.

Senator Cook: A heavy session in the morning and another in the afternoon is about as much as we can follow.

The Chairman: We will now adjourn until tomorrow morning. We do not have any strict liability penalties for your failure to be here at 9.30, Mr. Howard! If you are here at 10 o'clock, it will be satisfactory.

The committee adjourned.

Ottawa, Wednesday, February 26, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-29, respecting Canadian business corporations, met this day at 11:15 a.m. to give further consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have with us this morning Mr. H. Purdy Crawford and Mr. L. D. Hebb, partners in the law firm of Osler, Hoskin and Harcourt, who will be making a submission in respect of Bill C-29, respecting Canadian business corporations.

I might just indicate what we have on the plate this morning. Before we adjourn, we have to deal with Bill C-40.

I am not asking you this question, Mr. Crawford, for the purpose of trying to press you in connection with your presentation, but can you indicate how long you might be? I have read your brief and I think it is substantial and has value.

Mr. H. Purdy Crawford, Partner, Osler, Hoskin & Harcourt, Barristers and Solicitors: Honourable senators, I would be most surprised, Mr. Chairman, if we were very long.

Senator Flynn: What does that mean?

Mr. Crawford: At the most, half an hour; perhaps less.

The Chairman: Let us say we go for the half hour, at the end of which, if Mr. Crawford has not finished his presentation, we can adjourn the hearing on Bill C-29 until later today and deal with the committee's report on Bill C-40. On that basis, Mr. Crawford, you can proceed. I do not want you to feel that you are being rushed. That is not the case. What you have to say is, I think, quite important.

Mr. Crawford: Thank you, Mr. Chairman. Honourable senators, we appreciate the opportunity of appearing before this committee today—perhaps at some inconvenience to the committee. We were supposed to be here a week ago Tuesday, but could not get out of the airport in Toronto. It was convenient for us to appear today as we had to be in Ottawa for other reasons, and your Chairman and the clerk enabled us to do so.

We do not have many comments on Bill C-29, the proposed new Canadian business corporations act. Mr. Hebb and I, as well as other members of the law firm, have been involved in the process of reviewing and commenting on this bill for several years. Obviously, compromises have been made along the way. I am sure we could list quite a number of things. However, as a practical matter, we want to deal with only three or four points. The first point has no great fundamental significance but is of a good housekeeping character. I guess we dug in our heels a little bit on this one in discussions with departmental officials, to be honest with you. By the way, they have been very co-operative, helpful and imaginative about the whole process.

There is a requirement in clause 109(3) that a Canadian corporation, when it becomes subject to this bill—and you

recall it has to become subject to the bill within five years after its enactment—first of all has to have a majority of Canadian directors. Subsection (3) provides that business cannot be transacted at a meeting of the board unless a majority of the directors present are resident Canadians. It is hard to quarrel with that if you accept the first principle that you have to have a majority of Canadian directors. This is really a point of good housekeeping. It is of no great fundamental significance, but the fact of the matter is that a rather important meeting of the board could be called, but because of transportation problems, the flu or other illness, you could end up without a majority of Canadian residents.

We are not suggesting that the subsection be deleted. Our suggestion will probably apply only to quite a large public company. We are suggesting that if the secretary or other person calling the meeting does not have reasonable grounds to believe that he will not have a majority and can so certify, it can still be a valid meeting. We have not discussed this point with the public officials. Initially we suggested that the subsection be deleted. We got the response: "This is an important matter. We don't want companies putting dummy Canadians on their board." I do not necessarily agree with their response. The argument was that we have to ensure there is a majority of Canadians.

We are proposing a compromise. We are not wedded to the wording we suggest at the bottom of page two of our memorandum. You might be interested in why we put it negatively. Rather than saying that the secretary had reasonable cause to believe that a majority of resident Canadian directors would be present, we put it negatively. We would not be averse to changing it to be positive. The reason for putting it negatively was that some large companies schedule their meetings in advance; you know a long time in advance throughout the year, monthly or whatever, the date on which the meeting is to be held. Normally, therefore, the secretary would not poll or canvass directors before each meeting. That is the reason for putting it negatively.

The Chairman: It seems to me that there is a different kind of situation that might occur with this requirement that a majority of the directors must be resident in Canada. Suppose there are five directors and the quorum is three; three directors at a meeting must be residents of Canada. One of them may be seriously ill, which is a very possible situation. The alternative, in order to have a valid meeting in those circumstances, would appear to be to get the resignation of the director, unless there is some other way of doing it. That may be highly undesirable. As a matter of fact, the man who is seriously ill may be the major shareholder in the company.

Senator Flynn: Or he may not be able to resign.

The Chairman: He may not be able to. This is the sort of problem that was stirring me when I read this brief. The illness situation would cause an inadvertent absence. For instance, last week you could not be here because you could not fly from Toronto to Ottawa. If you had been going to a board meeting in Ottawa and were necessary for the Canadian quorum, they could not have had a meeting.

Mr. Crawford: Mind you, if I was going to appear before this honourable body again I would make sure I came down the night before, I hope.

Senator Buckwold: That would not even guarantee your getting here.

Mr. Crawford: Your point, Mr. Chairman, is a bit broader than the limited amendment I am suggesting. If the director were ill to the knowledge of the secretary, the secretary could not make the certificate that Mr. Hebb and I are referring to. It takes you back to the pros and cons of deleting this requirement. We are trying to work out a compromise that might be acceptable.

Senator Laird: Have you given any thought to the possibility that instead of a regularly constituted meeting there should be a resolution signed by all the directors, some such thing as that?

Mr. Crawford: Yes. That, of course, is permitted in other parts of the bill. It is one of the many good changes in the bill. That becomes difficult in certain circumstances, where discussion in a large public company about the issue is important, and what flows from that discussion. You, honourable senators, well know the intermingling of ideas that may flow from it. That helps alleviate the problem. There is no doubt about that.

The Chairman: Maybe there should be some such provision as they have in the United States when they are selecting juries; they always select two or three more than the panel requires, and they are called alternates. If during the course of the trial a juror becomes ill and is unable to continue, one of the alternates, who sit in court all the time, takes over to make up the panel. Maybe there should be a provision here for alternate directors.

Mr. Crawford: The alternate provision would solve this problem. I do not think now, as a matter of corporate law or under this bill, it would be permitted. The problem is broader than that. However, the directors as such are responsible for the ongoing operations of the company, and if you can jump in and out for one meeting as an alternate it seems to me to be diffusing the basis responsibilities.

The Chairman: Of course, under the bill and under the present law, if you provide for five directors you just could not provide for an alternate.

Mr. Crawford: That is right.

Senator Laird: What about, say, an officer of the company, such as the secretary, being an alternate, someone who was not normally a director?

The Chairman: You would have to change your limits. You have a limit. You say the number of directors shall be five.

Senator Laird: Then there could be a provision saying that there could be substitution if it was impossible for certain reasons to get the directors together.

Mr. Crawford: The requirement that the alternate had to be a senior officer of the company would meet part of the concern I have expressed; there is no doubt about that.

Senator Flynn: I think the problem is more severe when you look at it in the light of a very small board. With a large board the solution might be ratification of the decisions by a majority of the directors. In your case, when you have only a majority of one, if a man is sick you cannot get that ratification. With a large board you could solve that problem through ratification at a meeting where the majority consisted of Canadian resident directors.

Mr. Crawford: Ratification, of course, is not always the solution, particularly if some professional adviser is waiting until after the meeting is held, to give an opinion to the Securities Commission, the Stock Exchange or some financial institution.

Senator Flynn: The idea of having a majority of Canadian residents on the board is to have the decision taken by that majority.

Mr. Crawford: I am not quarrelling with the principle.

Senator Flynn: To be logical, I think the decision should also reflect that majority.

The Chairman: The alternate should be a resident. What is the next point?

Mr. Crawford: In a sense the next two points, which are the only two further points we have in our memorandum, may in terms of basic corporate law be regarded to be fairly fundamental. It depends on how you regard the role of the courts in this area. Some people may regard it as talking about different things on the head of a needle. I am not sure. But I would direct your attention to Clause 110 of the bill, and this is dealt with in our memorandum at the top of page 3.

This gives the directors of the corporation a power to appoint a managing director or committees of the directors and to delegate to that managing director or to the committees of directors all of their powers, except those enumerated in subclause (3) of 110. Then there is a subclause (4) which provides that the appointment of a managing director or committee of directors does not relieve the directors of a corporation from any liability imposed by law.

That could be interpreted—and as a matter of fact we in our office think the probabilities are that it would be so interpreted, although it could be interpreted either way—it could be interpreted as meaning that subclause (4) has the effect of making the directors liable for the acts of the duly appointed committee of the board operating within the committee's jurisdiction as if the directors had done the acts themselves.

We think that represents a rather fundamental change in the law. Also, if our interpretation is correct, it puts a rather serious limitation on the use of committees or managing directors. We have to refer to case law and we have to deal by analogy with an executive committee today, which is what the board can delegate functions to—to an executive committee of the board. I think the law today is that so long as the board is careful in choosing the members of the executive committee and so appointing them, exercising some care and supervision of their functions, and making some judgment on basic policy matters in the company, then the directors as such will not be liable if the executive committee is negligent.

We think, in effect, that subclause (4) should be revised, as we have outlined at the bottom of page 4 of our submission, or with some other appropriate wording to make clear that that will be the result.

The Chairman: You want to put beyond doubt the situation that in these circumstances the responsibility of directors would be the same as the responsibility of the trustees?

Mr. Crawford: That is right. The final point in our memorandum, Mr. Chairman, is quite interrelated to the point we are making, because it also deals with delegation by the board of directors. It is dealt with commencing at the bottom of page 7 of our memorandum. It provides in clause 116, paragraph (a) that, in effect, the directors after designating the offices of the corporation may appoint officers and may delegate to them powers to manage the business of the corporation. We point out in our memorandum that the basic responsibility of the directors in another section of the act is to manage the business and affairs of the corporation. And the word "affairs" is defined, if I can summarize i in general terms, as relating to the relationship between the corporation and its shareholders and officers, public, et cetera, rather than relating to its business.

However, to the extent that you are dealing with the business of the corporation, there is no limitation watsoever on the power of the directors to delegate to officers. Here we are making the converse point. We are suggesting that in this area the bill is too wide. We are suggesting that you should, first, import the limitations for delegating to a committee, which are contained in clause 110 subclause (3), and, second, that he power to delegate, as we state on page 10, should only go as far as is reasonable in the circumstances. That to me, and to our way of thinking, will give the court the right, and the court will look at the circumstances. With respect to a large corporation it is only realistic to suggest that the directors' greatest role is to supervise the management of the corporation; it is not to manage the corporation. They will probably permit a greater degree of delegation than in the case of a small corporation.

Those are our points, Mr. Chairman.

The Chairman: They come at an appropriate time, Mr. Crawford. In our study of the bill with the departmental officers, we have not yet reached the part dealing with directors and the part dealing with shareholders. We have made, I would think, reasonalby rapid prograss, but those were parts, which, as chairman, I felt would require more intensive consideration. Therefore, we are glad to have had your help at this time. I want to thank you very much for coming. Are there any questions?

Senator Flynn: They have made excellent points, Mr. Chairman.

The Chairman: Is there anything Mr. Hebb would like to add?

Mr. Crawford: Yes, there is one point which Mr. Hebb would like to make. We stated in the third paragraph of our memorandum that the bill is a good bill but that we have long since learned that no matter how wise the drafters of legislation are, people all over the country look at these things from their own particular points of view and problems will inevitably develop. We think fewer problems will develop as a result of this bill than has been the case with respect to many others, but we have already had one problem in practice in the last few days. I suppose it is really more of a query which in due course you might be helped with by the public officials.

Mr. L. D. Hebb, Partner, Osler, Hoskin & Harcourt, Barristers & Solicitors: Honourable senators, in spite of the fact that we have focused on various editions of this bill, it is only in the last week that we realized that the substance of section 134 of the Canada Corporations Act—which deals with arrangements, basically very complex corporate reorganizations which require not only share-

holder approval and three quarters majority but also court approval—does not seem to be provided for in the new act.

We have some real concern here. We have recently been doing several arrangements in our office under the Ontario Business Corporations Act. One in particular I am thinking of involves the exchange of shares of a company for the shares of another company which becomes a holding company and then holds all the shares of the first company. That arrangement we are doing by means of comparable provisions of the Ontario Business Corporations Act. Now, the present section 134 and the comparable provisions of the Ontario act do not purport to define "arrangement". They do not purport to contain an exhaustive definition of the word "arrangement," but rather incorporate the case law, the court-made law with respect to whatever an arrangement is. There is a substantial body of court-made law as to what constitutes an arrangement. So the point, very simply, is that here we are concerned that the new act will foreclose to us in future the use of the case law with respect to arrangements, which has been very useful in the past for complex types of corporate reorganizations.

The Chairman: Are you through?

Mr. Hebb: Yes. Thank you.

Senator Flynn: That is a good point.

The Chairman: Mr. Crawford, I want to thank you very much. Personally, I should like to feel that on some of these points I could call you.

Mr. Crawford: Certainly.

The Chairman: Now, honourable senators, having heard all the evidence with regard to Bill C-40 earlier, what we are doing now is to settle the form of our report. Does the committee feel that we should discuss that *in camera*?

Senator Flynn: I so move, Mr. Chairman.

Honourable Senators: Agreed.

The committee continued *in camera*.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

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Issue No. 28

WEDNESDAY, FEBRUARY 26, 1975

Twelfth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

28687—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker—(19)
Haig	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

Minutes of Proceedings

Wednesday, February 26, 1975
(34)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: "The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*), Barrow, Beaubien, Buckwold, Cook, Desruisseaux, Flynn, Hays, Laird and Macnaughton. (10)

In Attendance: Mr. John F. Lewis, C.A., Advisor.

WITNESSES:

Coca-Cola Ltd.:

Mr. Ian R. Wilson, President; and
Mr. Donald A. Burwash, Secretary and General Counsel.

Dominion Dairies Limited:

Mr. Frank Warnok, President; and
Mr. S. F. M. Wotherspoon, Q.C., Counsel.

At 11:15 a.m., following discussion of the above matter, the Committee proceeded to the next order of business.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, February 26, 1975.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, the first order of business this morning is the hearing of submissions on the competition bill. We deal first of all with the submission of Coca-Cola Ltd. and then with that of Dominion Dairies Limited. For Coca-Cola Ltd. we have Mr. Ian R. Wilson, President, and Mr. Donald A. Burwash, Secretary and General Counsel. Would you like to start, Mr. Wilson?

Mr. Ian R. Wilson, President, Coca-Cola Ltd.: Mr. Chairman, honourable senators, we are very grateful for this opportunity to express our views to you this morning, and I should also like to express our thanks for your interest in our brief.

We have a number of concerns regarding Bill C-2, and most of these we share with others. There is, however, one particular aspect that strikes at the very structure on which the Coca-Cola business is based, and it is to this that I should like to turn my attention this morning. Here I am referring to the Restrictive Trade Practices Commission powers, under the proposed section 31.4, of prohibiting any requirement that a bottler be confined to a defined territorial area. May I describe very briefly our bottling system?

On a world-wide basis the underlying structure of Coca-Cola is very simple, and Canada is typical of the way in which we do business. We manufacture concentrate and bases and supply these to local bottlers—in this case 60 contract bottlers scattered around 76 bottling operations in Canada, along with some 20 other operations on our own. These contract bottlers are granted an exclusive right to bottle and sell in a defined territory, that is, a geographical area. This is done for three basic reasons: first, to assure ourselves that the territory is capable of producing sufficient volume to make that a viable business area; secondly, to enable the bottler to make the substantial investment which is necessary in building the land, the plant, the machinery and bottles in which to assure him a return; and, thirdly, to make certain that it is an economic entity in which to sell, and then collect the returnable bottles that are so important to consumers both in terms of price and to our bottlers as a staple part of their business.

In addition, we believe that the exclusive territory system provides the most economically efficient and socially desirable method of operation for a soft drink business at the local level with local investment and initiative. I say "economically efficient" because Coca-Cola has as its objective a system which results in the lowest possible price to our consumers. The lower the consumer price, the more concentrate we sell, so there is a marrying of interests there between the consumers, the bottlers and ourselves. Some might ask whether such a system might not encourage monopolistic practices and subsidize inefficiency, but we are confident that this is not so, becasue the vigorous and sometimes almost vicious—here in Canada—competition within the industry's 200 bottlers provides a ready answer. We have in Canada, in addition to the 200 bottlers, of which approximately one-third are Coca-Cola bottlers, competitive private label products which all the chain stores manufacture and sell, so that not only within the industry but outside the industry we are subject to competition. In our opinion, any prohibition of the right to an exclusive territory by the Restrictive Trade Practices Commission would wreak havoc with the 50-year old Canadian bottler franchise system. It would destroy the very tenets on which the system is based. This opinion is shared by the Canadian Soft Drink Association in their submission and by the other franchise houses who operate here in Canada.

At the present time we are starting to suffer from the uncertainty that this aspect of Bill C-2 is creating in the minds of our bottlers. As recently as yesterday, when we were at a big bottler meeting in Quebec City, we found that our plans for expansion are being thwarted by bottlers who say that they simply will not invest money in returnable bottles without some assurance that the territory they are investing in will be safeguarded.

We have at the present time three sale or re-organization situations in territories, Sault Ste. Marie, Sudbury and North Bay, in which all the negotiations are held up pending the outcome of this, because people are saying what have you got to sell if you have no territory and no right to sell there? Then you have no assets. This is causing tremendous uncertainty among those upon whom we rely in Canada. Those are 60 local Canadian entrepreneurs, local men operating within their local communities. This uncertainty is beginning to affect returnable glass. Returnable glass is the product we can provide to the consumer at the lowest possible price. It is the package most favoured by the environmentalists.

In conclusion, I would like to outline six results which would in all probability flow from any RTPC order eliminating exclusive territorial arrangements. Those are: Firstly, havoc in the soft drink industry because the whole basis would be destroyed; secondly, the destruction of substantial investments by the smaller bottlers, some of whom are in the third generation and would have the whole substantive value of their franchise eliminated overnight by losing this territory; thirdly, the discouragement or delay in future investment by bottlers on a decentralized basis; fourthly, the elimination of the returnable bottle which, as I said, is not viable in a non-exclusive environment. If those bottles are sent out someone else might take them back and a loss would be incurred. A litre bottle costs 25

cents and the deposit is 5 cents. Fifthly, the reduction in availability of a wide range of products, package options and services, especially to the small outlets. The chains, the supermarkets, would be fine; they could do their distribution and make certain there would be distritution. The small, local 70,000 outlets in Canada, the "mom" and "pop" type variety store on the corner, would be seriously affected. Finally, and in my opinion this is very important to all levels of the population, is an eventual increase in price to the consumer. As we have got centralized production, these long arms of distribution going out there would be a potential reduction in the amount of competition and certainly an increase in price.

Mr. Chairman, that really in a nutshell sums up the comprehensive matters with which we have dealt in our brief. If there are any points which we could now clarify or detail better, we will be glad to do so.

Senator Laird: You mentioned the Canadian Soft Drink Association. How many members does it have?

Mr. Wilson: Two hundred.

Senator Laird: Does that include all bottling firms in Canada?

Mr. Wilson: All bottling firms, with the exception of some of the chain stores who, in fact, bottle soft drinks, but are not members.

Senator Laird: And you yourself have 60 dealers?

Mr. Wilson: We have 60 bottlers.

Senator Laird: But I notice in your brief that you produce products other than Coca-Cola.

Mr. Wilson: We make Coca-Cola, Sprite, Fanta, Tab and Fresca.

Senator Laird: I could not understand your point with regard to a handicap in connection with returnable bottles because such empties could be used by other companies. Did I understand you to say that?

Mr. Wilson: No, honourable senators; I meant that if territorial exclusiveness was done away with, then if the bottles were mine you could come into my territory, take my bottles back and refill them in your plant.

Senator Laird: That is what I was coming at.

Mr. Wilson: Yes, both of us being Coca-Cola bottlers.

Senator Laird: But would it not be possible to so shape your bottle that it could not be used for other products because the shape would identify with your product?

Mr. Wilson: Yes, that is in fact the case, sir, with Coca-Cola. However, there would be competition between two Coca-Cola bottlers, both putting Coca-Cola into the bottles, which would really render our job as a centalized administrative office impossible. These people would not be speaking to each other.

The Chairman: Mr. Wilson, you referred to section 31.2 in Part IV.1 of the bill.

The first paragraph, (a), at page 16 of the bill provides for an application to be made by the director if he has received a complaint that a person has not been able to obtain supplies. The director makes an application to the commission. The authority and the basis which must exist to support that application if the commission is to make an order is found in that language.

Paragraph (a) now speaks of "a person is adversely affected". Proposed amendments in the committee of the House of Commons suggested changing the word "adversely" to "substantially", but you will notice the language "a person is adversely affected in his business". If we were to strike out the words following, "or is precluded from carrying on business" we would simply have, "a person is adversely affected in his business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,".

The connotation of that would appear to be that the person who makes a complaint must be in the business in respect of which he says that due to his inability to obtain supplies he is adversely affected. If the limitation were applied that the person could not use this section to start up a business of bottling and selling soft drinks but must already be in that business, what would be your comment as to how that would affect, or affect in a lesser degree, your position?

Mr. Donald A. Burwash, Secretary and General Counsel, Coca-Cola Ltd.: Mr. Chairman, our concerns centre largely not around section 31.2, but around section 31.4 and, in particular "market restriction". However, that is not to say that we do not have some concerns with respect to section 31.2, which I believe you will find dealt with in some detail on pages 18 and 19 of our brief to honourable senators.

Again, although we are concerned with respect to section 31.2, we feel that your suggestion would certainly relieve much of the anxiety if it were adopted by Parliament and the person had to be in that business insofar as section 31.2 is concerned.

The Chairman: That is the threshold, is it not?

Mr. Burwash: The thrust of our concern is not in connection with section 31.2, but with respect to "market restriction" in section 31.4, under which the Restrictive Trade Practices Commission will be granted power to prohibit, in effect, exclusive territories.

The Chairman: What do you have to say with respect to paragraph (b) of section 31.4, which appears at page 20? Would you describe your operation as "tied selling"?

Mr. Burwash: Tied selling, as I understand it in the bill, means a practice where a supplier, as a condition of supplying product A, obliges the purchaser to purchase products B and/or C and/or D.

The Chairman: I was trying to find out whether (b) in this form, or by any amendment that might be made, would fit your position. That is, is there a technological relationship between or among the products that you supply?

Mr. Wilson: The answer to that is, "No," in that we try, through our expertise, to provide a full range of products that will meet most of the demands in the bottle marketplace. But it is not conditional. We do not give our franchise on condition that he will also bottle the other products.

The Chairman: Either he handles your product or he has to give up having your product and go elsewhere; is that it?

Mr. Wilson: No, sir, that is not so. We ask him, and we try to earn our exclusivity rather than do it by agreement, by promoting these products in the marketplace and keeping him sufficiently busy and profitable selling these so there is no necessity for him to go elsewhere.

The Chairman: You regard the bill as adversely affecting you, certainly in the territorial aspect of your operations?

Mr. Wilson: Yes, sir.

The Chairman: In relation to your dealers?

Mr. Wilson: Our whole structure in this country is based on their right to have exclusive territories.

The Chairman: You say that structure is basic to the operation of a business such as yours?

Mr. Wilson: Yes.

The Chairman: And it is a business practice on which your business has been carried on for many years?

Mr. Wilson: For many years—from the beginning, and in many countries, throughout the world.

Senator Buckwold: I certainly have every sympathy for Mr. Wilson in the fact that many businesses are involved in exclusive territorial arrangements which in fact do not lessen competition but make a more competitive policy possible in an overall situation, keeping in mind the chaos that would result in unlimited territorial rights for anyone who had the franchise.

It seems to me that it may be settled on the basis, again, of the definition of the word "product" that we talked about earlier. As I look at section 31(3)—the subsection that worries you—it says:

> (3) Where, on application by the Director, the Commission finds that market restriction, because it is engaged in by a major supplier of a product—

Which could apply to you.

> —or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product,—

We have had it fairly carefully explained to us that the interpretation of the word "product" is a generic term; it is not a brand name. We went into that at some length. The chairman can correct me, but I believe we were assured that the word "product" would in your case mean soft drinks. In other words, if, as a result of this kind of territorial exclusiveness, there was a shortage of soft drinks, generically, in the area, the act could in fact be enforced.

I do not think any of us would object to that, if we just could not buy any other soft drinks and Coca-Cola had such an exclusive basis that it was impossible for anyone to get the product. On the basis of that interpretation—again the chairman can correct me if I am wrong—I am wondering if that would basically relieve your problem.

Mr. Burwash: The honourable senator has anticipated my next comment, if I might respond to that. We proposed that "product" be defined to ensure that in assessing the effects of competition all reasonably or functionally competitive or substituted goods are taken into account.

At the time the new section 31.2(2)—that is the refusal to deal section—was proposed by the minister on December 3, 1974, we proposed that it should be deleted as not then being required.

If I may explain our reason for proposing this, it will enable the commission in all appropriate cases to consider products which are realistically in competition with each other in the market. The effect of the minister's proposal—the December 3, 1974 proposal— in section 31.2(2), which is the refusal to deal section, is to restrict the definitional aid in the refusal to deal section alone, when it should apply, in our view, to all of the reviewable and prohibited trade practices including market restriction. If the definition of "product" is not revised, in our view there is a realistic danger that each branded product, and perhaps each product having only a slightly different specification, could be regarded as the only product which could be looked at to determine the effects on competition.

Senator Buckwold: You did not answer my question. My question was, if the broad term of "product", generically, was applied, would this not in fact solve your basic problem?

Mr. Burwash: It would go a long way in solving our basic problem. We would propose in addition, however, that the threshold be raised so that the Restrictive Trade Practices Commission could only look at exclusive territories or market restriction.

In the soft drink business, there should be very substantial competition among competing products and among competing suppliers of those products. That, if you recall, is the submission of the CSDA, the Canadian Soft Drink Association, which we, of course, endorse. There are perhaps two things to be concerned with, sir—

The Chairman: Mr. Burwash, habe you considered the amendment which the minister proposed in the Commons committee to section 31.2(2)?

Mr. Burwash: We have, sir. Is it 31.4(2)?

The Chairman: It is 31.2(2).

Senator Buckwold: On which page is that?

The Chairman: May I read it, in order to make my point? It says:

> Add a new sub-section 31.2(2) as follows:
>
> "(2) For the purposes of this section,—

That is, section 31.2.

> —an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade mark, proprietary name, or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless he has access to the article so differentiated.

I can tell you, frankly, that I looked at this for a long time and I am not sure that I know what it means even yet. I have thought of a few changes which I am going to try out on you.

If instead of "unless"—and that is the "unless" following "or the like,"—you had, "only if" so that it would then read, "only if the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on (his) business"—I would add the word "his"—"in that class of articles unless he has

access to the article so differentiated." I think that change would improve the situation, but the question is whether, in your opinion, it goes far enough to protect the situations you have presented to us.

Mr. Burwash: Mr. Chairman, again the amendment proposed by the minister on December 3 in respect of section 31.2(2) applies only to the refusal to deal section and, therefore, does not apply to the definition of product, or the lack of definition of product, and market restriction.

The Chairman: It deals with exclusive dealing.

Mr. Burwash: I believe, Mr. Chairman, it deals only with refusal to deal.

The Chairman: It is a proposal to add a new subsection 31.2(2). Although it says "add," it is not clear what happens to the existing subsection (2).

Mr. Burwash: I agree, Mr. Chairman, that it is not quite clear, but it is my understanding, on the advice of outside counsel, that the minister's proposed amendment 31.2(2) applies only to the refusal to deal provisions and not to market restriction, tied selling, or exclusive dealing.

The Chairman: I admit there is some confusion. The proposed amendment says "add a new subsection," and that leaves me wondering about what happens to the existing subsection.

Mr. Burwash: That is a good question, Mr. Chairman.

The Chairman: In the comment which follows what I have just read, the minister says:

> Considerable concern has been expressed about the possibility that the Commission might interpret 'product' to mean an article bearing a particular brand name, and order the supplier (who would be in a monopoly position with respect to that brand name) to supply would-be buyers. This represents a misunderstanding of the intention of the section. There is only a very small number of sectors where one firm so dominates his industry that without supplies of his branded lines, a dealer cannot stay in business. The proposed change is intended to make clear that it is only in such exceptional circumstances that the Commission would interpret the word product or article in this narrow sense rather than in the sense of a class of articles.

If I might be permitted a comment, I do not think the comment attached to this section bears on the section which I have read. The comment might indicate what the department was hoping to correct, and perhaps that was in line with Senator Buckwold's question.

Senator Buckwold: I am not versed in the niceties of the law, Mr. Chairman, but wouldn't the minister's definition of "product" as being not a specific item by brand name, apply as the definition throughout the entire act?

The Chairman: Is Coca-Cola a brand name?

Mr. Wilson: Yes, Mr. Chairman.

The Chairman: If you have a brand name, then it is a product with a brand name. You are wondering whether the word "product" as used in the bill recognizes a product with a brand name as being a separate and distinct product?

Senator Buckwold: No, Mr. Chairman. I feel that the interpretation of the word "product" as being a soft drink, not Coca-Cola, takes away most of the problem that is facing the Coca-Cola Company in so far as its territorial exclusiveness is concerned.

The Chairman: You are saying that even a brand name should not make it a separate product?

Senator Buckwold: Yes. The example of Kodak cameras came up several times at our earlier hearings and the minister agreed that the key word, really, was "cameras", and not any particular brand name. As far as I can see, this bill would not affect the Coca-Cola Company as long as there was a reasonable supply of soft drinks. In other words, no one is going to be put out of business as long as there is a supply of soft drinks.

The next part of my question deals with how this bill might affect Coca-Cola in its control of exclusive dealers. In other words, whether Coca-Cola could prohibit one of its franchise bottlers from moving into somebody else's territory. I presume you do that presently?

Mr. Burwash: Yes, senator.

Senator Buckwold: Can you tell me whether this bill, if enacted into law, would preclude Coca-Cola from saying, "Sorry, Mr. Bottler, but under our franchise you have a distinct geographic territory and you cannot go into another area." Would that be prohibited under the new act?

The Chairman: If the bill is left the way it is, there will certainly be problems. The director could make an application to the Commission in relation to a man whose business is substantially affected to the point where he is unable to get supplies, and he could also make an application on behalf of some person who is not then in the business but who wishes to get into the business but is precluded from getting supplies. If the bill is left as drafted, then we will be building up a lot of trouble and confusion. You might disturb not only the business practice of a company such as this, but many other companies.

Senator Buckwold: That is what concerns me, Mr. Chairman. Perhaps I can explain it in a different way.

The Chairman: Let me just add, Senator buckwold, that you were the one who brought up the question of cameras vis-à-vis Kodak cameras, and under the bill as it is presently drafted, the Kodak people might, themselves, be in trouble.

Senator Buckwold: I think that the minister's definition is clear enough. It has been stated many times that they are not worried about brand names but supplies of products. I can see problems with respect to an aggressive franchise dealer who has a certain territory and who then decides, because he has sufficient plant capacity, to get hold of a large distributor outside his territory. I do not know whether you control prices. Maybe you do; maybe you do not, but the result will be that you will get complaints from your franchisee in the territory affected. In those circumstances, would you then go back to the aggressive dealer and threaten to take away his franchise if he does not stop encroaching on the territories of other franchise holders? I presume that is what you would do now, but this dealer, under the proposed legislation, could apply to the Commission on the basis that you are restricting his ability to do business and, by taking away his franchise, making it impossible for him to conduct his business. I see that as a fairly significant danger.

Mr. John F. Lewis, C.A., Advisor to the Committee: Mr. Chairman, a very interesting point has been brought up, that being the interplay of sections 31.2 and 31.4. Section 31.4 talks about the franchise dealer and his relationship with his franchisees. That is market restriction; that is an agreement to restrict the market, which has been the business practice. Then we go to section 31.2, which is the refusal to deal provisions. This deals with the relationship of Coca-Cola, say, and also its franchisees with the other people who wish to get into the market. Under clause 31.2, as it is worded, both before and/or after this proposed amendment, this gentleman could go to the minister and ask for an order, saying, "I want to have the right to bottle Coca-Cola in the Province of Quebec", or in a certain county. The minister's proposed amendment, in talking about a separate product, applies only to clause 31.2. I think you agree with that.

Mr. Burwash: Yes.

Mr. Lewis: However, it does not solve the whole problem of market restriction. Similarly, the definition of "product" merely says "includes an article and a service," and any amendment to affect clause 31.4, market restriction, should be in the definition section, when it would be covered, but the minister's proposed amendment would apply only to clause 31.2. That is a very good point.

Mr. Burwash: In our view, that is quite clear. We would propose that "product" be defined, as it is not now defined, to ensure that in assessing effects on competition all relevant and substitutable products or goods be taken into account. We agree with your view that the minister's proposed amendment of December 3 to clause 31.2 applies only to refusal to deal. I think that is confirmed, if you look at clause 31.2 (3), where the minister proposes:

> For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Those words appear only in the refusal to deal clause and not in any other clause. When he says "for the purposes of this section" he must clearly and only mean clause 31.2, refusal to deal.

The Chairman: If you amend the word "product" in the definition section you are affecting the interpretation of any clauses of the bill where that word occurs. Do you need to go that far? Could you simply provide in relation to the clause with which you are concerned that for the purposes of this clause or subsection "product" shall mean so-and-so?

Mr. Burwash: It would go a long way to helping us if the word were so defined, and perhaps extended to tied selling and exclusive dealing, if it were appropriate to do so. However, we feel very strongly that it should be amended for market restriction to mean all generic products, as the honourable senator mentioned.

The Chairman: Would you say, as far as you are concerned, only for market restriction?

Mr. Burwash: We would propose that it be amended for all the reviewable practices clause as well as prohibited practices, where appropriate. I do not have the exact wording, but that has been suggested to us by counsel.

The Chairman: That is enough. You say, in the reviewable transactions?

Mr. Burwash: Yes, sir.

Senator Laird: Is there anything wrong with putting the definition in the interpretation section, from your standpoint?

Mr. Burwash: No, sir. This is what we would recommend.

Senator Laird: You would prefer that?

Mr. Burwash: Yes. It is not there now, as you know.

The Chairman: There is a proposal that relates to clause 2. The staff have been looking at it, and the committee will recall witnesses who have dealt with this. There was a suggestion that "product" might be defined as follows:

> and unless the contract shall otherwise require all articles and services that are functionally competitive therewith or may be reasonably substituted therefor.

Senator Buckwold: To me that sounds very reasonable.

The Chairman: I thought it was. The purpose of putting these words together as I read them was to make it clear that the words "article or service" should not be construed so narrowly that the generic product would not be included. It does not seem reasonable that in the case of, for example, electric stoves the word "product" in clause 31.2 could be construed to mean a stove manufactured by one particular manufacturer. That is exactly the point I have been making.

Senator Buckwold: Again I submit that with that definition there most of the problems the witnesses have raised would disappear.

Mr. Burwash: A large part of it. We also propose, however, that the threshold for the RTPC intervention be raised to limit the possibility of intervention to instances where there are effects on competition in the soft drink industry which are unambiguously serious, where non-intervention would allow serious use of very substantial competition amongst products in members of the industry. That is, in effect, the recommendation of the Canadian Soft Drinks Association, which we support.

The Chairman: Mr. Burwash, you were asked a question a little while ago by Senator Buckwold, but I do not recall having heard an answer. If one of your bottlers who has an assigned territory wants to expand and move into the neighbouring territory, which is already occupied by another one of your dealers, are there any sanctions in your agreements that would preclude him from doing that, or any penalties that he would incur?

Mr. Burwash: Yes, sir, there are. I believe I answered by nodding my head to the honourable senator. I should have spoken orally. I am sorry. The contract bottlers are registered users of our trade marks for a specific territory only, under the Trade Marks Act. The contracts prohibit him from selling outside those territories, in order to protect the investment of his neighbouring bottler or bottlers.

The Chairman: With the registration in the form in which it is, they could not operate outside the territory the registered user gives them?

Mr. Burwash: Quite right, sir.

Senator Buckwold: I am concerned that the bottler may apply to the board saying "You cannot take away my

franchise because you are restricting competition; I am ready to go out," and this could create a problem.

Mr. Wilson: The aggressive bottler would go out and take the easy business in the adjoining territory; he would take the chain stores and the bulk business that he could get into. The loss of this business, the cream on the top, would make the defensive bottler's business no longer viable, and he would then have to serve the small "mum and pop" type outlets, having lost the bulk of his business; he would simply go out of the business, because he needs the balance between the bread and butter accounts and the large volume to remain stable.

Senator Buckwold: I recognize the problem and I support you 100 per cent, but I am just wondering whether the bill might protect such an aggressive dealer.

The Chairman: The question appears to be this. If a bottler who is operating in a territory that has been granted to him, as between Coca-Cola and himself, who is the registered user of that trade mark limited to that territory, moves out of that territory, he would appear to have lost his right to use that trade mark as the registered user, because he has gone out of the territory to which it is applicable.

Senator Buckwold: I understand all that. I guess I am not getting my point across.

The Chairman: I do not see how the commission could make an order that could be effective.

Senator Buckwold: Well, if Coca-Cola says to this dealer, "We are taking away your franchise because you are not abiding by your contract, he then appeals to the commission and they say, "You cannot do this." I am just wondering if anything in the act would prevent the commission from doing that.

Mr. Burwash: If the word "product" was amended as you have suggested, honourable senator, and we would support your recommendation, then as well as the threshold being raised to limit the intervention of the Restrictive Trade Practices Commission, except only when there is the absence of substantial competition among products and among vendors, it would be my view, just thinking out loud with you, that the board would not have power to do that.

Senator Buckwold: That is what I thought.

Senator Desruisseaux: Mr. Chairman, the witness has referred to franchise restrictions. I wanted to ask whether they had price restrictions in their franchise.

Mr. Burwash: With our bottlers, sir. The bottlers are restricted in one way only so far as prices are concerned. They may not charge more than the prices specified by the company. In other words, there is a maximum above which the bottlers are not permitted to sell. They may sell as low as they wish, but they may not sell above certain prices in that territory.

The Chairman: Let us move on to the next point, Mr. Burwash. What is the next point?

Mr. Burwash: We will not burden you much further, Mr. Chairman. I think our other points are covered in the brief. I should like to deal briefly with our proposal that the full right of appeal to the courts of law be allowed on both fact and the law.

The Chairman: You mean from the decisions of the Restrictive Trade Practices Commission?

Mr. Burwash: Exactly.

The Chairman: It has been suggested that there is enough ground for appeal provided in the Federal Court Act. Frankly, as a personal view, that is not my view.

Mr. Burwash: We would support your view, sir.

The Chairman: But there is precedent for having a right of appeal to the courts—and to the regular courts wherever the problem occurs—from decisions of the commission, if it is provided. Is that what you suggest?

Mr. Burwash: Yes, sir. We feel that fallibility is such an important thing in an entire distribution system, in our case the soft drink distribution system.

The Chairman: This bill, in the form in which it is drawn, would appear to establish the infallibility of the commission.

Mr. Burwash: Yes, sir.

The Chairman: You want a right of appeal?

Mr. Burwash: Yes.

The Chairman: Do you want just one right of appeal?

Mr. Burwash: One right of appeal.

The Chairman: One right of appeal to the court of appeal in the province or to the trial division?

Senator Laird: Or to the Federal Court?

Mr. Burwash: Or to the Federal Court? I am sorry, sir. I had not considered it to that extent. I would think probably to the trial division—certainly, in the first instance.

The Chairman: But then with whatever appeals exist for appealing from the decision of the trial division.

Mr. Burwash: Yes, sir.

The Chairman: Were there some other points, Mr. Burwash? We are looking for information from you, too, you know.

Mr. Burwash: If I may just conclude the appeal suggestions, sir, just briefly, we feel that, when fallibility becomes so important to an entire distribution system, the cost of getting a product to the market and the ultimate cost to each consumer and the right to have an error corrected or at least make argument as to an error on facts in evidence before the Restrictive Trade Practices Commission are essential to the soft drink business.

We have been advised by outside counsel that there are provisions of the bill which are of questionable constitutional validity. Those provisions would be the ones which create a right to civil damages, which empower the commission to regulate certain business practices—in other words, the ones we have been speaking about this morning, the reviewable practices, as well as the interim injunction provisions. These are of questionable constitutional validity, so we have been advised.

We and our contract bottlers are again left in doubt. The uncertainty element is there again as to many important long term and medium term business decisions. In today's economic climate we feel that uncertainties in investment

decisions would not appear to need any further encouragement.

As recommended by the Economic Council of Canada, there should be an immediate reference to the Supreme Court of Canada of these constitutionally questionable provisions before their proclamation. It would indicate to all that the cost of such litigation ought not to be borne by those who are first proposed to be brought before the Restrictive Trade Practices Commission.

Senator Flynn: Would you specify those provisions which you are thinking of?

Mr. Burwash: Yes, sir: the interim injunction provisions; the civil damages provisions; the reviewable practices provisions—the market restriction, the refusal to sell, tied selling and exclusive dealing; and perhaps the jurisdiction of the Federal Court. I am not too sure about that, but, certainly, the first three.

Senator Flynn: That is quite clear.

The Chairman: What do you say about the interim injunction? An interim injunction, of course, even for a short period of time, could do a lot of damage to a business operation.

Mr. Burwash: If you are familiar with the wording, Mr. Chairman, of the interim injunction provisions, they could go on forever. There is no limit in time. We are advised that those provisions are, perhaps, constitutionally questionable.

The Chairman: Well, except that if you are calling something an interim injunction, then you have to give some significance to the word "interim."

Mr. Burwash: Yes, sir, I agree with you; but the fact that the bill allows interim injunctions, of whatever length, is, we are advised by counsel, of questionable constitutional validity.

The Chairman: You know, there is a principle, too, in connection with interim injunctions. If the failure to get an interim injunction and to arrest things at the stage where they are might do irreparable damage, that seems to be the basis for granting an interim injunction. But I had not thought in terms that under this bill an interim injunction could go on forever, because the very term "interim injunction" involves a limited period of time.

Mr. Burwash: Yes, it allows the courts to issue an interim injunction. I am looking at clause 29.1 on page 11 of the printed bill. On page 12 it says that:

> . . . the court may, by order, issue an interim injunction forbidding any person named in the application from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence, . . .

As you say, the word "interim" suggests that it be for a limited time. However, our point really is that perhaps the whole concept of interim injunction is of questionable constitutional validity.

Senator Flynn: Why?

Mr. Burwash: Sorry, sir. We are advised by counsel outside and I cannot answer your question, sir.

Senator Flynn: I can see your point with regard to civil remedies.

Mr. Burwash: Yes, sir, particularly when those civil damages or reviewable practices are confined within a province.

Senator Flynn: But with regard to the interim injunction, I do not see your point. I would have to guess.

Mr. Burwash: I would like to be able to answer your question, sir, but, I am sorry, we were simply advised by counsel.

Senator Laird: It has always been my understanding that there has been reluctance to refer any constitutional issue to the Supreme Court of Canada before proclamation of any legislation. Am I right? Is my memory accurate?

The Chairman: You say there has been a reluctance. Let me tell you what there has been in fact. We have provided, in certain bills, that the bill shall not come into force until the matter has been referred to and dealt with by the Supreme Court of Canada, and I think in one or two instances we have limited this prohibition to particular sections. We can certainly do that.

Senator Laird: That is interesting, because I remember proposing it once—I have forgotten under what circumstances—and being slapped down in a hurry.

The Chairman: Well, you know, the atmosphere changes, depending on the subject matter. That is only one question, however. You said you had another.

Senator Laird: No. That is the principal one.

The Chairman: Any other questions?

Senator Flynn: I was wondering, Mr. Chairman, if the problem of Coca-Cola with regard to territorial exclusiveness would be the same in all other industries which have similar agreements.

The Chairman: Yes. We had a brief, you may recall, from the bottlers' association.

Senator Flynn: Yes. Well, I am not speaking of bottlers. I am going outside the field of bottling. I am speaking of generally, in industries where they use this system of territorial exclusiveness. Would you know about that, Mr. Burwash? I am trying to see whether, if we make a correction, or meet the problem, we may be creating other problems for someone else; if we may be correcting the problems of someone else outside the bottlers.

The Chairman: Yes. Well, any changes would have to deal generally with the problem.

Senator Flynn: Is it always the same problem?

The Chairman: It is broader than just the bottlers' situation, of course. I take it Mr. Burwash would agree with that.

Mr. Burwash: Yes. We are not entirely familiar with that.

The Chairman: Do you have anything else to add to what you have already said, Mr. Burwash?

Mr. Burwash: We have spoken of civil damages. We feel that it should be made clear, and very certain, that any civil damage provision, assuming it is constitutionally valid, is not retroactive, and does not apply to any act or any conduct which occurred before the passage of the act.

Senator Flynn: I am in agreement with that, but as far as I am concerned I would delete the reference.

The Chairman: The retroactive effect?

Senator Flynn: I would delete the whole thing. I think the remedy exists in civil law in each province.

The Chairman: Except that there is a broader right, a broader question. You have agreements in existence, you see, and they have terms to run. People have committed themselves in relation to those terms and conditions, and they may still have two, three, five years to go. Now, should there be some restriction, or some exception in the bill, so as to read out of the provisions of the bill situations of that kind? This is a question we have to think about.

Senator Flynn: Yes.

The Chairman: And it may be a very serious question indeed.

Senator Flynn: Yes, although, if we decide that something should not be done any longer, I think the contracts in force would have to be modified accordingly.

The Chairman: It could be one of the conditions for entering the threshold of reviewable transactions, because this set of circumstances must exist.

Senator Flynn: That other point would worry me more.

The Chairman: I am just raising this matter. We do have to think about it.

Senator Flynn: I know. Now, Mr. Chairman, may I have a reply to my question about territorial exclusiveness in other fields than that of the bottlers?

Mr. Burwash: My reply was, sir, that I am not familiar with the territorial restrictions in most other industries.

Senator Flynn: I thought you would add some comment to that. You are very prudent.

Mr. Wilson: The only differential I could possibly think of, senator, is the problem of returnable bottles. Here is a bottle that cost 25 cents, on which the deposit is five cents. That has to go out and be returned, and that puts some territorial restriction in terms of distance on a territory. Whether there are any other industries that have that peculiarity or not, I do not know; but I think this would work to the benefit all of the franchise agreements.

The Chairman: Any other questions, senators? Do you have anything further to add, Mr. Burwash?

Mr. Burwash: Well, I do have one last point, sir. We are of the view that the reviewable practices sections, plus the implementation of foreign judgments, section 31.5, and the implementation of foreign laws and directives, section 31.6 are each capable of the interpretation that the onus is on the person called before the Restrictive Trade Practices Commission to justify the marketing or distribution system. We note in our brief that the former minister, the Honourable Herb Gray, before the committee, indicated that the department was then prepared to draft an amendment for the purpose of making a clarification to the effect that the onus would not be on the person.

The Chairman: Well, supposing, Mr. Burwash, we provided in the bill, in Part IV, for instance, and maybe in the other sections that you have mentioned, that the onus is on the director.

Mr. Burwash: Yes, sir.

The Chairman: He makes the application.

Mr. Burwash: Yes, sir.

The Chairman: He hears the complaints.

Mr. Burwash: Yes, Mr. Chairman.

The Chairman: And puts the onus on him to prove his case.

Mr. Burwash: Yes. We suggest also that perhaps the restrictive Trades Practices Commission not be both investigator and judge, but limit its role to being "judge", and allow the director, and only the director, to be the person that presents evidence.

The Chairman: You are raising another question there, and I am surpirsed that so few people who have appeared before us have raised it. That is as to whether the commission is the proper body to deal with the situations in Part IV, seeing that it is a complete part of the investigative processes of the Combines administration, and whether we should not have what is in process in the United States, that is, the setting up of an independent customer protection agency. What would you think of that?

Mr. Burwash: I am sorry, Mr. Chairman. I have not had an opportunity of considering that. I had contemplated that the director and his office would be the people who assemble and present evidence; and that the TPPC not be empowered to collect its own evidence and be its own investigator, and then later be the judge of its own information that it has collected.

The Chairman: But you recall the procedures in the Combines Act. The commission enters into it in the very beginning. Some commissioner issues the order for a search warrant, and some commissioner presides at the investigation, and the hearing of evidence, and in the course of the investigation. Then the director may refer his report to the restrictive practices commission for them to hear and consider evidence, and give the people who are affected by the report the opportunity to be heard. Then they report to the minister. Now, in their report to the minister, if you look at the form of their report, they discuss the evidence in the light of pertinent sections, particularly in Part V of the present act. So you have that thread running the whole way through in the investigative processes where the commission enters into the picture. Is that the body that should have the added authority, and can you assume that it can shed itself of all the investigative procedures and the information that they have collected for the purposes of Part IV?

Mr. Burwash: One would think it would be rather difficult to do so, since we are all human and they are. We would not unnaturally prefer that they confine their role to the consideration of the evidence submitted by the director.

The Chairman: But there is the other consideration that perhaps some body is needed under Part IV because otherwise the alternative that the government might take could be to make these things provided for under Part IV criminal offences, and that condition would be worse.

Mr. Burwash: We would have to agree with that. However, my suggestion would not necessarily exclude the

director's assembling the evidence and presenting it to the commission for a civil ruling.

Senator Cook: It certainly makes a very strong case for having the right of appeal.

The Chairman: Any further questions?

Mr. Burwash: Thank you for the opportunity of being here and making our presentation this morning.

The Chairman: Now we have representatives from Dominion Dairies Limited. Those representing Dominion Dairies are Mr. Frank Warnok, President, and Mr. S. F. M. Wotherspoon, Q.C., Counsel.

Mr. Wotherspoon, I gather you are going to make an opening statement.

Mr. S. F. M. Wotherspoon, Q.C., Counsel, Dominion Dairies Limited: I would like to make an opening statement and then have Mr. Warnok add a few words.

Mr. Chairman, honourable senators, in our brief we deal essentially with six points. We have assumed that we are dealing with these in the light of the minister's comments of December 3. Touching on what you were dealing with a moment ago, the Restrictive Trade Practices Commission has traditionally been a commission of inquiry, and the whole thing is structured in that way. As a commission of inquiry where they could not make orders that would be binding on anybody, the matter of rules of evidence and behaving like a court were not of the same importance, but essentially this new Part IV creates them as a court—the same people as you were suggesting.

Here I should like to refer to one case; Dominion Dairies were only once in conflict with these people. Some of you may remember that in the early 1930s there was a milk war in Ottawa. At that particular time one of the dairies, not Dominion Dairies, offered milk at half price to one of our largest supermarket shopping areas. Dominion Dairies were in my office within a matter of minutes asking what they should do. After considerable discussion and advice Dominion Dairies met the competition, and they provided milk at half price too. But I told them also that they had to offer that to every competing store because that was what the act said—that you could not give a discount to one and not to another. The director requested the commission to have an inquiry, and the inquiry was held by this commission we are dealing with now and, to our amazement, the commission said that Dominion Dairies had offended—not the one who started the war. As a result of that, through the directors, the Department of Justice took hold of it and we were charged. Naturally we defended it and we had a judgment that I could not have written myself. But they had taken the bull by thetail and so they took it to appeal and the Court of Appeal said, "We agree with everything said by the trial judge, and in addition—". And they gave us about another four bits of whitewash which cleared the air for a long time.

This is an example of what can happen with a commission of this type. It gets all bound up, as you have suggested, in the investigating part, the original hearing part and some of these parts under Part IV. They do not necessarily come in from the director in the first instance. There may be an inquiry on the whole subject and following that inquiry the director brings one of these points.

I look very seriously on the matter of the rights of the individual to be heard. The bill refers to the fact that an opportunity must be given to each person to be heard before the commission can make an order against them. But the bill carefully only refers to these items for the commission's proceedings. Perhaps it has not come to your attention, but in connection with the National Energy Board there was a big fight before the federal court in December. The National Energy Board actually refers to hearings in their act. It took 23 pages for the judge to decide that the use of the word "hearings" would give some rights to be heard, to cross-examine and to produce evidence. We submit very strongly that it should be made quite clear, first of all, no matter what definition phrase you like, that the person against whom an order is going to be made must have the right to be at that hearing throughout the entire hearing. The way this is framed he could miss four days of the hearing and not know anything about it and then all of a sudden find himself called in and asked, "What have you got to say?"—and an order is made against him. He should have the right to bring in his own evidence, which he does not have here, and he should have the right to cross-examine on the evidence submitted by the director.

The Chairman: Is it your view that while the bill permits the supplier to make application to the director of the commission and that it may permit them reasonable opportunity to be heard while at the same time it may not imply that they can be present when the suppliers are representing their case?

Mr. Wotherspoon: It is quite possible.

The Chairman: You will notice that the form of this is that the proceedings commence when the director makes an application. Do you think it is an unusual situation where the person making the application does not have the onus of proof?

Mr. Wotherspoon: We feel very strongly that there should be an onus. As we see this it is the first half of the complete trial—maybe the first two-thirds of the complete trial—because once that order is made there are very severe penalties for the breach of it, and some of these orders are very touchy as to whether you are breaking them or not breaking them, and the penalties can go up to two years in prison.

We submit that essentially this is criminal law to a great extent. There is the possibility of civil damages and I would hope that might be dropped as unconstitutional, or bad. Although we did not make reference to it in our brief, that is a personal opinion. However, these being criminal proceedings, surely there should be an onus on the Crown, the director being the Crown in fact, to prove its case as in a criminal situation, beyond a reasonable doubt.

The Chairman: I am not expressing any view, except my own, which I have already indicated. That is that in cases in which the director is making an application and the commission is making a finding on it as a result of which the suppliers who are named are to be given a reasonable opportunity to be heard, that there should be an onus on the director to make out a case and the person against whom he is endeavouring to make out that case should be heard, be present and entitled to participate, that is to cross-examine witnesses in addition to in his own right offering evidence in answer.

Mr. Wotherspoon: I agree with you completely, Mr. Chairman. Also, if civil damages are included, this complainant and I think this involves one complainant in most cases, the matter of obtaining six signatures is the easiest

thing in the world, so essentially one complainant has no onus. All he must do is persuade the director to make an application. So in my opinion the onus is most important and it should be made quite clear that there is an onus on the Crown and that this right to be heard is exactly the same as if someone were accused in court, that he is entitled to be in that court throughout, adduce his evidence and cross-examine the evidence on the other side.

The Chairman: In considering how this procedure might go, we can refer to the procedures provided in Part V, which relate to lessening competition and criminal proceedings. This provides that the director may make a report to the commission and the report is presented to the person named, who has an opportunity to appear and offer evidence. However, the director files his report with the commission and the onus is on the person involved to answer it. There is no opportunity for him to cross-examine the evidence that went into the preparation of that report. I can tell you that in the cross-examination in the investigative processes the commissioner who is presiding has such wide authority that I would say practically every question that might be asked by the Crown is relevant, because the answer of the commissioner is that he has not heard all the evidence and is therefore not in a position to rule that a question is not relevant and it might develop to be relevant later. It is really like an inquest. A person may refuse to answer on the ground that the question is not relevant, but at his peril, because the commissioner may refer the matter to a judge who can rule that the person is in contempt.

Is that such a procedure as might develop under Part IV.1? If there is any possibility of that, we should make sure that there is a proper and regular procedure and the rights of those affected are properly protected.

Mr. Wotherspoon: If such a provision is not included in the bill, Mr. Chairman, it is absolutely wide open as to what this commission will do. They set their own rules.

The Chairman: That is right.

Mr. Wotherspoon: And administer them in any way in which they wish, possibly without an appeal. So we should introduce an amendment in that respect. It is curious that the drafter of this bill picked one small item for giving right of cross-examination, statistical evidence. In cases of reports from Statistics being entered, the director must deliver a copy of it to the supplier, who is entitled to cross-examine those who prepared it. That is the only place.

The Chairman: We have noted it.

Mr. Wotherspoon: Thank you.

The Chairman: What is the next item?

Mr. Wotherspoon: The matter of these orders being for ever.

The Chairman: Do you mean the orders of the commission?

Mr. Wotherspoon: Yes, there is no time limit on them; they never end. Almost every order that they can make depends upon a situation in the market place existing today and those conditions are going to be continually changing. For example, exclusive dealing and tied selling depends upon the particular supplier being a major supplier in a particular market. Five or 10 years from now he may not be a major supplier anywhere. What is a market? It is pretty dicey as to what is a market at any time, but whatever the commission decided was today's market will be completely changed as there are changes in methods of marketing goods, transportation and so on.

The Chairman: You think there should be a right in the supplier against whom the order is made to move against the order at some future time on the basis that the conditions supporting the order disappeared?

Mr. Wotherspoon: That is right and, upon reflection, I am not sure that the commission has any right to make an order for a limited period. I noticed that only when I was going over this a couple of days ago.

The Chairman: But making an order for a limited period might not work. The condition the order is made against might continue after that limited period, so there would either be another application or the order would have to carry on.

Mr. Wotherspoon: It might work. I just wonder whether the elbow room might be worth while, but certainly there should be provision for the supplier to re-apply to the commission to have the order changed because conditions have completely changed.

Senator Laird: A perfect precedent for that exists in the possibility of having alimony lowered in the event of changing conditions.

The Chairman: Yes, that is a civil procedure, such as this is supposed to be.

Mr. Wotherspoon: The next point is the matter of public or private proceedings. It has been traditional with respect to hearings under the Combines Investigation Act that the proceedings before the commission, which are inquiry proceedings, have always been in private with the power to the commission to move them into the public domain if that should appear to be desirable. This is now suggested in reverse so far as the commission hearing under Part IV.1 are concerned. I strongly submit that the old procedure has worked very, very well with respect to the inquiries. The public interest has never been hurt because provision has always been available for the hearing to be moved into public in the event the commission considered evidence adduced in private should be made public. However, the problem with respect to such situations involving competition in a quasi court between two persons in the market place is that there are many others just dying to hear the inside information. These spies will be in the commission hearing room trying to pick up information as to how the other fellow does his costing and so on. This comes out from the witness in response to questioning before the door is closed and the private hearing resumed. We therefore submit that the old rules should apply and private hearings be conducted unless the commission orders otherwise. I also suggest as a mechanical item that it would be wiser to have the order made, whichever way it is, by the commission, rather than by the chairman. The chairman may be in Vancouver and the sitting here. It is right in the centre of the heat of a hearing that the decision needs to be made.

Our submissions on refusal to deal are based mainly upon what actually happens in the marketplace. Mr. Warnok, who is President and Chief Executive Officer of Dominion Dairies Limited, will explain that situation.

Mr. Frank Warnok, President and Chief Executive Officer, Dominion Dairies Limited: Mr Chairman and senators, what I say may, in the light of the discussion earlier, be somewhat redundant, but it might strengthen the need, as we see it, for the generic term to be used other than a brand name. Although it may be redundant, if I may, I shall proceed on that basis. Quite independently, it seems to back up the previous presentation, and might tend to answer the question of one honourable senator regarding restrictive practices or restrictive areas.

I propose to give a brief overlook of the distribution system in the dairy industry. It is the Dominion Dairies distribution system and might somehow be representative of the industry as a whole. If I may, I would like to break it down into two areas: (1) distribution, and (2) individual stores; and then refer to our overload distribution, getting it to stores or to the consumer direct.

So far as stores are concerned, our basic philosophy is that we will be happy to sell to every store in business in a given area, every store which is willing and able to compete on our terms, has adequate refrigerated equipment and can fit into our distribution system.

Since our objective is to achieve 100 per cent distribution in stores, it will be easy for you to see that we have to have very firm, good and justifiable reasons for refusing to sell to any store that fits into that category. Our reasons for refusing to sell to an individual store are five.

One, that the store's equipment was such that our product could not be maintained at the temperatures we required.

Two, that the store is not prepared to accept the service which fits into our distribution system. For example, many stores demand a six day a week delivery, or even more. Some stores demand delivery more than once a day. Such a pattern of delivery for an organization such as ours is almost impossible. Other stores demand what we call a full service call, where the product is placed in the display case, assembled, and stamped with our store price by the driver delivering the product. A corporation like ours refuses to supply that kind of service and we would, in effect, refuse to sell to stores which demanded that.

Three, many stores have a difficult delivery location. For example, they have a narrow back lane. Two years ago that would be quite acceptable, because we were running around with very small trucks. Today we use large units, which cost upward of $25,000, and in some instances tractor trailers. Some of those locations are impossible to effectively serve. We would, in effect, refuse to sell to stores of that nature.

Four, we have a returns policy in the dairy industry. We have a very limited shelf life for our product. We guarantee to sell our products and have them returned to our dairy the day following the expiry date code on the product. An unscrupulous or unfair store can take advantage of that policy. He can continue to make sure that he never runs out of stock by overstocking the product, because he knows we will take it back. Strange as it may seem, there are many stores dealing on that basis. If they continue to return to us an excessive amount of the product for credit, we refuse to supply that store.

The fifth reason is obvious—namely, failure to comply with our credit terms.

Those are the reasons for refusing to deliver the product, which I believe would hold up in the new act, so long as we are talking about dairy products and not about Sealtest milk or cottage cheese, or brand names such as that.

Perhaps I could describe the distribution system. I should like to point out in this connection that two of the points I mentioned earlier would make it impossible for us to sell to a store under our distribution system—namely, one, the equipment problem and the necessary temperature; and five, failure to comply with our credit terms.

Basically, we have four delivery systems. We have, one, our wholesale, company-owned routes—in the case of my company, completely refrigerated company-owned trucks driven by union drivers who are employees of the corporation. Two, we have home delivery systems. I might point out that we have only one area, in Windsor, where we have company-owned vehicles driven by union employees of the company delivering to home service accounts in the traditional dairy way. Three, small independent distributors operating usually in a metropolitan area. They are entrepreneurs who own their own equipment and are, in effect, our customers. Four, what we call dairy distributors. These, generally speaking, are outside the large metropolitan areas and are in a given area of our total delivery operation. Again they are, in effect, our customers and have exclusive territories.

For the purpose of this presentation, I believe we could take the latter two—the small independent working in the city, and the large dairy distributors working outside the city—as the same system, since there are many similarities. These distributors, whether they be large or small, whether they be totally oriented to home delivery—which is usually the case in a major urban centre—or to a mixture of stores and home delivery outside the urban centres, they are all, regardless of the way they distribute, entrepreneurs in their own right. They have an investment which will vary with their volume in a geographic area, and, with very few exceptions, their only source of income comes from distribution of our dairy products.

Therefore we, at this date, would refuse to sell to a competitor of such distributors if it would tend to fragment a particular market, where the financial success of a distributor lies in his ability to earn a satisfactory return on his own investment, where he has to establish a delivery pattern in line with our products and needs, the customers' needs, and, of course, the essential economic factors.

If we were forced, because of the lack of definition of the word "product," to fragment this delivery system, the economies currently in there to date would be reduced or destroyed, and we think the consumer and the general public would be victims in the long run.

The Chairman: Are there any questions?

Senator Buckwold: Regarding the refusal to sell—you gave a list of reasons why you refuse to sell—do you not feel that under 31.2(a), in which matters reviewable by the commission are outlined, you could be found liable only if your customer is not:

> willing and able to meet the usual trade terms of the supplier or suppliers of such product in respect of payment, units of purchase and otherwise,

It seems to me that the word "otherwise" fairly well protects. So long as you have the same standards, the same regulations to do business with all customers, it would seem to me that it should fairly limit any problem you would have insofar as refusing to deal because you could

not deliver in a certain area due to physical limitation. The word "otherwise", it seems to me, would, if it is interpreted in that way, take care of your problem.

Mr. Warnok: I think you are probably right, senator. When you have a mixed distribution system, such as the one I just outlined, you have four patterns. Taking the city of Ottawa as an example, there are two distinct patterns, one with our large company-owned union wholesale routes and two with independents. It should, theoretically, cover every store, but that is not always the case. We have patterns in Toronto, particularly, where it is absolutely impossible to fit into a system.

Quite honestly, these are the only grounds on which we would refuse to deliver, but never is that the case in the man's mind. It is that you do not want to sell to him for some reason or another—perhaps because there is a fellow down the street. If I had exclusivity in a given town where we were, in fact, the only milk supplier, obviously we would have to view every step we took very differently. I only know of one city in Ontario where there is true exclusivity. Unfortunately, it is not mine, so I do not have that problem. In our case, there is an alternative in every instance.

As long as it is clear that we are talking about milk and we are not, in effect, cutting off the source of supply, I do not think we have any problem. However, if the act implied that it was Sealtest products that he had the right to have, then we could find this type of problem.

Senator Buckwold: You are now getting back too the generic term. If we are able to assume that the act just talks about milk, I suggest to you that all the concerns you have about restriction of trade would be covered.

Mr. Warnok: If it is clear throughout that it is milk, or cottage cheese, or whatever, rather than particular brand names, we have no difficulty.

Senator Buckwold: You have to keep in mind, too, that there are other conditions before the Commission can review the situation. The product has to be in ample supply and an inadequate degree of competition in the market. I suppose that means that if you were, in fact, the only supplier in some town in Ontario that you would probably, as you would do naturally, have to do the best you could to make sure there was a supply available in that area.

Mr. Warnok: If I may, there is one point I may have failed to bring out clearly, that being that I was really talking about two systems. We want to sell, theoretically, to 100 per cent of the stores in a given area, but we do not want to sell to 100 per cent of the distributors in that area. There is a distinct difference. It is really "distributor" with which I see a problem, much in the same way as you talked earlier about the bottler.

Mr. Wotherspoon: I might add, Mr. Chairman, that "willing and able" is a pretty dicey question. Somebody may be very willing, or they may say they are willing, but the "able" part, even taking the easy example of dollars, may present some difficulty. They may have the big bank account, but they like to get the interest on it. They are regularly two or three weeks late. I know a good many big companies which, in effect, finance on other people. They are able, but they are not going to do it.

The Chairman: I suppose it is nice if you can get away with it.

Senator Buckwold: I would submit that if your terms are 10 days, or something like that, the commission would have to follow the terms.

The Chairman: That overcomes the problem.

Mr. Wotherspoon: Again, this would emphasize that you need the review of the order so that Dominion Dairies, for example, could come back and say, "This fellow is two weeks late and has been every pay time throughout the past year." Based on that, they could get the order rescinded.

The Chairman: Are there any other points you wish to raise, Mr. Wotherspoon?

Mr. Wotherspoon: I would just add one general comment, Mr. Chairman, on the refusal to deal provision. I have not been able to find anywhere in the Free World any such provision. I did read one article that said this is a first. So far as I know, neither the department nor the minister has ever produced any real reason why we should have a refusal to deal provision at all. I submit that such a provision is unnecessary and is certainly unwanted interference in the market place.

Senator Laird: As a matter of interest, assuming there is some responsibility on you to see that these five factors which affect you are carried out, do you have in your organization any means of doing a check, say, on the sale of cottage cheese? Do you send someone around every so often to check on the expiry date and yank such products off the shelves?

Mr. Warnok: Fortunately, senator, we do not have any problem with getting products off the shelves because we have a credit system for any products which are not sold prior to the expiry date. Very few retailers who are at all interested in their businesses would try to sell an item that had gone out of code if they are going to get credit for it. That is the reason we have such a generous system. I know in Ottawa, for example, some companies have gone to a "no return" system. From a purely economic point of view, I would like to do that, but obviously if a man has a 95-cent item today that he will have to destroy tomorrow—and the item is probably all right, because the shelf life always takes into account that the product will remain in the consumer's home for four days after the expiry date—rather than throw it out or destroy it, he will sell it the next day. We do have people who do checks regularly at every store in our system that supplies our products.

The Chairman: Thank you very much, gentlemen.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 29

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THURSDAY, FEBRUARY 27, 1975

Fifth Proceedings on Bill C-29, intituled:

"An Act respecting Canadian business corporations"

(Witnesses: See Minutes of Proceedings)

28689

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker—(19)
Haig	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, February 4, 1975:

"Pursuant to the Order of the Day, the Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill C-29, intituled: "An Act respecting Canadian business corporations", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, February 27, 1975.
(37)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

Subject: Bill C-29—"An Act respecting Canadian business corporations".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Buckwold, Cook, Desruisseaux, Flynn, Hays, Laird and Macnaughton. (9)

Present, not of the Committee: The Honourable Senator Heath. (1)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

WITNESSES:

Mr. N. Cafik, M.P., Parliamentary Secretary to the Minister of Consumer and Corporate Affairs.

Department of Consumer and Corporate Affairs: Bureau of Corporate Affairs:

Mr. John Howard, Assistant Deputy Minister;
Mr. Phil Anisman, Director (Corporate Research Branch); and
Mr. Jacques Brazeau, Assistant Director (Compliance Division).

Following a lengthy and detailed examination of the above subject, the Committee *Agreed* to defer until the next meeting Parts 5, 9, 11, 14 and 19.

At 11:50 a.m. the Committee adjourned until 9:30 a.m. Wednesday, March 5, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Thursday, February 27, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-29, respecting Canadian business corporations, met this day at 9:30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we will proceed with our consideration of the Canadian Business Corporations bill. We have before us Mr. Howard, the Assistant Deputy Minister, and his departmental officials. On the last occasion, Mr. Howard, we were talking about strict liability and we were at page 16, Part IV, dealing with section 21, sub-section (3).

Senator Macnaughton: Mr. Chairman, did we finish with the "guilt complex" of the department, if I may put it that way?

The Chairman: That is subsection (6) on page 15. I have opposite subsection (5) the word "stands", which means we will discuss that later.

Mr. J. L. Howard, Assistant Deputy Minister, Department of Consumer and Corporate Affairs, (Bureau of Corporate Affairs): Mr. Chairman, you will notice that the last topic we come up with in the later list of controversial topics is Part XIX, which deals generally with all the remedies and offences and penalties under this bill. We know this is a difficult area and, therefore, we did put it off.

The Chairman: Opposite the note I have on my copy I also have the words, "See section 245," because they are of the same whole cloth.

If you look at page 16, sub-section (3) of section 21 says:

> Any person, upon payment of a reasonable fee and upon sending to a corporation or its transfer agent the affidavit referred to in subsection (7), may upon application require the corporation or its agent to furnish within ten days from the receipt of the affidavit a list (in this section referred to as the "basic list") made up to a date not more than ten days before the date of receipt of the affidavit setting out the names of the shareholders of the corporation, the number of shares owned by each shareholder and the address of each shareholder as shown on the records of the corporation.

My question to you, Mr. Howard, is: Why "any" person? Why is it not limited to shareholders?

Mr. Howard: Of course, the real reason for this provision is that it is essentially a continuation of the law in the Canada Corporations Act and is a very close analogue of the corresponding section.

The Chairman: Suppose we had studied that bill and had missed that. Supposing we admit that. That does not prevent us from catching it this time.

Mr. Howard: We did not bring in things we thought were bad things. There are good policy reasons for having it in here.

The Chairman: What is the thinking behind this?

Mr. Howard: The reason why it is opened up to others is that others, outsiders, may have valid reasons for soliciting shareholders of a corporation. As I mentioned before, somebody may want to get involved in a proxy dispute, somebody who is not himself a shareholder. Somebody may want to make a take-over bid who is not a shareholder. There is one third point: you do have groups interested in influencing the affairs of a corporation who have a legitimate right to these lists. The most controversial practical case we have had in the last several months involved a group of churches which was trying to influence one of the very large retail stores in Canada not to handle grapes coming from California. The church groups obtained a list under this provision and solicited all of the shareholders of the corporation, asking them to pass a resolution at the annual meeting of the shareholders supporting the farm workers' strike in California.

We feel that that is a legitimate use of this and we stated that to the management of the corporation, when management complained that this was a misuse of the provision. We stated that we assumed that that is what parliament put the provision in there for, so that outsiders through shareholders could bring pressure on management in respect of broad issues that are of interest to people who are not shareholders of the corporation.

There is one other aspect to this, of course. If you limit it to shareholders, then anyone can go and buy one share and get the same thing anyway. That was the practical reason underlying all of this.

We could have put in some formal hurdles such as requiring the holding of a share, but as far as possible in this bill we have tried to keep out all artificial hurdles of this type. This is another illustration of that.

Senator Laird: Mr. Chairman, having had some experience in getting lists of shareholders, I would say this is imposing a monumental burden on any company. There are some companies with thousands of shareholders. Ten days within which to produce a complete and total list? I have gone through this and it is some job.

Senator Beaubien: Mr. Chairman, on that point, surely there should be a reasonable fee?

Senator Laird: Exactly. It is just another burden to do it for nothing.

The Chairman: What bothers me was the first reason Mr. Howard gave. Really, in effect, what he said was that it was to facilitate take-over bids. What is the design of incorporation and what is its aim and purpose? It is for those who are running the company or carrying on the business to have the necessary authority and the necessary checks on how they operate in relation to the shareholders, and that is the purpose of this bill. It is sort of guideline legislation. What is the interest of any person, any member of the general public, simply because he comes along? Well, he has to make an affidavit in accordance with subsection 7, in which he shall give his name and address and the name and address for service of the body corporate, if he is a body corporate, and the basic list and any supplemental lists obtained pursuant to subsection (4) will not be used except as permitted under subsection (9); and subsection (9) says:

> A list of shareholders obtained under this section shall not be used by any person except in connection with
>
> (a) an effort to influence the voting of shareholders of the corporation;
>
> (b) an offer to acquire shares of the corporation; or
>
> (c) any other matter relating to the affairs of the issuer.

Senator Beaubien: That is pretty broad, Mr. Chairman.

The Chairman: This almost looks like providing a list for any person, ranging from the curious to the mischievous.

Senator Laird: Exactly, Mr. Chairman. Since I belonged to one of those churches involved in that grape business, I think I can talk rather freely. It seems to me, frankly, that that sort of situation reduces the whole proposition to the ridiculous. It is bad enough when you want information regarding a take-over. This is when I tried to get it once. I bought a few shares of a big company. I thought there were a few shareholders in the company. It was only because I happened to know the general manager of the trust company that I was able to get that within a couple of weeks. It was a monumental task. As Senator Beaubien has said, there should be a fee attached to it. That would stop a few of these people.

Senator Cook: Would the list also show how many shares a shareholder holds?

Senator Macnaughton: It says so.

The Chairman: Any person.

Senator Cook: But is that not a serious invasion of privacy, if you have to go to all kinds of people—old and young, trusts and so on having shares in the company? Why should the number of shares they have be noised around? Certainly, without good reason that is an invasion of privacy.

The Chairman: Another question is who pays for it, Mr. Howard?

Senator Buckwold: There should be a reasonable cost.

Mr. Howard: We have three basic questions in front of us. May I answer them one by one?

The Chairman: Yes, you may.

Mr. Howard: The first one is the availability of the list itself. Of course, when we put provisions of this type in a bill we go out and discuss this, not just with a few lawyers or accountants but with corporate secretaries and with the Trust Companies Association and with the securities committee, that is, the securities transfer committee of the Trust Companies Association. They assured us that any corporation of any substantial size in Canada either has a transfer agent that manages computerized files or maintains its own computerized files and can give these lists out overnight with very, very little difficulty. Therefore that is no longer a serious physical problem. If a corporation is so large that it is a problem, then they should hire a transfer agent. They can do this easily. There are a number of them in Canada that can do it competently.

Senator Desruisseaux: Mr. Chairman, on that very point, it is very easy to say what you have just said, that there are some basic problems to solve in this. When you ask for the listing of the shares I do not believe for a moment that you should ask for the list as of the day before, because this the transfer agent is unable to do, and he cannot do it unless he is allowed a certain time.

The Chairman: The subsection we are talking about provides for a period of ten days.

Mr. Howard: The times given in here are agreed to be reasonable times among the people who make up these lists and furnish them. That is on the assumption that most of them, if they are of any size at all, have computerized files.

Senator Desruisseaux: If you take a large public corporation with thousands of shareholders and if you ask the transfer agent for a complete list so that he can provide some information, then this information is costly because of the thousands of people that they have on such a list. Therefore, it is my belief—and I do not know whether it is provided for in here or not—that it should not be done without paying a certain cost for it, if they are entitled to it.

Mr. Howard: As I said there were three questions raised, one was the practicability of being able to furnish these lists, the second was the cost and the third was the general question raised by the chairman. Under subsection (3) on page 16 the applicant asking for this list must pay a reasonable cost. In the bill we have to say "reasonable cost" because we have to ensure that the incumbent management cannot use this as a hurdle to block access to a shareholder's list.

The Chairman: Just a minute. The question of paying anything for the list is not in subsection (3); it is covered in subsection (4). That section only deals with paying reasonable costs if you ask for supplemental lists.

Mr. Howard: To supplement the basic list, and the basic list is provided for in subsection (3).

The Chairman: The basic list is the list of shareholders made up to the date within ten days of delivering the list. That is a list of all the shareholders. What is the difference between a basic list and a supplemental list?

Mr. Howard: The supplemental list picks up the changes since the tenth day up to the day of the meeting. That is very significant. For example, in the infamous meeting of I.O.S. Ltd. in June 1971,—their annual shareholders meeting—many, many thousands of shares changed hands during the adjournment of the meeting and in fact the

Vesco group succeeded in taking control at this stage. Because people did not have the supplemental list, they did not know how close Vesco was to having absolute control. In certain circumstances this can be very, very valid information. In that particular case they were minority shareholders who wanted to have that particular information.

The Chairman: We are not talking about the right of a shareholder. On terms, a shareholder can get at the list. We are talking about "any person."

Mr. Howard: Any person on payment of a reasonable fee may get a list made up to ten days before the meeting, and he may also on payment of a reasonable fee get a supplemental list showing those transfers made since the tenth day before the meeting and that has to be delivered within a very short time period. That can be taken very easily from the journal—that is the register of transfers.

Senator Hays: It seems to me that it is like going to the woodshed and saying to somebody, "Can I borrow your axe; I am going to kill you." It is a policy question whether you give this information or whether you do not give it. I suppose the shareholders are entitled to it because they have a right of access to the list of shareholders. At least, I have always assumed that. But if this is a policy decision, then if we do not like it we should eliminate it. We should amend it and say, "We set policy".

The Chairman: We have not come to that point yet.

Senator Hays: I do not think we should go on and debate it simply because somebody has set policy who does not have a right to set policy.

The Chairman: What we are doing now is simply going over the bill and picking the points that we think just do not look right to us and we are asking Mr. Howard to support or justify what the provision is in the bill. That is why we asked him to give his reasons. Now he has given his reasons, but I notice in the reasons he always brings in the question of a minority shareholder. I am not talking about a minority shareholder; I am talking about any person.

Senator Macnaughton: Does section 21 also apply to private corporations? It says here, "shareholders and creditors of a corporation . . .".

The Chairman: I would expect so. You can see the curiosity hunter coming in here.

Senator Macnaughton: Certainly. You can also see a competitor coming in and finding out all sorts of information which can hurt you very materially.

The Chairman: And if you read the newspaper, which for some purposes is recommended reading, a reporter can get a notion that he wants to write something and that perhaps this company would produce something of interest if he were to go in and study the shareholders' list.

Senator Macnaughton: Did Mr. Howard say this would apply?

The Chairman: Yes. Any person. A reporter is a person.

Senator Cook: If it is a federal corporation, yes.

Mr. Howard: Mr. Chairman, I hate getting cut off as to what is the main policy point. I would like to answer Senator Hays on this, since both you and he raised the question. Of course, it applies to all private corporations because there is no such thing as a private corporation under this bill. It does not exist. There are corporations and there are special rules with respect to insider trading or proxies in cases where there are fewer than 15 shareholders. In that case those particular disclosure provisions do not apply. To proxies, for example, the solicitation rules do not apply. The main thing here is the purpose of this bill and the policy that underlies it. Since the chairman used the loaded phrase that this bill "appears to facilitate take-overs by outsiders" I would like to clarify once again that the bill is absolutely neutral in this respect. It is true that we make shareholder lists available. This has been one of the great weaknesses of United States law that outsiders cannot get hold of these lists as they have been able to do under English law for the past hundred years. The shareholders' list is always required to be filed in the office of the registrar of companies. The reason for that is not to facilitate take-over bids, but because the major check on incumbent management of a corporation-to make sure that management itself is not running the corporation for its own benefit but for the benefit of the shareholders within the context of the public interest—is to make it possible for an outsider who thinks he can manage that corporation better to come in and take it over. That is exactly the point of a take-over bid and that is why the institution was developed. That is why it is legitimated under this statute and other statutes of Canada, although there are a lot of rules in there to make sure that the take-over bid game is played fairly.

Mr. P. Anisman, Director, Corporate Research Branch, Department of Consumer and Corporate Affairs: It is required where it is a take-over bid that the take-over bid circular be mailed to every shareholder of the corporation. That provision is added in order to protect all shareholders and so that they may have adequate information. Now in order to send that circular to the shareholders it is essential that the bidder have the shareholders' list. To prevent that would simply prevent all take-over bids, which is something that the act was not intended to do.

Senator Laird: What is wrong with giving the court jurisdiction to grant this application, instead of just putting it in the act?

Mr. Anisman: In terms of the take-over bid, and it can get fairly technical, the purpose of the act was to avoid giving an advantage either to the incumbent management or to an offeror or to a bidder. The purpose was to ensure that the shareholders have an opportunity to make a reasoned decision without allowing either side—if you can characterize management and bidders as sides—to have any advantage which would prevent them from doing that. In giving the ten-day time lag to a corporation before they have to give a shareholders' list, it in effect warns them that a bid is coming in and allows them to prepare. To provide that the bidder had to go to court would provide delaying tactics and in effect would shift the balance of the advantage back to management. The request for a list itself gives management enough warning of that.

Senator Laird: What I am getting at is this. Here is an aboslute right under this proposed section. Why should it not be subject to scrutiny by somebody, objectively, like a judge?

The Chairman: Senator Laird, may I read the provision in the Ontario act? It has some of the points in it that we raised:

Any person—

So it uses that same language—

—upon payment of a reasonable charge therefor—

Which is not in here.

Mr. Howard: That is there already.

The Chairman: Very well. It continues:

—and upon filing with the corporation or its agent the affidavit referred to in subsection (2) may require a corporation other than a corporation that is not offering its securities to the public—

That is not in, and this is the question you raised, Senator Macnaughton—that companies are not distributing their shares to the public. Why should that information not be made available?

Senator Hays: It should not?

Senator Macnaughton: Mr. Chairman, I would go even further. We seem to be switching the onus from mangement is good to management is suspect all the time. I do not see how this is suspect, in a general principle like that.

Senator Desruisseaux: I would question whether the Province of Ontario legislation is along the same lines on these very points?

The Chairman: On some of the points.

Senator Desruisseaux: On this?

The Chairman: Not on the private company. This subsection that we are talking about means that any person may, by following the particular subsections we are talking about, and doing what he is required to do, may require a corporation to furnish a list of the shareholders. That includes any corporation incorporated under this bill when it becomes law.

Senator Beaubien: Mr. Chairman, suppose I own some shares in a company and I have them put in my bank's nominees name, is there any way in which they can prove this, that the bank would have to disclose whom they hold the shares for?

The Chairman: There is nothing here that requires that.

Senator Beaubien: There is nothing that requires that?

The Chairman: No.

Mr. Howard: Mr. Chairman, if I may, I will make one brief reply to this. Notwithstanding that this bill is much influenced by Ontario law, there was no intention here to transfer Ontario law to the federal level. There are a number of jurisdictions in Canada, like British Columbia, following the United Kingdom, which have always required the disclosure of shareholder lists, and it has not exactly crippled the economy in British Columbia. Nor in the United Kingdom, where this kind of disclosure has always been required, because it is considered a good safety check on management, on incumbent management.

Senator Cook: We have to provide shareholders' lists in Newfoundland and all one has to pay is 25 cents. Then you can inspect them. If you do not file, you are under a penalty, or used to be, when I was practising.

Senator Buckwold: I personally have no objection to the general impact, the objective of the clause, namely, to make the shareholders lists available. I think it is done in many jurisdictions and it is not nearly as bad as many people might suspect. I do object to the actual time limitation of ten days to respond and bring out a list up to date, within ten days. From my experience in this, I doubt whether this is in fact reasonable. Where you have an actively traded stock on several stock exchanges, including even New York, to try to bring a shareholders' list up to date within ten days of the application, I suggest to you, Mr. Howard, is a very difficult thing.

By the time registrations go through and the company secretaries are advised, it becomes very difficult. Although I agree, I am one of those here who does not object particularly to the shareholders' lists being made available, it seems to me that the time schedule makes it almost impossible to comply with this. Possibly this could be looked at.

The Chairman: There is a penalty here, is there not, if you do not furnish a list?

Mr. Howard: Yes, there is. If I may answer—ironically, the corporations that are in the best position to provide these lists within these time frames are the very large corporations whose shares are actively traded, because they are compelled to keep their registers and transfers and registers of shareholders current at all times. Remember that all they have to do is, on that tenth day before, take a photograph of the registers of shareholders as it then exists, and that is very easy to do with a computer.

Senator Buckwold: It does not matter if it is not up to date at that point, in other words, if there are some shares bought somewhere that have not been registered?

Mr. Howard: They do not have to worry about those. They have to furnish their register at this date on that tenth day before the meeting. If anybody wants more firm data, he has to request and pay for a supplemental list. In that way he can see not only what is in the shareholders' register but he can also pick up the current position.

The Chairman: Senator Buckwold, there is an additional requirement for information that you must give in subsection (6) of this same section, on page 16:

A person requiring a corporation to supply a basic list may also require the corporation to include in that list the name and address of any known holder of an option or right to acquire shares of the corporation.

That is getting beyond a shareholders' list.

Senator Hays: Who is the author of this subsection (6)? And also subsection (4)?

The Chairman: Who is the author?

Senator Hays: Yes.

The Chairman: It was tabled in the House of Commons by the Minister of Consumer and Corporate Affairs. Back of that there has been five or six years' of hard work and everybody agrees that in many particulars the bill is a good bill. But that does not mean that we have to give our blessing to every section of it.

Senator Hays: I am asking about this particular section.

Senator Cook: In regard to that section, Mr. Chairman, Mr. Howard said you had a conversation with a transfer agent about this, and so on. Just on the question of nuisance value, have you any idea of what a reasonable fee would be in the case of a large corporation—$5, $10, $100?

Mr. Howard: That depends. The last one I personally obtained had about 2,000 shareholders and I paid about $200. A reasonable fee, of course, is to cover the cost—

Senator Cook: I know that.

Mr. Howard: —of the computer print-out. It is relatively low.

Senator Cook: You have answered my question. In other words, if there is a fee of $200, that would discourage the nuisance seeker, who wants a list. He is not going to pay $200 simply to satisfy his curiosity.

Mr. Howard: That is correct.

The Chairman: Under the subsections we are talking about, you pay a "reasonable" fee. The corporation does not have any right to contest the amount of the fee that is tendered. The corporation may very well be billed by the transfer agent for a larger amount than the applicant in person, any person, when he settles for what he thinks is a reasonable fee. How do you resolve that?

Mr. Howard: It is a very hypothetical question. It has not arisen, because no one has tried to charge an unreasonable fee. What they try to do is charge the amount they pay to generate a list of shareholders.

The Chairman: You are not answering my question. If you do not want to, that is fine. All I am saying is that it is the person who is asking for the list who settles what a reasonable fee is and he sends a cheque along for that.

Mr. Howard: The answer to that, sir, is no. The corporation, or its transfer agent—the transfer agent determines the fee. If there is a dispute over it, then the applicant can go to court and have it settled there.

The Chairman: Well, that is not the way I interpret subsection (3).

Senator Macnaughton: He has to pay first, before he gets the list, doesn't he?

Mr. Howard: Yes, sir.

The Chairman: So if he says that is not a reasonable amount, then what happens? Might I tell you that under subsection (10) of this very same section—

Senator Desruisseaux: Mr. Chairman, before we pass from that, I wanted to know what happens in the case of a strike, which would be a major reason which would prevent the furnishing of this information that is required about shareholders. There may be cases where notice to supply these is sent and may not be fulfilled because of some major occurrence, such as a strike.

The Chairman: The obligation under these sections is that any person who applies for a shareholders' list, and sends for it a reasonable fee and the affidavit that is required, is entitled to get the basic list, and to get it up to a date, it says, not more than ten days before the date of receipt of the affidavit. Now, there is the obligation on the corporation. If the corporation says, "This fee is not reasonable," how is that question resolved?

Secondly, under subsection (10) of the same section, a person who contravenes this section is guilty of an offence and is liable on summary conviction to a fine not exceeding $5,000, or to imprisonment not exceeding six months, or to both.

First of all, the penalty seems to be just a case of tossing a lot of numbers in the air, and "$5,000 seems like a lot of money, so we will use that as the big stick, so that there won't be any objections to carrying out the terms of the section;" but there is no defence. I mean, if I tell the person who is applying that he has not sent a reasonable amount of money, and I will not send the list, I am in contravention of the section.

Senator Macnaughton: You can always pay the $5,000 and go to jail.

The Chairman: Pay $5,000 for not sending a list?

Senator Macnaughton: That you think should not be sent.

The Chairman: Yes.

Mr. Howard: There is an answer to this, of course. What happens is that somebody comes in and asks for a list. The transfer agent of the corporation says, "Fine, we have a statutory duty to give you this list upon payment of a reasonable fee; we think $400 is a reasonable fee." If the person objects to that, he applies to the court under section 240, asks for an order compelling the corporation to furnish the list at a reasonable fee, and at that stage the court gives an order compelling the corporation to issue the list, and also establishing the fee, if indeed there is a conflict.

This has not been a real problem in practice. People do not try in Canada, as they have done in the United States, to block shareholders or *outsiders* from acquiring these lists. This has been a very serious problem in the United States, because incumbent management succeeded in locking themselves in by refusing to disclose these lists. That is the policy reason why this is in here. The real reason is—

The Chairman: You are back on your old ground again. In supporting your statement you talk about shareholders. We are talking about persons.

Mr. Howard: I said "shareholders or outsiders", and I underlined "outsiders".

The Chairman: I did not hear the underlining. You referred to section 230, did you?

Mr. Howard: No. Section 240, sir.

Senator Laird: Section 245 provides for an order to comply.

The Chairman: Yes. Under section 240—and if you want to have a look at it, it is on page 190—you can see that if you do not comply with subsection (3) that we have been talking about, then section 240 may apply. It says:

> If a corporation or any director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation does not comply with this Act, the regulations, articles, by-laws, or a unanimous shareholder agreement, a complainant or a creditor of the corporation may, in addition to any other right he has, apply to a court for an order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions thereof, and upon such application the court may so order and make any further order it thinks fit.

So this is where the whiplash is, except that they do provide for an appeal. It seems we have discussed this particular section. Anything further might be repetitious.

Senator Beaubien: I would like to ask one question, Mr. Chairman. In what we used to call a private corporation, an individual could not go and buy a share and therefore there was no way he could stick his nose in and find out who were the shareholders. This is something completely different, now, according to this. If I have a private corporation, and there are 15 shareholders, let us say, somebody can come all of a sudden who has nothing to do with it, and does not own any shares in it. He can demand information as to who owns the shares and how many each one owns in this private company, and who has options and who does not. I think this is a completely new departure, which is being eased in through the back door. What business is it of anybody else's, if I have a private corporation and we have 10 or 15 shareholders? Why should somebody be able to stick his neck in? Supposing we are mismanaging it. Nobody else has any shares. Whose business is it whether we are mismanaging it or not? This is something totally different. We have not had anything like that before.

Mr. Howard: May I answer that?

The Chairman: Yes.

Mr. Howard: The closed corporation, under this statute, will normally be governed by a unanimous shareholders' agreement, if it is a closed corporation of the type you describe. If there is any question about privacy, all the shareholders have to do is put their shares into a trust, and they are absolutely guaranteed privacy. There are very simple solutions to these problems, without trying to bring in the old mystique of private corporations, and so on. Through very simple techniques, people can get all of the privacy they want. They can get all of the shareholder control over the corporation they want, even better than they could under the old institution of the so-called private corporations, under the Canada Corporations Act.

Senator Laird: Why should they be put to that trouble? After all, that is only causing more difficulty for companies which are now swamped with paper work, and all sorts of other things. It is a wonder they have time to carry on business, with everything that is demanded of them.

The Chairman: Senator Laird, I am trying to figure this out. In private companies there are certain features that must exist. One is that you cannot offer any shares to the public. The second is, you may have restrictions on the transfer of shares. Those restrictions may require that there not be a transfer of a share without the consent of the board. Now, who is "any person" who wants a shareholders' list of a private company in thar regard? It surely cannot be for a take-over bid.

Senator Laird: That is right.

Senator Macnaughton: That is my point.

Senator Laird: It is for pure curiosity. That is what worries me.

Senator Macnaughton: It might be your competitor.

The Chairman: If they wanted to make a take-over bid, they would be accepting an order in violation of the provision that they cannot offer shares in public.

Senator Macnaughton: Could I ask Mr. Howard again to explain a little bit further section 21, subsection (9)(c), "any other matter relating." That is a wide-open door.

Senator Cook: As a supplement to that same question, I wonder if he would explain what abuses subsection (9) is supposed to prevent. Why did he put subsection (9) in there at all? What other abuses? What other things could be done with the shareholders' list which subsection (9) says cannot be done?

Mr. Howard: The usual abuse that arises in connection with the use of shareholders' lists is where marketing firms acquire them and use them to peddle books, or goods or services. We tried to put in quite clear provisions here to prohibit that kind of misuse of these lists. That, of course, is what the offence sanction in subsection (10) is particularly directed at, although it could also be invoked if management just obdurately refused to issue a list. As I say, the real solution to that problem is to go under section 240 and get a court order requiring management to comply. Once the list is issued, then the person who obtained it can only use it for these statutory purposes. I mentioned one practical problem that arose where a church issued a list in order to solicit the views and win the support of shareholders. I might add that the affidavit in that case was filed by a member of Parliament. They did obtain the list, and they did use it for the purpose mentioned.

Senator Cook: It does not make it any better.

The Chairman: What does the word "issuer" mean there? Does it mean the corporation that delivers the list or does it mean the issuer of the shares, the corporation which issues the shares?

Mr. Howard: Throughout this bill the word "issuer" means the corporation which issued the shares to the shareholders in question.

The Chairman: But where any person may apply, some person may apply for this list who is not a shareholder.

Mr. Howard: Then the use of the list is limited and "issuer" here can be used in a double sense: it can be the corporation that issued the shares to the shareholders and it can also be the corporation that has issued the list.

The Chairman: Subsection 9 (c) on page 17 looks as though you were writing a blank cheque of authority to any person and that no matter what information he is furnished with he can spread himself over every aspect of the corporation. He can get not only a list of every shareholder but any other matter relating to the affairs of the issuer, in other words, of the corporation which has issued the shares. If that is not sweeping, tell me how it could be made more sweeping.

Mr. Howard: Indeed, it is very broad, Mr. Chairman, but the government thought that it could not strangle people like church members who somehow wanted to intervene in a management- labour dispute.

Senator Buckwold: Well, that is covered by paragraph (a).

Mr. Howard: That is a clear case, but remember the shareholders would not have a right to vote on that, normally, unless some shareholder put in a proposal and it was a resolution before the meeting. That is another technique which shareholders can use.

Senator Buckwold: The chairman is raising the point as to why paragraph (c) should give a blank cheque.

Mr. Cafik: It seems to me that the term "affairs" in the interpretation section in the front of the bill describes what the affairs of the corporation are.

The Chairman: Oh, yes, we have been through that.

Mr. Cafik: It is not quite the broad brush that everyone seems to presume it is in the discussion that we are having here, because the word "affairs" is defined as follows:

> "affairs" means the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate;

When you read the word "affairs" in that sense, then you find it a quite restrictive clause and it is not the basket or umbrella approach which would allow anyone to do anything they want with the list.

The Chairman: Why, Mr. Cafik, should any person be entitled to ask for that information in relation to the affairs of the company? I am trying to conceive the purpose of it. What business is it of his?

Senator Cook: He does not even have to disclose his hand, either. He does not have to say why he wants it. He just asks for it.

The Chairman: Well, there is the affidavit.

Mr. Cafik: There is no doubt that why he wants it is very relevant, because he can only use it in a specified way under the act or he is in contravention of the act.

The Chairman: You see, Mr. Cafik, in subsection (7) the affidavit that any person has to make includes the provision in paragraph (c) that he has to swear that the basic list and any supplemental list obtained pursuant to subsection (4) will not be used except as permitted under subsection (9). Now, under subsection (9), the paragraph we have been discussing there is subsection 9(c), and the words are:

> any other matter relating to the affairs of the issuer.

So this means that if the person makes an affidavit that he wants the basic list, except for the purposes permitted under subsection 9, that means that he may get the list in relation to any other matter relating to the affairs of the issuer. What business is it of his? He is an outsider.

Mr. Cafik: It depends on how you interpret the word "affairs", in my view.

The Chairman: I am talking about the definition which means the relationships among the directors, shareholders and affiliates. That is, other companies. But he is an outsider and he is nosy, and he is not a shareholder. He has not any money at stake.

Mr. Cafik: One of the points being made throughout this act, in my understanding of it, is to try to get rid of a lot of artificial things which were in the previous act which can be easily avoided or gotten around. It has been pointed out so far in this committee that, if you take out "any" and you make it only a "shareholder" who is entitled to do it, anybody can become a shareholder pretty quickly in any event.

The Chairman: That is the way they used to do it.

Mr. Cafik: In my view it would not be a very meaningful deletion to remove the word "any" and change it to a "shareholder".

Senator Cook: It could be sometimes.

Senator Hays: I do not see why you object to it being a shareholder, and as to the example you used, we were through with religious wars 300 years ago. Surely we are not going to go through that again.

Senator Macnaughton: Mr. Chairman, let us bring it up to date and assume that under (9)(c) we have a Canadian communist member of Parliament. Where is the limitation? In other words, it is wide open.

Mr. Cafik: I do not understand that.

Senator Macnaughton: You mentioned that a church was acting and obtained a list. Let us jump right over from the church to the other side, a communist, a Canadian communist member of Parliament. If he can be a member of the church and sign an affidavit for this information, he could certainly be a communist Canadian member of Parliament and sign an affidavit. What would his interest be in this, in "any other matter relating to the affairs"? He just wants to create trouble. You assume the management is crooked or incompetent or anything you want. Why not assume the management is competent, to begin with? Why not assume that Canadians are honest in their affairs?

Mr. Cafik: I must admit that I do not quite understand the significance of the question, senator, because it seems to me that the information being obtained is information that is not going to do anyone any harm. I cannot see it being harmful to the corporation. It may cost them money to get the information available, but you get paid for it under the provisions of the act, for both the original and the supplementary list. The kind of information you are getting is information that I think the public should be entitled to, in any event.

The Chairman: Would you stop right there for the moment, Mr. Cafik. This is an argument which we hear from time to time, when it seems to be the last resort. That is, "Oh, well, if you do it, it won't harm anybody". So far as we are concerned, that is not good enough. Just to say that you justify this because it won't harm anybody is not good enough.

Mr. Cafik: My understanding in dealing with this act is that it has been gone through for a number of years, as we all know, and that there have been all kinds of representations from groups, business groups, associations and so on over the years. There has been an enormous number of amendments which have been accepted by the government in the House of Commons committee. They were accepted by the department prior to the bill being reintroduced in its present form. In this particular area, my understanding is that we have not had any representations from those people who would be directly affected, feeling that this is a very bad provision of the act. In terms of the time that is required to furnish the lists, no one in the field who deals with this subject every day seems to feel that that is a burden upon them. The kind of questions that we are getting here are relevant questions, I agree, but we have not had representations to change these particular provisions from those people who are directly affected. It would seem to me, if it had been, indeed, a serious problem in a real sense rather than in a theoretical sense, those problems would have been brought to our attention and they would have been dealt with.

Senator Laird: Our job is to protect the public. That is what we are here for.

The Chairman: Senator Laird, may I point out to Mr. Cafik that in the Canadian Manufacturers' Association's brief they comment in relation to section 21 (1) as follows:

> There appears to be no cogent reason why shareholders' lists should be available to any other person.

I would say that the Canadian Manufacturers' Association is a substantial organization. They have expressed a view.

Senator Macnaughton: The theory just expounded adds up this: "Father knows best". I am not at all sure that father does know best. Our duty here is to use our experience. That is why we are here. We are here to revise and review. I cannot agree that just because you tell me that everyone else likes it we should accept it. No. I do not say you are wrong. I do not say I am right. I cannot accept that because somebody else likes it we should accept it.

Mr. Howard: Mr. Chairman, could we get back to the two main points? Has anybody any concern about the public distributing corporation—about the entitlement to lists and the rules in here with respect to the public distributing corporation?

Senator Laird: I have serious misgivings about anybody but a shareholder getting this information.

Senator Buckwold: I have no objection in the case of a public distributing corporation.

Mr. Howard: The second thing is the closely-held corporation. If it is a public distributing corporation, anybody can buy one share on the exchange, so that is a very technical objection. It is just a little formal trick. But the second is the closely-held corporation. Under this, that would normally be covered by a unanimous shareholder agreement; and if there is a question of privacy, then put a trustee or nominee in between the beneficial owners and the shares as shown on the registers and you have blocked anybody from snooping. It is as simple as that. We have just tried to do it in a simple straighforward way so that we do not get into a bunch of little formal gimmicks, because these gimmicks would make it more difficult.

Senator Buckwold: But you are suggesting a little trick yourself insofar as the private corporation is concerned.

Mr. Howard: This is done every day in every type of corporation.

Senator Macnaughton: I thought this was the kind of thing you were trying to get away from.

Mr. Howard: No, all I say is that if privacy is important, then shield yourself.

Senator Buckwold: Can you give us a basic philosophical reason for this? I am quite content about public corporations whose share lists are available easily without problem, but I am concerned about companies that are family-held, or by a variety of closely related persons whose shares are not on a stock exchange. I would like to know why you say everybody should be the same. I would like to know why you say that all corporations, either public or private, should be treated the same and what the reasoning is behind this.

Mr. Howard: The basic philosophy behind it is that limited liability is a privilege being conferred by the state on anybody who is using the corporate vehicle. For example, in England anybody who is accorded that privilege must not only disclose a shareholder list but he must also disclose financial statements. The argument is that that is healthy for the whole economy. We have put it in a general rule here, simply because as a matter of commonsense it should apply across the board. If you do have a closed corporation, you can block the snooper quite simply by the device that I have mentioned. Normally, of course, nobody goes in and snoops in this way in a private corporation if it is closely held, so it does not mean anything anyway. If it is closely held and if there is unanimity in the family group and so on, then it does not matter.

Senator Buckwold: I can think of a family corporation that is closely held, and I do not want to mention the name for the record, but we will say it is a large department store.

The Chairman: Even Ontario limits the right to distributing companies.

Senator Buckwold: In the instance I have in mind, there were lots of snoopers. This is a family-owned corporation, so what right has the government to inflict on them the kind of thing that you are asking?

Mr. Howard: If the government is according them the privilege of limited liability, then the government has the right, in its wisdom, to attach conditions to that privilege. For example, the unnamed corporation that you mention was a federal corporation when this Parliament put through a rule requiring financial disclosure. That corporation moved its assets out of the jurisdiction, in order to avoid that disclosure rule of this Parliament. It is up to this Parliament to decide the issues. I don't care. It is a straight policy issue. I am just pointing out that on the shareholder listing there was a straight technical problem and we dealt with it in the simplest possible way administratively, that is, by having one general rule, knowing that there could be no snooping if anybody wanted to interpose a trustee in a closely held corporation.

Mr. Anisman: There is a third prong to the definition of private company at the moment, that is, it may have shareholders up to the number of 50—but in some jurisdictions it may be more than 50 because it includes employees. We are thinking of a closely held corporation only in terms of a family corporation. There are other small business enterprises where you have the same types of restrictions on transfer of shares and which may have up to 100 shareholders. If there were a potential acquirer who wanted to talk to some of those shareholders and wanted to see if he could get some kind of consensus without going through the directors, this would leave it open to him, whereas there would be no purpose in doing so in the family corporation. If there are three shareholders who run the corporation and you want to get a shareholders' list to convince them of something, then it would be very foolish and it would put the person going after it to substantial expense, or to some expense at any rate, without any possibility of results, and he would be banging his head against the wall if all he wanted to do was to aggravate the situation.

Senator Buckwold: Except that in the smaller corporations even if there were only 50 or 60 shareholders, it is always the major shareholders who are the directors, so who are you going to get at? Some little guy who has four shares?

Mr. Anisman: I know of a case where there was a formal takeover bid made for a privately held corporation which ultimately failed because the big shareholders, the direc-

tors, refused to approve the transfer of the shares. But the bidder received the majority, and there are cases like that. I guess what I am saying is that the desire here is to leave it open there, when there is no substantial risk of harm in the small cases.

Senator Laird: What is wrong with the Ontario section?

Mr. Anisman: I would not want to talk about the Ontario section being wrong, but it would limit it in terms of the more widely held type of private company.

Senator Cook: You say the directors refused to register the transfer of the shares?

Mr. Anisman: Oh, yes, that is the *Tate and Lyle* case. It went up to the House of Lords, if I remember correctly.

Senator Cook: What happened. Did they fire the directors?

Mr. Anisman: I think the directors used another device to keep themselves in office. I would have to check. I may not recall correctly. There may have been a change in the voting power of the shares after that.

The Chairman: Let us get down to the realities. Mr. Howard, I think you said that the provision that you are talking about is in the present federal statute?

Mr. Howard: Yes, it is in there, but not word for word. We have changed the wording here to come up to date with Ontario.

The Chairman: But there is a substantial difference. The present federal act gives the right to shareholders and creditors to inspect the books and records of the company, to examine them and to make extracts therefrom. That includes the book you have and an alphabetical list of shareholders. There is a big difference between having a right to come in and examine and do your own copying—where it is limited to shareholders and creditors—and any person having a right to hand in a cheque which he says is for a reasonable amount and sign the affidavit and say, "I want a basic list" and then "I want a supplemental list". This is broadening the field very much. I think that in Ontario act there are the same provisions. I read it for you a few minutes ago. It does exclude from the force of that provision any company that is not a distributing company, that is, one that has not issued shares to the public.

Now, Mr. Howard, you were talking about the public interest, and that is a vehicle that gets quite a lot of riding. Let us analyze it and see what is the public interest in this instance? The public interest is that any person should be able to follow this provision in the bill and get a basic list of shareholders—not only that but get all the other information permitted under this section of the bill?

Senator Cook: The affidavit is only window-dressing. That does not mean anything at all. All it says is that "I will not break the law."

The Chairman: Subsection (9) gives him a broad right in connection with the affairs of the company. I think we have probed this one and anything further might be repetitious.

Senator Hays: It seems that we are not convinced.

Mr. Cafik: Mr. Chairman, I am sure you will have subsequent meetings and I would like to take into consideration and discuss directly with the minister the reservations that you have. I understand the reservations which you have put forward in the areas that concern you, and perhaps I could deal with that when we return.

The Chairman: I have marked that that section "stands". That finishes Part IV.

Mr. Howard: Yes, that is right. I would suggest that we now jump Part V and go to Parts VI, VII and VIII. There are two reasons for that. You will see that Part VI relates to everything that was discussed.

The Chairman: Honourable senators, we turn now to Part VI, starting on page 31. My usual first question is, how closely does this relate to the provisions in the present act; and are there changes of such a nature that you should direct our attention to them?

Mr. Howard: These provisions are enormously different from the present federal corporations act, which is almost totally deficient in this area. The first eight sections in here continue the policy, essentially, of the present act with respect to the maintenance of share registers and so on by corporations in the head office or branch offices, the entitlement of the shareholder to a share certificate, the general provisions.

The Chairman: You have a word in here that is almost new to me, "fungible."

Mr. Howard: The word "fungible" just means that one bushel of No. 1 northern wheat is like every other bushel of No. 1 northern wheat.

Senator Hays: When you sell it.

Mr. Howard: It means that if you go and properly endorse a share of IBM common, it is like any other share of endorsed IBM common.

Senator Hays: I understand.

Mr. Howard: It is a good Alberta definition.

The Chairman: To the extent that a company might issue shares that were not just like any other shares, that would mean creating another class of shares, would it not?

Mr. Howard: Yes. To be a fungible share characterized as such, it must be of the same kind and class or series, and must be in proper form endorsed by a person with authority to endorse, an "appropriate person" under this part.

The Chairman: Supposing that happens and there are differences in provisions, then they are different classes?

Mr. Howard: Yes, sir. Then of course it cannot be a fungible share. All that means is that somebody can satisfy an obligation under this, through presentation to a transfer agent for registration of transfer. He does not have to bring in a specific share. All he has to do is bring in a share in proper form and he is entitled to have the share registered in his name.

May I continue for a moment? I mentioned the first few sections in here. The first four sections are very long ones. From section 48 until the end of the Part, the provisions come out of the Uniform Commercial Code that was developed by the American Bar Foundation. These parallel quite closely like provisions in the Ontario Business Corporations Act, 1970. So, from section 48 to the end of this part, that is, to section 76, these provisions are out of the Uniform Commercial Code but are parallel to the Ontario

law—although there are some slight technical distinctions between the wording in this bill and the wording of the present Ontario law.

We found that in the Ontario act the draftsman departed in a few areas from the Uniform Commercial Code model. We thought that that was a mistake. We have adhered more closely to the UCC model. There are two or three reasons why we did this. These provisions themselves come out of the Uniform Stock Transfer Act, again developed by the American Bar Foundation, which has governed share transactions in the United States since 1909. They have had a great deal of experience with these provisions. In addition, the sophisticated people in Canada who deal with a lot of share transfers or securities transfers are used to dealing with the New York market or the Chicago market, complying with these more detailed rules. To a large extent, what these rules do is declare in the statute what the people thought the law was, anyway.

There are several differences, of course, when you introduce sections of this type. What it does is clarify the law and above all it tries to make clear that a security certificate, between registration dates, is like a negotiable instrument and, if it is in proper form, properly endorsed by an authorized person, then the bona fide purchaser who receives it is in the position of a holder in due course of a negotiable instrument. He becomes owner of that security and he can pass it on freely.

The Chairman: The Canadian Manufacturers' Association, in their brief, had this comment on section 45(4). I am wondering if you would comment on it. They say, at page 6 of the brief:

> This sub-section should be amended to include with respect to the term "trustee" a trustee defined in section 77(1).

Mr. Howard: Yes, sir. We did not want to limit it in that way because that is only a certain kind of trustee. It is quite common in Quebec to use trust indentures and to issue securities under trust indentures where the trustee would not be one of the trustees defined in the latter section, that is, section 77. We want to leave it open. We could see no reason to restrict it. We could see no reason to tie it in with this definition. That is all. We wanted to see that the law is as flexible as possible because the trust indenture is such a frequently used institution in the province of Quebec.

The Chairman: That seems reasonable. Is there any comment?

On section 45(7), at the bottom of page 34 and the top of page 35, the suggestion by the CMA is:

> This subsection should refer to security certificate instead of share certificate since the details required apply to securities in general.

Mr. Howard: We ran into a couple of problems here, Mr. Chairman. Here we are really focussing on the share certificate, because normally the person who receives a certificate under a trust indenture is entitled to get this kind of information out of the trustee and not out of the corporation. What we were really concerned with here was the requirement of disclosure, on a share certificate, the entitlement of the shareholder to obtain that full disclosure in respect of his share. I think the law is adequate now to protect anybody who holds a security certificate under a trust indenture. He can go to the trustee and he should have no difficulty in getting that information from the trustee.

The Chairman: I think that is reasonable.

Senator Beaubien: Yes.

The Chairman: The CMA also talks about section 47(8), on page 40. At page 7 of their brief, they say:

> Paragraph 8(a) should be revised to include the additional requirement of paragraph 7(b) where the transmission is governed by the laws of Quebec . . .

Mr. Howard: If you notice in reading carefully subsection (8), in the preamble we talk only about the "laws of the jurisdiction governing the transmission of a security . . ." It is up to the laws of that jurisdiction whether this short form of transfer may be used. These two sections, 46 and 47, were drafted first to make this transfer a convenient process, with reasonable safeguards for shareholders and for heirs and so on, but above all else to try to minimize the formality and reduce the cost in respect to this. Those of you who are lawyers and who handle small estates with a few shares know that it costs more to transfer a few shares than they are worth. These sections are designed to try to minimize the costs and to make it convenient. This subsection (8) of section 47 is designed ultimately for the short form transmission of a security certificate. If the provincial law permits it under their law governing testimentary or intestate succession, then we will make it legitimate under this statute. But we cannot tell the provinces what to do in respect of the administration of estates in the province.

The Chairman: I think that is all right. I think the committee would agree with that.

The Canadian Manufacturers' Association also talk about section 50.

Mr. Howard: Mr. Chairman, I should point out we are now getting into the Uniform Commercial Code provisions. They start at section 48 with overissue. We are now getting into the technical area of security transfers.

The Chairman: In regard to section 50, which is at the top of page 43, the CMA suggests:

> "Stock exchange rules" should not be sanctioned by statute. They are binding because of their listing agreements.

Mr. Howard: All this rule states generally is this—and this comes up later in the rules—delivery is good delivery, if you furnish a security that complies with the statutory rules. However, we do not want by this statute accidentally to take away a protection that may exist under a stock exchange rule. We have been very careful in this bill not to accord any law-making power to outside agencies. This is an example. Where there may be a good protecting rule for the benefit of shareholders or brokers among themselves, we do not think this bill should detract from that kind of safeguard.

The Chairman: These are the broker and stock exchange regulations. The agreement provides for the guidelines which apply to the broker if he is going to be a member of the exchange.

Mr. Howard: They will be set out in the listing agreement, but mainly in the by-laws of the exchange to which each broker becomes subject. They may have some peculiar

protection rule in there, and we could see no reason to try to abrogate that rule.

The Chairman: Well, that is all the comment on this part. What else is there in this part, Mr. Howard, that varies in any way from the present act?

Mr. Howard: When it comes to varying basic common law, for example, most of this does not exist in the present act. It exists in the common law, which is in a state of utter chaos. This is particularly true in Quebec, where there just has been no development of the concept of the registered share or the concept of transferring of property by perfection on registers. Since this is, to a certain extent, a totally foreign system, we cannot say that it is in any way comparable to the existing statutory law. Although this is a close analogue of existing common law rules, it has not been in the Canadian statute law before this bill.

The Chairman: Are you saying that from section 48 of this bill down to and including section 76, this is really the product of the work of the commissioners on uniformity of legislation?

Mr. Howard: No. This was done by the commissioners for the uniformity of legislation of the United States. The first one was done in 1909. It came into the Uniform Commercial Code, which is now the law in all of the United States, governing this. It happens in the United States to be in the Uniform Commercial Code, which is a uniform law broadly adopted in all of the states. It is not in the corporation laws down there, first because they have no federal corporation law, and secondly because it was more convenient to make it a general law through the adoption of the Uniform Commercial Code. It could be in either a commercial code or in corporation law. We felt that the corporation law was the more appropriate vehicle.

I will try, if I may, to flag two or three things that are very different from the common law. The first is section 53.

There is a rule in the common law right now that even where an officer or agent of the corporation who is responsible for handling securities forges or places an unauthorized signature on a security, that does not bind the corporation. Section 53 reverses that rule, and re-establishes the general principle of agency. Where somebody has apparent authority, then the third party can rely on that, and the principal, in this case, the issuer corporation, is bound by its agent's or apparent agent's acts; and it is just getting back to the general agency principle. It does, however, abrogate the present common law.

The Chairman: Well, certainly section 53 is intended to protect the person who receives the certificate.

Mr. Howard: Yes, sir. The third party.

The Chairman: Yes, the third party, if he receives it without any notice of lack of authority of the person who signed it on behalf of the corporation.

Mr. Howard: That is correct; but that is not the common law at present, and this does abrogate the common law and re-establish what is a general agency principle, both in the civil law and the common law.

The Chairman: Is there anything else?

Mr. Howard: Section 56 deals with the title of the purchaser, which is a very, very central section in this whole part.

The Chairman: Section 56 on page 45?

Mr. Howard: Yes. As I mentioned, what we do, as far as possible, is characterize the security certificate as a negotiable instrument, and section 56 is the essence of these rules, so that a purchaser acquires the rights of the security that his transferor had. That is just the purchaser. But if you get down into subsection (2) you see a *bona fide* purchaser who is equated with the holder in due course under our Bills of Exchange Act. He not only acquires the rights of the purchaser, he also acquires the security free from any adverse claims.

Under this, adverse claims are what we all know as "equities" in dealing with bills of exchange. Those are personal claims among prior holders. If there is no counterfeit, no forgery, no unauthorized endorsement on a certificate, if the certificate is endorsed, then the *bona fide* purchaser, that is, a purchaser for value without notice of any flaw in the certificate acquires it free of any equities of other persons arising from personal claims for any fraud, breach of contract, or something of that type. So this is the central section in this Part, and what it does, of course, is protect the innocent third party purchaser.

The Chairman: It just says that a *bona fide* purchaser; or at least, a purchaser, cannot profit from his own fraud.

Mr. Howard: Yes, that is correct. As I say, I do not want to belabour these provisions, because they really reflect what all of us thought was the law, and should be the law in any event, to a large extent.

The Chairman: That is right. What other sections should we look at?

Mr. Howard: I am not going into all of these technical sections, because every one is an analogue of a rule in the Bills of Exchange Act concerning authorized endorsements, changes on the certificate after the certificate has been issued, and so on.

I suppose the only other controversial section that has caused any confusion is section 71, which concerns the duty of the transfer agent. That is on page 54. I only point this out because people have difficulty understanding it. What it does here is impose a duty on a transfer agent to register a transfer if the conditions set out in subsection (1) are fulfilled. Now, one of those conditions, (e), is that "the transfer is rightful, or is to a *bona fide* purchaser". That really is an escape valve for the transfer agent, if he knows it is not rightful. He may have obtained this information because he knows somebody, let us say, in his own trust company, who handles the affairs of this corporation, or of the trust that is involved. He may know it is not a rightful transfer, and refuse it. Then he is not in breach of his duty.

The Chairman: He may know it is not a rightful transfer, but would he necessarily know that it is not to a *bona fide* purchaser?

Mr. Howard: If it is, he can find that out quickly, because a *bona fide* purchaser is very carefully defined in the bill, and if somebody fulfills those conditions as a *bona fide* purchaser, then the transfer agent cannot refuse the transfer. He must put it through. As I mentioned, however, nobody can be a *bona fide* purchaser unless he is a purchaser for value in good faith of a certificate that is not affected in any way by an unauthorized endorsement, a forgery, or a counterfeit, in any way, on the certificate.

The Chairman: No. I am thinking of the obligation you are imposing on the transfer agent.

Mr. Howard: Yes, sir, but then the common law, as you know, already imposes a pretty strict obligation on a transfer agent not to refuse an innocent purchaser of a security who comes in and presents the certificate for transfer. This just makes it very clear.

The Chairman: I am curious as to the duty of a transfer agent to satisfy himself that the transfer is to a *bona fide* purchaser.

Mr. Howard: Well, the applicant himself will have to show that he fulfilled the statutory conditions that characterize him as a *bona fide* purchaser.

The Chairman: If he has possession of it, and it is endorsed over to him—let us say the certificate is in the name of some person whose name appears on the share register, and there is an endorsement to John Doe, for instance, and it is properly witnessed, or the signature guaranteed, he just turns over the certificate, and that is the information he finds there, does that end his responsibility in your view, under this section, or is it intended to end it?

Mr. Howard: Essentially that ends his responsibility. What he has to do is see that it is a certificate in proper form, duly endorsed. The one thing he can require is a guarantee of signature on it to verify the endorsement.

The Chairman: That is required even for exchanges?

Mr. Howard: Yes, sir. It is the general practice. Nothing will be substantially changed here from the point of view of good practice.

The Chairman: It is not intended to sweep in anything more?

Mr. Howard: I hope not, sir. No, it is intended to rationalize this whole system. We have gone over this many times with the experts who are responsible for the administration of stock transfer departments in the various trust companies.

The Chairman: Would it be fair to say that it is intended to rationalize the existing practice in the matter of transfers of shares and the actions of the transfer agent in that regard?

Mr. Howard: Intended, yes, sir, There are substantive changes in the law. We have gone over these with the experts many times. I do not think there is anything else that I can get into on this. It is such a technical area that I think I would be wasting the committee's time. All I wanted to do was to try to flag those rather fundamental provisions.

The Chairman: In section 72 you switch from the transfer agent to the issuer, which means the corporation. You say, "may require an assurance that each necessary endorsement on a security is genuine." This is a right that you are giving to the corporation, and I suppose the corporation could provide, by its bylaws, as to the conditions of transfer.

Mr. Howard: Yes, sir. How it does this is through its contract when it appoints a transfer agent. If you go back to section 76 you will see that transfer agent and issuer are largely equated under this bill. Both have the same duties.

Senator Cook: The transfer agent could also acquire, therefore.

Mr. Howard: Yes, sir.

The Chairman: There does not seem to be anything wrong with that.

Mr. Howard: There are no other points that I would raise, Mr. Chairman, unless there are some questions on that Part.

The Chairman: If we locate any, we will be back at you on them, because this is a run through to get your explanations and, let us say, account for why these provisions have been incorporated in the bill. We are not through even with the parts of the bill we have gone over with you. We have stood some of them so, obviously, we are not through with those, but despite the fact that we have gone over others we are not through with them, because it does not mean we have said they are okay.

Mr. Howard: I understand that, sir. If you need any further explanations from us, we are available.

The Chairman: You want to move to Part VII which starts at page 60 and deals with trusts.

Mr. Howard: This part is very limited in its application. It has to be read very carefully to see this. It applies only to public distributing corporations and it has no retrospective application. You have to read the definitions on page 61 to see this. The definition of "trust indenture" on page 61 makes clear that its application is only prospective. Section 77 subsection (2) makes it clear that the part applies only to trust indentures under which securities are distributed to the public. I do not want to go into the institution of the trust indenture, but you know, sir, from your long experience, that it is the device through which a corporation employs an arms-length agent called a trustee in order to distribute securities to the public.

All we wanted to do in here was to bring in basic conflict of interest rules, basic qualification rules, to ensure that there will always be at least one corporate trustee on these trust indentures who is subject to regulation under the Trust Companies Act. You will notice in section 80 that we have an analogue provision concerning the list of security holders under a trust indenture which parallels very closely the right to acquire a list of shareholders.

The Chairman: I was just wondering if this would apply generally to this part. Trust indentures really represent contracts or agreements between certain parties—the corporation and the underwriters—and if you stop there, you are dealing with property and civil rights.

Mr. Howard: There is not a provision in this act which does not deal with property and civil rights. As soon as a corporation issues a share to a shareholder there is a contractual relationship of some kind created. All we are saying here is that with respect to a security issued under a trust indenture, although in form it is issued directly by a trustee, it is under a contract with the corporation so the corporation itself is really issuing a debt obligation through a trustee to a security holder. The reason for doing this is to aggregate all of the security holders in one trustee to whom a security interest can be granted for the sake of convenience.

The Chairman: This is not an attempt to generate law of general application in connection with securities for companies other than those incorporated under this bill?

Mr. Howard: That is correct, sir.

The Chairman: There are not limiting words, are there, anywhere in this part?

Mr. Howard: It only concerns the issue of securities of a corporation throughout.

The Chairman: Yes.

Mr. Howard: If you look under the definition of "trust indenture," for example.

The Chairman: And "corporation" is defined, I take it?

Mr. Howard: Yes, a corporation is a corporation incorporated or continued under this bill.

The Chairman: I suppose as far as we are concerned at this time the federal government has the constitutional authority to incorporate companies and to govern and regulate their operations, et cetera. So I do not see any issue there. The Canadian Manufacturers' Association suggested that there might be some constitutional problem. I doubt it, but this is only "arm-chair" opinion.

Mr. Howard: I might add that we have had people raise questions about Part VI, Part VII and Part VIII. We have, of course, done very detailed studies of these problems.

The Chairman: You have to be able to govern your creatures.

Mr. Howard: We are just saying that you have to be able to govern them directly and in respect of what they do indirectly through a trustee they appoint.

There are two other things I should point out in this part, Mr. Chairman. We try to strengthen the hand of the trustee to get information from the corporate issuer. This has been a problem under the present Canadian law. This bill, like the very closely parallel Ontario law, does the same thing. In addition, under Section 86 we impose rather strict duties on trustees under trust indentures. As you all know, we have had the real practical problem in the Atlantic case, the Cofomo case, the Commonwealth case in British Columbia and the Champion Investments case. To their credit, the trust companies themselves certainly did not object to our putting in tough provisions. They took the point of view that they would rather know clearly that they had the strict duty than have it left nebulous.

The Chairman: I see under section 80, which is at page 62 of the bill, that we have a provision in relation to the securing of a list of security holders. The provision there has got away from the question of any person. Section 80(1) says:

> A holder of debt obligations issued under a trust indenture may, upon payment to the trustee of a reasonable fee, require the trustee to furnish with fifteen days after delivering to the trustee the statutory declaration referred to in subsection (4) a list setting out
>
> (a) the names and addresses of the registered holders of the outstanding debt obligations,
>
> (b) the principal amount of outstanding debt . . .

And so on.

In this case we are limiting the right to demand a list of security holders. We are limiting it to a holder or holders of those securities. So we have got away from the "any person" concept.

Mr. Howard: There was good reason for that. The security holder is a straight creditor of the corporation. His interests are limited to that credit agreement. What happens here in most cases is that one security or one debenture holder wants to organize all other debenture holders in order to compel the trustee to act more aggressively in defence of the interests of the other debenture holders.

The Chairman: I wish you had applied the same reasoning when we were talking about "any person" in relation to the list of shareholders because when you get to that position you do not require him to have any status. You say "a security holder or creditors" of the company so they have that status and they are entitled to know what the state of the outstanding securities is, who are the holders, and all that information. But if it is dealing with the list of shareholders, then any person who gets the notion can apply and by following the conditions get a list, and if he does not get it, the corporation or any person who refuses it can be fined and may be sent to jail.

Senator Cook: Any such person is deemed by the act to have good intentions.

The Chairman: Or, as Mr. Cafik puts it, even if we do incorporate that provision, it won't do any harm.

Senator Laird: He will mention this to the minister.

Mr. Cafik: We will discuss that point later, if you are agreeable.

Mr. Howard: This is very technical. The only thing I would point out, Mr. Chairman, is that we have worked very closely with the Trust Companies Association and with the draftsmen of the Ontario bill and the British Columbia bill with a view to making these provisions as uniform as possible throughout Canada.

The Chairman: You have not incorporated anything here that would be in conflict with provincial securities legislation?

Mr. Howard: No, sir, there is a special saving provision in here in fact is subsection (3) of section 77. This exemption is put in. For example, where a Canadian corporation is listed on the New York Stock Exchange and issues debentures under a trust indenture in the United States and Canada and it complies with United States federal law and with, let us say, Quebec and Ontario law, if there is any distinction, we do not want these rules somehow to override the rules of these other jurisdictions, so then the director is empowered to make an exemption. Then, if he does not that decision is appealable to the court.

The Chairman: In this subsection (3) on page 61 you would not go so far as to agree that the use of the word "may" means "shall"?

Mr. Howard: No, sir. He has to be pursuaded that the debenture holder or the prospective debenture holder will be adequately protected under the laws of the other jurisdiction. If anybody disagrees with that decision, then they can appeal to the court and of course the court can overrule it.

The Chairman: The conditions I am thinking of are that "If the trust indenture, the debt obligations issued thereunder and the security interest affected thereby are subject to a law of a province or a country other than Canada that is substantially equivalent to this Part."—This is a judgment decision, in the form in which it is stated, that the director has to make.

Mr. Howard: Yes.

The Chairman: Where can I challenge that judgment decision?

Mr. Howard: That is expressly appealable to the court under section 239 on page 189, paragraph (c).

The Chairman: Yes. It says:

> 239. A person who feels aggrieved by a decision of the Director . . .
>
> (c) to refuse to grant an exemption under subsection 2(8), 10(2), 77(3), 122(8) or 145(1), section 150, subsection 154(3)—

Mr. Howard: There is one other point about which you will have to read section 241 where you will see that these appeals are not full-fledged appeals but are made by summary application.

The Chairman: Notwithstanding the fact, Mr. Howard, that the right of the minister to make a judgment decision may involve the exercise of discretion you are specifically providing for a right of appeal?

Mr. Howard: Yes, but there are limits on this discretion and that is the standard set out in the subsection itself. We have to be realistic about this. The origin of these rules on trust indentures come from the U.S. Federal Trust Indenture Act of 1940. The U.S. standards are much higher than those we have. They have higher qualification standards for trustees. The SEC itself qualifies a trust indenture by a very careful scrutiny of its terms. No provincial securities commission does that yet, but under the provincial law, they now have rules at least in Ontario and British Columbia where they are substantially parallel to these rules. It is not therefore an exercise in broad discretion. We have always tried carefully to avoid this.

Senator Laird: Have you had any squawks from trust companies about this part?

Mr. Howard: No, sir. We could never say that we have had absolute unanimity on everything, but we have worked very closely with them and indeed their counsel has made a very great effort to criticize these with good reasons and we agreed with many of the reasons. On some of the toughest they did agree with us to our surprise. They felt that some of these were the kind of obligation they had anyway and they might as well be clear in the law.

The Chairman: The next one you are going to talk about is Part VIII starting on page 66 dealing with receivers and receiver-managers.

Mr. Howard: This is a very brief part, Mr. Chairman, and in large part influenced by the English Companies Act. The reason for putting it in here, of course, is to cover that case where a creditor through a receiver or receiver-manager effectively takes control completely over the business corporation.

The Chairman: Usually in debt securities there is provision for the appointment of a receiver at the instance of action by the holder of the share of the security.

Mr. Howard: This could arise in the case you mentioned of a trust indenture under which securities are issued, or under a normal mortgage or hypotheque.

Senator Buckwold: A layman's question—does the term "receiver" need a definition, or is that accepted?

Mr. Howard: This is an old and very well-known concept.

The Chairman: I do not want to rush ahead, but we do deal elsewhere with liquidators.

Mr. Howard: In Part XVII; and this is very carefully integrated both with liquidation and dissolution, and also with the proposed provisions concerning receiverships under the bankruptcy bill. This is a very loose area of the law right now and we tried to make sure that there are no contradictions between these provisions in the corporation law and the bankruptcy law.

Senator Flynn: But they are not called receivers under the bankruptcy law.

Mr. Howard: There is an official receiver under the present bankruptcy law, but he is in fact a public servant. That comes out of the English law. In fact he is not a receiver in any sense at all. He is an administrator. And under the new bankruptcy bill we will call him the "bankruptcy administrator" to dispel all misunderstandings that people now have. Under the bankruptcy law the estate is administered by a trustee in bankruptcy. Of course, under present bankruptcy law, before a trustee in bankruptcy comes in, it is very common for a receiver to be appointed under a mortgage or a trust indenture who just moves in, realizes all of the assets in the interests of his client who appointed him and that is the case we are concerned with. That would be resolved under the bankruptcy law. It is not the provision we are concerned with here. Here we are more concerned about the protection of shareholders where a creditor puts in a receiver and takes over control of an entire corporation.

The Chairman: I have one comment, although we have not come to Part XVII yet, and it is not on your immediate list, is it?

Mr. Howard: That will be on this list, yes, of essentially non-controversial technical issues.

The Chairman: I have a comment to make that it is about time we have a provision of that kind. The only way in which one could wind up a company under the present law would be by an application to surrender the charter and then you do all the things that a liquidator would do.

Mr. Howard: Yes, sir, you will see that this is very much streamlined administratively.

The Chairman: Ontario has a much better provision.

Mr. Howard: These provisions, with respect to Ontario, are much better than Ontario law.

The Chairman: Well, we will see that, later on.

Senator Buckwold: It sounds like that.

Senator Flynn: Of course, it is coming after the Ontario act. You can always improve on something that is already there.

The Chairman: They have moved faster in improving. We have an act of 1970 and here we are now at it again updating. The development in corporation operation is running pretty fast and even this act I think, if you let it sit for a few years, may become out of date.

Mr. Howard: Mr. Chairman, I think perhaps Mr. Cafik should speak to that. He made some statements in the House of Commons committee on this point.

The Chairman: I have made some statements, too.

Mr. Howard: It will have to be continually watched.

Mr. Cafik: It is our intention to do that. There is no doubt that when this act is passed in its present form or its amended form it would clearly have to be updated again. There is no doubt about that. It is a complex technical law as everyone knows, and it is not the intention of the department to let it sit for years without reconsidering aspects of it. There are some points that have not been brought out yet that will come out later. I made an undertaking that in some areas we would take things out of regulations and bring them into the law at the first opportunity. So that is our general intention, to revise and update this law on a current basis, rather than let it sit for years as was done in the past.

The Chairman: What is the next part?

Mr. Howard: I would suggest that we go, sir, to Part XVII, liquidation and dissolution, because it is so close to the receivership.

The Chairman: So my comment is not too much out of line?

Mr. Howard: No, sir, I would prefer that you would associate these two. Part XVII begins at page 161, section 200.

The Chairman: In one sense, this is new.

Mr. Howard: Yes, this whole part here is substantially new.

The Chairman: In that you did not have a specific provision in the present law for a liquidator—unless maybe under the Winding Up Act.

Mr. Howard: There are some rules applying to liquidators, particularly under the Winding Up Act, as it applies to solvent corporations. But the law is very vague right now as to the duties of the liquidators.

The Chairman: In Voluntary liquidation there did not seem to be any provision dealing with that except the indirect way of applying for surrender of a charter.

Mr. Howard: The whole law was completely unsatisfactory. This Part XVII, like the corresponding provisions in Ontario law was much influenced by the American Bar Foundation's model Business Corporations Act. It provides for two or three very short forms of dissolution—where a corporation has never carried on business, or has no property, then the liquidation and dissolution can be done in a very expeditious manner. If the corporation has carried on business or does have a property, then it still can be done by the sharefholders without the supervision of the court, unless a shareholder or creditor objects. In those circumstances, the shareholder or creditor may apply to the court asking that the court supervise the liquidation to ensure that everything is done correctly.

Senator Laird: I presume you would give the usual notice in the *Gazette*, and so on, would you?

Mr. Howard: Yes, there is provision for notice to shareholders, public notice for the benefit of creditors and notices in the *Gazette*, and so on.

Senator Buckwold: For my own information, what is meant by section 202:

> (1) Where a corporation is dissolved under this Part or section 261, any interested person may apply to the Director to have the corporation revived.

This does not mean shareholder, it means anybody. Anyone can come in and ask to have that corporation revived? Can you explain?

Mr. Howard: It could be a shareholder or a creditor or it may be somebody else. We do not want to define that now, and we do not want to limit it now. One of the difficulties under the present Canada Corporations Act, is that although we do have that power to dissolve in certain circumstances where a corporation has failed for two or more years to file an annual report, we have no revival power. Therefore, where by accident we kill off an existing corporation with assets, the only way in which it can be revived is by a special act of Parliament. As a matter of policy we do not right now arbitrarily dissolve any corporation simply because we want to wait until we have some greater powers.

Senator Buckwold: My basic question is, why do you say that anybody interested may do so, rather than a shareholder?

Mr. Howard: We say "any interested person."

Senator Buckwold: Any interested person means anybody.

Mr. Howard: It could be that the director of the corporations branch, for example, has a good reason to reinstate this corporation because there is some problem in litigation and this corporation may have a claim from which shareholders could benefit but no shareholder has the resources to come in and revive the company and press a legal claim. We cannot anticipate all that.

Senator Buckwold: That definition of interested party, I take it, would mean anybody who has evidenced any interest.

Mr. Anisman: The court would define it somewhat more narrowly than that. It would not be anyone entitled to push in, concerned about what happens. It would be someone with a more tangible type of interest, a more definable type of interest.

Senator Buckwold: I cannot interpret what the court may say. I just look at it and to me it seems to say that anybody off the street could just walk in.

Senator Cook: There may be a judicial definition of the interest.

Mr. Anisman: We would make it more well defined.

Mr. Howard: That was our real concern, that the court would narrow it down because they have such a narrow concept of standing before the court. We were concerned that they would narrow it too far. We do not see that as being a serious concern. We did not want to limit it to specified persons, for fear we would be missing someone who had a legitimate interest in the dissolved corporation.

Senator Cook: Does this mean that a company can be revived without the department having anything to do with it at all? If the company is dissolved, can the directors revive it?

Mr. Howard: They must apply to the corporations branch, through a formal process.

Senator Cook: I see. The "Director" there means the director appointed under the act. I understand.

Senator Laird: It is a very useful thing, senator.

The Chairman: It is very useful. Why would the director be brought into this, having the right of revival. On the question of a right to apply to the court for liquidation of any corporation, what would be the basis of the Director's interest and what purpose would he be serving?

Mr. Howard: You mean, sir, under the revival provisions of section 202?

The Chairman: Under section 204:

> (8) The Director or any interested person may, at any time during the liquidation of a corporation, apply to a court for an order that the liquidation be continued under the supervision of the court as provided in this Part, . . .

What is the purpose of the intervention of the director?

Senator Cook: Under subsection (9), you mean?

Mr. Howard: It is really subsection (8).

Senator Cook: Subsection (9) says taht an applicant under this section shall give the director notice of the application. I understand that now.

Mr. Howard: The purpose of subsection (8) is to enable the director of corporations to act, where he is getting in a lot of complaints from shareholders all over the country, no one of whom has resources or power to act in these circumstances—where the shareholder thinks that something is not being properly done, either he is not getting adequate financial reports or adequate accounting out of the liquidator or out of the directors who are supervising the liquidation.

The Chairman: Well, where is it provided as to how the director goes about acquiring the information for verifying the complaints so that he is in a position to apply to have the liquidation continue under the jurisdiction of the court?

Mr. Howard: We have a division of our corporations branch for that purpose. Mr. Brazeau is here today, and he is responsible for just this activity. He does this every day.

The Chairman: What I am really asking is where, in this portion of the bill, is the director empowered? Does he just have general authority if a complaint comes in, to have it investigated?

Mr. Howard: Yes. He has a general investigatory power to ask questions under Part XVIII. He might not get answers to those questions, but he is entitled, under this act, to ask them. If that does not work, then he has the general investigative power under Part XVIII. If he does not want to invoke that, and wants to go through a less formal process, he may invoke subsection (8) here and apply to the court and seek to have the court supervise, generally, the liquidation. That means, of course, that the liquidator then will have to report to the court, and will have to file his accounts and his reports in the court file so that they become public documents. That is to ensure that the shareholders receive this information.

The Chairman: You have, first of all, to have a liquidator. The moment the liquidator is appointed he takes charge of the assets, and he determines the liabilities, and then his job is to clean up the liabilities and embark on a distribution of the assets, getting all the necessary tax clearances, etcetera. What I am getting at is, the reasons which might impel the director to force a liquidation by the courts—in other words, to take it out of the hands of the liquidator—must relate to the conduct of the liquidator, surely. You have not mentioned shareholders before.

Mr. Howard: Normally it is because the shareholders are not getting advance financial reports, or other reports, out of the liquidator, in connection with the liquidation.

The Chairman: So therefore, if there are shareholder complaints that the liquidator is not conducting the liquidation in the proper form—

Mr. Howard: Or there are creditor complaints. They might also claim that they are not getting adequate notice. Or other claims might be made. Any of these things. Again, however, the director himself does not have much discretion. He can only go before the court and point out that he has received a number of complaints about things, and thinks that it is in the interest of the shareholders, creditors, and the public generally to have the court maintain surveillance over this liquidation, to make sure it is done properly.

The Chairman: I do not see that it says so here, but I take it the notice will be given to the liquidator of the proceedings that the director contemplates.

Mr. Howard: You will notice that the court has broad powers under subsection (8), but there are also other provisions in here that confer broad powers on the court. I am thinking particularly of sections 209 and 210, where the court has very, very broad powers. This is on page 169, section 210, paragraph (c). You will see that the court has power the determine who is entitled to notice, and what notice, in connection with any court proceedings.

The Chairman: Well, all I am concerned about is that the liquidator, if he is going to be ousted from his administration, should have notice, and he should have the necessary material that is going to be presented to support that application.

Mr. Howard: Yes. I think a lawyer, as a matter of common sense, or the director of the corporations branch, will have to give notice to the liquidator. If he does not, the court can require that such notice be given. Most applications can be made without giving notice in respect of this matter.

The Chairman: You would have to rely on subsection (8) on page 164, and lean on the court to the end that the liquidator would have to get all that information, because

where would the liquidator get notice that an application was being made?

Mr. Howard: The court, if it thought that the liquidator should have notice, and if it has not been given by the applicant, would order under that other section, exercising the court's powers. The court would require that notice be given to the liquidator, and of course would adjourn the proceedings until the liquidator had an opportunity to review it.

Senator Cook: Is this section 210(d)?

Mr. Howard: Yes. Section 210 (d).

The Chairman: Yes. You mean the provision which adds, "and replacing a liquidator", in (b)? Was it (b) you said?

Mr. Howard: No. Section 210 (d).

The Chairman: Section 210 (d) reads:

> an order determining the notice to be given to any interested person, or dispensing with notice to any person;

Now, if I go back to subsection (8), on page 164, all it says is, "The Director or any interested person . . ." What is included in "interested person"? A creditor, I suppose? Shareholders who feel that the administration is being abused? I am thinking of the position of the liquidator. Paragraph (d) give the court the power to make an order determining the notice to be given to any interested person, or dispensing with notice to any person.

Mr. Howard: One of our problems here, with these liquidations, sometimes, is that they are handled by an accountant who dies, or a firm that is dissolved, or perhaps by a corporate liquidator that just disappears, and therefore notice to a liquidator is just irrelevant.

I think probably many senators here have handled liquidations and dissolutions where there are no assets involved, and somehow they do not quite become finalized, because they are not worth the trouble, and that is why we have this proceeding. It is section 205 that is really geared to that problem, but there are cases where it does not make sense to give notice to the liquidator. If, however, there is a liquidator there with substantial assets, it is a matter of common sense that an applicant knows he must give notice to that liquidator. If he did not, the court would look after the liquidator. That is our assumption.

The Chairman: If the basis for the directors' intervention relates to the manner in which the liquidator has been administering the affairs, that is a reflection on him, and it may be of a very serious nature; or it may be that he is just absolutely incompetent.

Mr. Howard: It may be a reflection on his professional competence.

The Chairman: So he is one who is certainly entitled to notice, and I think it should be provided specifically. He not only should have notice, but I think he should have all the material on which the director is relying, or any other interested person.

Mr. Anisman: The act would want the liquidator to be bound by the court's decision. In order for that to occur the liquidator would have to be a party, so the liquidator, I believe, would invariably get notice in the circumstances which you are describing.

Mr. Howard: In short, you are saying, Mr. Anisman, that the liquidator has control of all the assets of the corporation; indeed, he is the corporation at that stage, and obviously he would be the other party in the application.

In theory, I guess, you could make an *ex parte* application, but you know from your long legal experience that *ex parte* applications are looked on with very great suspicion by every judge in this world. Quite frankly, throughout this bill you will see that we have assumed that judges have a lot of common sense and should have a lot of discretion to exercise it.

The Chairman: I am glad to hear you say that, because somewhere else in this bill you have referred to *ex parte* proceedings, and we may find it necessary to quote this against you.

Mr. Howard: Well, that is fair game. If we are inconsistent, we would like to be shown where.

The Chairman: I still say that we should stand section 204 over, to consider the question of the notice and the material that should be given to the liquidator if the director or any interested person is applying to have the administration transferred to the court.

Is there anything else there, Mr. Howard?

Mr. Howard: No, sir. It is section 205, I think, that you would want to look at. This is where the Director, or the Corporations Branch, has power to dissolve, because of default. Although harsh, I do not think these are objectionable provisions, because we have this strong revival power under section 202. This is really a matter of practical administration.

The Chairman: There does not appear to be anything else there.

Mr. Howard: I think all of the rest of this is just straight administrative mechanics. I might point out that under section 214, on page 172, we have tried to make very clear the duties of a liquidator. We have tried to make sure that the liquidator is not passing accounts in Victorian form but is required to keep and to show his accounts in accordance with contemporary corporate accounting standards.

The Chairman: Well, you need those guidelines.

Mr. Howard: Again, on the assumption that the liquidator is a little bit in the position of the director—he is the only organ of the corporation existing. Under section 215 we have given him very broad powers including, under subsection (2), reliance privileges similar to those enjoyed by directors.

The Chairman: If on reflection we think there should be more there, you will hear from us on that.

Mr. Howard: Very good, sir. I think they are very technical issues.

The Chairman: But it is a very important procedure. Liquidation has different connotations: It has a bad connotation and a good connotation. Very often the good connotation is that a business is sold out and the company is left only with cash, and depending on the conditions of the shareholders and their geographic location at the time, which may not necessarily be in Canada, liquidation is a method, a simple method for distributing the assets rather than keeping the liquid assets in the company and having the company do the distribution. First of all, it is ma-

chinery that you need. The liquidator can do the job and, invariably, he is bonded—or have you provided for bonding?

Mr. Howard: We have not required that, sir. Our experience has been, I might add, Mr. Chairman, that normally liquidators, if it is a complicated case, are already trustees in bankruptcy. Although there is no insolvency or bankruptcy connotation, they are very sophisticated.

The Chairman: An individual can be appointed a liquidator.

Mr. Howard: Yes, but normally a corporation does not go and pick up any individual off the street to act as liquidator.

The Chairman: Is there anything further in this part?

Mr. Howard: I suggest, Mr. Chairman, we move to Part XX, which is the general part. It is at page 192. These are a number of general provisions, some of which seem trivial, perhaps, but those of you who are corporate lawyers will know that they are an attempt to clear up issues which have been an aggravation for a long time. There is consensus on section 246, except subsection (3), which parallels Ontario law and which we think is correct. We just could not see any other way to deal with this problem and we could see no way to put in a quantified, wooden rule to deal with this issue.

Senator Molson: The "ordinary course of mail"? What about today's situation?

Mr. Howard: Read on, sir, to the "unless" clause.

Senator Molson: Yes.

Mr. Howard: I might add that it was stock transfer agents who came in to us and pointed out that because of mail strikes and similar things they had to have some provision of this type. They don't seem too concerned by it, but I believe the CMA and others thought we could put in some number-of-days rule. We did not want to do that. We saw no reason for doing that.

The Chairman: There does not appear to be much in this general section that is controversial.

Mr. Howard: There is one thing I pointed out to you and I know you will want to reserve it. That is section 254. In the outline that I prepared for you, I pointed out that I know you would want to review the regulation-making powers carefully.

The Chairman: We will have a look at that.

Mr. Howard: As I say, it is a central part of this bill that we have considerable regulation-making power under it. As I pointed out yesterday, not because we are reaching out to exercise power, but often because we are restraining our own power and getting away from the discretion we now exercise, we are explaining to people what we do and what standards we apply when we do it. When people do not like what we do, they very frequently have a right of direct appeal to a court.

The Chairman: I do not want to embark on anything right now that would take a long time, in view of the hour. What other parts do you wish us to consider?

Mr. Howard: The other parts are what I characterize as the controversial parts: Part V, Corporate Finance; Part IX, Directors and Officers; Part XI, Shareholders; Part XIV, Fundamental Changes; and Part XIX, Remedies, Offences and Penalties.

The Chairman: My own suggestion, then, is that if we are going to get to the controversial things this is not the right time to deal with them. We will concentrate on those next time, if the committee approves.

Hon. Senators: Agreed.

The Chairman: We will meet on next Wednesday morning at 9.30.

The committee adjourned.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 30

WEDNESDAY, MARCH 5, 1975

**Sixth Proceedings on Bill C-29,
intituled:**

"An Act respecting Canadian business corporations"

(Witnesses: See Minutes of Proceedings)

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THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, February 4, 1975:

"Pursuant to the Order of the Day, the Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill C-29, intituled: "An Act respecting Canadian business corporations", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, March 5, 1975.
(38)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: *Bill C-29—"An Act respecting Canadian business corporations".*

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Connolly, Cook, Desruisseaux, Flynn, Laird, Macdonald, Macnaughton and Sullivan. (10)

Present, not of the Committee: The Honourable Senator Lafond. (1)

In Attendance: Mr. H. Purdy Crawford, Special Counsel to the Committee and Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel.

WITNESSES:

Department of Consumer and Corporate Affairs; (*Corporate Affairs Bureau*):

Mr. John L. Howard, Assistant Deputy Minister;

Mr. F. H. Sparling, Director, Corporations Branch;

Mr. P. Anisman, Director, Corporate Research Branch;

Mr. R. D. Viets, Chief, Legal Division, Corporations Branch; and

Mr. Jacques Brazeau, Assistant Director, Compliance Division.

The Committee then proceeded to the examination of Parts 9, 10, 5 and 14.

At 12:15 p.m. the Committee adjourned until later this day.

———

3:00 p.m.
(39)

At 3 p.m. the Committee *resumed* consideration of the above Bill.

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Connolly, Cook, Desruisseaux, Flynn, Macdonald and Macnaughton. (8)

In Attendance: Mr. H. Purdy Crawford, Special Counsel to the Committee.

WITNESSES:

Same as list above.

The Committee then proceeded to the examination of Part 14 of the said Bill and following discussion it was agreed to defer consideration of Part 19 to a later date.

At 4:45 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,

Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, March 5, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-29, respecting Canadian business corporations, met this day at 9.30 a.m. to give further consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Members of the committee may see a new face sitting beside me this morning. We have retained Mr. Purdy Crawford as counsel to the committee. I told Mr. Howard that we were lining up the big guns for him, so he had better be careful!

Mr. Howard, on the last day we decided that today we would deal with those parts concerning directors and shareholders. Then, if we have enough time, we shall deal with the rest of the bill. Let us start with the section dealing with directors.

Mr. J. L. Howard Assistant deputy Minister (Corporate Affairs), Department of Consumer and Corporate Affairs: Mr. Chairman, it is clause 97, on page 68.

The Chairman: This is subject matter that intruded into our discussion when we were looking at other clauses of the bill. It is not clause 97 alone. That clause merely says that the directors and affairs of a corporation shall manage the business. That is quite simple. It blends into the requirements later that the majority of the directors shall be resident Canadians. Mr. Howard, would you like to start the discussion?

Mr. Howard: If I may, Mr. Chairman, I will run through the whole part touching on what I think are the salient features that cause some real controversy. We can then focus on those that are of particular interest to you. Before beginning, I would point out that I am always careful in making my responses—even when Mr. Crawford is not here!

As the chairman mentioned, all of these clauses are closely articulated. When you look at a Part, you particularly have to look at the whole Part. You cannot look at any one clause in isolation. Clause 97 brings in two or three concepts, Subclause (1) makes it clear that we continue the present federal law, that is, that the directors have very broad powers to manage the business and affairs of the corporation. There is no concept under this law as, for example, under the English Companies Act, that the members—that is, the shareholders—have anything other than specific powers in respect of fundamental changes, and so on. Unless there is unanimous shareholder agreement, the shareholders cannot control the directors as managers of the corporation.

Subsection (2) again raises the idea of a corporation with one director. Notwithstanding that we do not particularly promote the formation of small closely held corporations at the federal level, nevertheless a very high percentage of all corporations have only one, two or three beneficial shareholders.

This part makes clear, or recognizes clearly, that this is the real world, and therefore that we should minimize empty formalities such as requiring more than one director or requiring directors to hold qualifying shares, which, as most of you probably know, only means that you go through the formality of finding nominees, issuing shares to them in trust, so that they barely qualify to become directors, and they can then sign annual minutes of directors' meetings. So clause 97 is clear-cut.

Clause 97(2), however, points out that where a corporation distributes shares to the public it must have at least three directors. The reason for that is that under later clauses, particularly clause 165, where a corporation distributes shares to the public it is required to have an audit committee, and the audit committee is required to have at least two outside directors. Therefore, we require clearly that all public distributing corporations must have at least three directors.

I will not belabour these. By referring to clause 97, I just wanted to point out that there are a lot of concepts buried in these provisions. However, I do not think many of them are controversial, either among lawyers, accountants, or policymakers. I believe all of us want to get rid of what is, really empty formality.

Again, I should like to skim through these and react to your questions rather than go into them in detail.

Clause 98 respecting by-laws more or less continues the present law, but makes it clear that a shareholder has the right to make a proposal with respect to a change of by-laws.

The Chairman: Subclause (5) on page 69 states:

> A shareholder may, in accordance with section 131, make a proposal to make, amend or repeal a by-law.

What is behind that subclause?

Mr. Howard: This provision only makes clear what is already common law in the United States, the jurisdiction from which we derived the idea for shareholder proposals. The reason for the proposal section under clause 131 is to enable a shareholder, at relatively low cost, to take this initiative through management proxy materials which, of course, are paid for by the corporation.

It is rather impractical to expect a shareholder to undertake a dissident proxy solicitation, therefore we allow the shareholder to make the proposal provided he gets it in on time to management. Management must, if it is an acceptable item of business, include it in the management proxy materials.

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As I said, under clause 97 management is given sweeping powers to manage the business and affairs of the corporation. However, there are some residual rights of shareholders, this being one of them. If a shareholder feels a by-law is unfair, he can then make a proposal under clause 131 which must go out in the management proxy material and, therefore, must be considered at a meeting of shareholders.

The Chairman: And the shareholders at the annual meeting may discuss it and may vote on it?

Mr. Howard: Yes, Mr. Chairman.

The Chairman: Have you made it compulsory that if there is a proposal by a shareholder assuming he follows the form or the requirements of clause 131 the matter must be included in any statement that goes to the shareholders in connection with the annual meeting and also that it must be a subject matter of the agenda at the annual meeting?

Mr. Howard: It is clear, Mr. Chairman, that it must be both in the notice of meeting and in the proxy materials. We are jumping around a bit, but if you look at page 98 of the bill, you will find that clause 129(5) and (6) deal with notice of business at the meeting. Under subclause (6) special business must be pointed out clearly on the notice of meeting as extraordinary business.

The Chairman: I am not sure that subclause (6) on page 98 of the bill is tied in to clause 131 on page 99. Clause 129(6) speaks of special business. Is "special business" defined anywhere?

Mr. Howard: If you read subclauses (5) and (6) together you will see that it is the residue of all things that are not ordinary business.

The Chairman: So, if the shareholder raises an issue as to a bylaw or an amendment or repeal of a bylaw, it must be on the agenda of the meeting and must be in the proxy materials sent out by management?

Mr. Howard: Yes, Mr. Chairman. The specific reason for that is that there is a common law rule to the effect that under the letters patent corporations the directors have such complete control of not only the business but also the internal affairs of the corporation. That only the directors can initiate a bylaw change.

The Chairman: That is right.

Mr. Howard: Quite frankly, the general consensus was that that was an offensive rule; that directors or incumbent management should not be able to control shareholders to that extent.

The Chairman: The tendency in corporate legislation in the United States is to give the shareholders a more prominent part. I sometimes wonder whether they do not give them too prominent a part. People set themselves up in business and advertise that they will represent you at annual meetings and make all kinds of representations and speeches and ask all kinds of questions. They may have gone too far in that direction.

Mr. Howard: Certainly, the most famous dissidents are the Gilbert brothers from New York who have for 30 years been attending annual meetings of shareholders. I think the general consensus is that they have a very good catalytic effect on shareholders' meetings. One has to bear in mind, of course, that in the United States they did not have a lot of rules concerning the holding of meetings and the location of such meetings.

It was common, as you know, for larger corporations in the United States to call a meeting in a small village somewhere in a remote part of the country where there was only one hotel, and the corporation itself would then reserve all of the rooms in the hotel, making it most awkward for any shareholders to get to the meeting, ensuring that management would then control the meeting through the proxies which it acquired through management solicitation.

I am not suggesting that that has ever been the practice in Canada, and it has not been so largely because Canadian law prohibited such practice. I think there is very little evidence of any abuse by shareholders in the exercise of these powers.

The Chairman: I was not suggesting that. I have attended some meetings of shareholders in the United States where such characters have been present—and I use the word "characters" in its good sense—but they were well organized. They submitted questions to the company beforehand; they proposed plans and schemes beforehand. Sometimes this practice is useful, but very often it is not useful; it is disturbing.

I am just wondering whether the shareholder proposals under clause 131 are limited to a shareholder entitled to vote at the annual meeting. There is no provision under which that shareholder may bring such a character with him and that that individual would be given a voice at the meeting?

Mr. Howard: That is not much of a constraint. I mentioned the Gilbert brothers. They, of course, hold one share in a great many corporations. They have quite consciously solicited support, as you know, from members of an organization which they have set up so that they can go in with some kind of analyses of the financial statements and the annual report of the corporation with a view to asking the management good questions at the meeting. There is no doubt that when the Gilbert brothers go to a meeting, management comes to that meeting well prepared.

The Chairman: It is quite easy for them to become shareholders. There is no question about that.

Senator Connolly: Mr. Chairman, may I ask one question. Clause 98(5) is very broad as far as making a proposal is concerned, but clause 131 seems to cut down the effect of the proposal. I take it that this does not open the door for shareholders to make proposals in writing to the management of the company, to the board, to the officers, and have the directors deal with such proposals quite apart from the annual meeting, reject it and have it disposed of in that way?

The Chairman: No, it does not.

Mr. Howard: If management receives a proposal, that proposal, if it is in the proper form and has qualified as a proposal, must be included with the proxy materials, unless the subject matter is exempted under subclause 131(5). If there is any conflict, there must be an application to a court under subclause 131(8) or (9) to resolve the conflict; that is, to determine whether or not management is required to print that particular piece of information in the proxy material.

Senator Connolly: So that in practice, the only time the proposal is likely to get the attention of the company as a whole is at the annual meeting of shareholders.

Mr. Howard: Yes, that is correct. Clause 99 is simply a formal provision. Clause 100 gets us to the qualification of directors, including the Canadian resident director ruling.

Senator Laird: The ordinary meaning one would take of "Canadian resident" is somewhat whittled down by the interpretation section. If you turn to page 4 of the bill you will notice that a resident Canadian can be what we think he is, a Canadian citizen ordinarily resident in Canada. Then (b) says he can be a Canadian citizen not ordinarily resident in Canada who is a member of a prescribed class of persons, and if you go backwards you will see that "prescribed" means prescribed by the regulations. Have such regulations been at all promulgated in any fashion, or what is intended?

Mr. Howard: We are working on draft regulations, senator, and there are three classes. There is the Canadian citizen who is already resident in Canada; a landed immigrant within the meaning of the Immigration Act, and that covers the person who honestly and in good faith intends to become a Canadian citizen—

Senator Laird: That covers a landed immigrant who fulfils the requirement within a year to take appropriate steps to acquire citizenship?

Mr. Howard: In effect, senator, it would be six years. He has five years to wait before becoming eligible for Canadian citizenship and then he must, within one further year, become a citizen. Otherwise, he would be disqualified.

The third class is a Canadian citizen not ordinarily resident in Canada who is a member of a prescribed class of persons.

We have some problems, particularly with multinational corprations where Canadian citizens are officers and directors. Because they are working for multinational corporations, they are resident most of the time abroad, say, in New York, or the Bahamas, or some other office of the multinational corporation. The purpose of this provision is to permit the Canadian citizen in that funny category, although he is not resident in Canada for tax purposes, to maintain his Canadian citizenship for purposes of this act.

It is a very narrow class that we contemplate in the regulations.

Senator Laird: But it is contemplated that that class will be included in the regulations?

Mr. Howard: Yes, senator.

Senator Laird: Is there any other class that is likely to be prescribed in the regulations?

Mr. Howard: I cannot foresee any other. This seemed to be the only practical problem.

Senator Connolly: Leaving apart the question of multinational corporations, what about the situation where an individual, in his later years, is still owner of the company and still wishes to remain on the board but who, in fact, lives six or seven months of the year outside of Canada? Although he pays his taxes in Canada and considers himself a Canadian citizen, he may be out of Canada even longer than 6 months.

Mr. Howard: Senator, by giving that illustration of the multinational corporation, I was only showing the common case. Certainly, the regulation would not be drafted just to cover that case. It would be drafted in general terms to cover Canadian citizens not ordinarily resident. Again, it is in order to catch the Canadian citizen who is resident 5 months of the year in Florida but who maintains his domicile in Canada.

The Chairman: This language, I understand, is also used in the Foreign Investment Review Act, which we considered and approved.

Senator Cook: On division.

The Chairman: Do you need as long a sentence when you say in (b) on page 4:

> a Canadian citizen not ordinarily resident in Canada

Suppose you stop there.

Mr. Howard: If you stop there, then you do not catch the bad-faith landed immigrant. One of the problems of multinationals is that they qualify foreigners as landed immigrants and have them working here for 5, 6, 7 or 8 years, and then transfer them out without their ever having become citizens.

The Chairman: A landed immigrant is dealt with in (c). It says:

> a landed immigrant within the meaning of the Immigration Act and ordinarily resident in Canada, except a landed immigrant who has been ordinarily resident in Canada for more than one year after the time at which he first became eligible to apply for Canadian citizenship.

I am just wondering why you would need to give yourself the scope to prescribe by regulation. Do you need it? What do you encompass by the statement "a Canadian citizen not ordinarily resident in Canada"?

Mr. Howard: We were under pressure, as you know. This came in at a very late stage in this bill because of changes that had been made in the Foreign Investment Review Act. When we first drafted this bill we did not care about this very narrow class. It is in here to permit Canadian citizens not ordinarily resident here to qualify as directors in narrow circumstances which will be prescribed. When we draft the rules, obviously, we try to make them as parallel as possible to the rules of the Foreign Investment Review Act relating to this problem. You can cut it off anywhere, but if you do that, then you have included any Canadian citizens who has no connection whatsoever with Canada—for example, a Canadian citizen who has consciously gone abroad and is permanently living abroad in order to change his domicile for succession duty purposes or for income tax purposes, although that is not a sure way to avoid Canadian income tax any more. Still he could have very loose connections with Canada. I do not think we want to open it that broadly. I have no strong feelings about it, but that is why the rule was drafted that way.

The Chairman: Having approved of this description in another bill, perhaps there is virtue in being consistent. Would you go along to the next item?

Mr. Howard: Most of the rest of the provisions in this part, from clause 101 to clause 109—

Senator Desruisseaux: Before we proceed to clause 101, may I refer you to clause 100. Subclause (2) says:

> Unless the articles otherwise provide, a director of a corporation is not required to hold shares issued by the corporation.

Why should he be entitled to be a director if he is not a shareholder?

Mr. Howard: As I mentioned earlier, senator, as of this moment most directors of Canadian corporations, although they are required to hold shares, are not really shareholders. They only hold qualifying shares in trust. It is a totally empty formality which people have gone through now for two generations. It is done as perfunctorily as typing out an application to the corporations branch. In short, it does not mean anything to hold a qualifying share. We have made it clear here.

I was going to say that clauses 101 to 109 are essentially the mechanics of directors' meetings, removal of directors and so on. Although not terribly bold—it is similar, I believe, to Ontario law—there is a ruling here that a majority of shareholders may remove a director at any time by ordinary resolution. That is to ensure that directors do not become locked in office and that the shareholders do indeed maintain residual control. Under this bill, as I have underlined already, the directors have very broad powers. The shareholders have little power to come in and actually interfere with the way the directors manage the business. If the shareholders do not like the way the directors are doing it, they can make a proposal, but their more realistic remedy is to elect other directors and to remove the incumbent directors from office.

The Chairman: That takes us down to clause 109, did you say?

Mr. Howard: To clause 110.

Senator Connolly: If you are giving the shareholders the power to remove a director from office, do you also give the shareholders the power to direct a calling of a meeting for that purpose? Or must they wait until the annual meeting to exercise the right they are given under clause 104?

Mr. Howard: You will see under Part XI, sir, that there are two ways in which the directors can requisition a meeting of shareholders. They can do it directly—

Senator Connolly: I am talking about the other way. I know the directors can arrange for a meeting of the shareholders, but can the shareholders?

Mr. Howard: Yes. Under clause 137 and clause 138 you can see that there are two methods which the shareholders can use to take the initiative to call a meeting of shareholders.

The Chairman: This gives the shareholders a pretty powerful weapon, does it not?

Senator Connolly: Yes

The Chairman: In other words, a special meeting may be called for this specific purpose, and by a majority vote—that is, an ordinary resolution which is a majority vote—they can oust a director.

Mr. Howard: Yes, that is correct. As you know, that would be a most extraordinary proceeding under any system. In short, it indicates that the shareholders are so disenchanted with management that they will go to the trouble of requisitioning a meeting and will succeed in displacing the incumbent directors.

Senator Connolly: Only 5 per cent of them need get together to do this.

Mr. Howard: If it is a publicly distributed corporation, 5 per cent is a relatively large group to get together.

The Chairman: But in order to have such a resolution approved, there must be a majority vote.

Mr. Howard: Yes, sir.

The Chairman: So that is the controlling feature. It is quite a weapon to be hanging over the heads of directors, but perhaps it is supportable.

Senator Connolly: Well, it is democratic, and I think that is probably the trend in all law today. But the thing one wonders about is whether it makes the orderly management of the business of a company more difficult, because all of these powers reside in the shareholders, who can really interfere in the management of the company, I suppose, to the extent that they are empowered to do so by this bill. However, perhaps the way to look at it is that it is a safeguard against mismanagement by directors who are really not the owners of the company; the shareholders are.

Mr. Howard: Yes, sir. I think that is the realistic way to look at it. If it is a publicly distributing company and the shareholder is not happy with the conduct of management, normally he will not get involved in a proxy dispute, or in the procedures to call a shareholder's meeting, with a view to electing new directors. If there is a market he simply will sell his shares in the market and get out. It is only where he has a substantial block, or a great interest in the corporation, that he will invoke these extraordinary remedies.

Senator Connolly: We do have to remember that there has been an ample number of examples of pressure groups that get interested in certain aspects of a company's work. They do not like the environmental aspects; they do not like, perhaps, the foreign business that they do; they object to the politics in the country where they sell their goods or buy their products—things like that. And, you know, these people can interfere very drastically with what is normally ordinary business practice, because they are dealing with side issues, and they can get powers here. I am not saying that we should revise all this, but it is a consideration, I think. You do not want to be interfering, or over-interfering, in the normal conduct of a company's business because of side issues.

The Chairman: Well, it may not be interfering, if this is the view of the majority of the shareholders.

Senator Connolly: Yes. I suppose, ultimately, the majority of the shareholders can put them down, but the putting of them down very often is an expensive business for the corporation.

The Chairman: Yes. Are there any other questions?

Mr. Howard: I was just going to say, in reply to Senator Connolly's remarks, that of course it is clause 131, the proposal clause, and particularly subclause (5), concerning exempted matters that cannot be included in the proposal, that brings this into sharp focus; and what we have tried to do is leave it to a court to determine what is a reasonable interference in the actual business operations, so that management is not obstructed by what really are extraneous social or political issues. On the other hand, we did not think management should have a completely blank cheque,

either, but that it should still be subject to some scrutiny, and even residual control, by shareholders.

Senator Connolly: Yes. I think that is so.

Mr. Howard: I stopped at clause 110 mainly because Mr. Crawford is here today, and he has some very strong feelings about this clause. Again, when you look at clause 110, you must also look at clause 117. Clause 117 is concerned with the general duty of care on directors and officers. You might say that this is the counterpart in this bill of article 1053 in the Civil Code covering breach of fiduciary duty and negligence. This is a little broader than article 1053.

What we have tried to do throughout this bill is make directors and officers subject to one standard with respect to fiduciary duty, and one standard with respect to the exercise of care, diligence and skill in their capacity either as directors or officers.

Now, clause 110, when you look at it, raises some problems. For example, subclause (1) permits the directors to delegate certain functions to a managing director, or to a committee of directors.

Subclause (3) of clause 110 places limits on this delegation. In the earlier version of this bill subclause (3) was longer; that is, it contained more particar items. What we have done in the earlier draft was go through the bill and pick out every point where a director or officer was subject to personal liability in respect of misconduct, and we listed those in subclause (3), stating that there could be no delegation from the full board where a director or officer might be exposed to personal liability.

Senator Connolly: Will you say that again, please?

Mr. Howard: We went carefully through the bill to find every point where personal liability might be imposed on a director or officer, and we listed those in subclause (3). In the meantime, we received comments on the predecessor bill, Bill C-213, pointing out to us that many of these prohibitions on delegation concerned acts that had long been delegated in practice by the full board, either to an executive committee or to a finance committee. They brought pressure on us to abridge that list, and we did so.

My own feelings have always been a little bit ambivalent about this, because it complicates the law a little more than is necessary. However, on balance, a lot of commentators thought it was better to give the full board of directors more flexibility, even if it did expose them to a little bit of unusual risk.

Now I will point out the purpose of subclause (3). Notice that this is only to limit delegation, and really, what subclause (3) does is not to impose liability by itself; its function is to flag all of those sensitive items where a director or officer might be held personally liable. The standard is to be found under clause 117. There are, of course, the specific sections listed in subclause (3) of clause 110, which were added to make it very clear to directors and officers that when they are dealing with any one of these matters outlined in clause 110(3), they should be careful.

The Chairman: In subclause (3) of clause 110, the limitations on the authority of a managing director or a committee of directors are pretty extensive.

Mr. Howard: Yes, but they are very fundamental issues. As I say, where any director could be found personally, liable if he did not make himself aware of what was going on and did not dissent from what he thought was improper action.

The Chairman: Well, where do you protect the director against that?

Mr. Howard: We will get into these dissent provisions, and so on, later, in clause 118, and following. As I say, these were put there to warn them.

Now we come to subclause (4) of clause 110, which gets us into some of the very basic, conceptual theory that underlies this bill. I might say here that this provision was taken out of the American Bar Association's Model Business Corporations Act, and from a like provision in the New York Business Corporation Law. Our view is that subclause (4) makes it clear that the appointment of a managing director, or committee of directors, does not relieve the directors of the corporation from any liability imposed by law.

Senator Connolly: Is that not the common law now, anyway? It is the law, anyway, is it not?

Mr. Howard: I think it is, but you will find that Mr. Crawford disagrees with my analysis of this clause. That is why I underlined it here. We considered it to be largely non-controversial, and our reasoning was as follows. When you are talking about directors as a group you are talking about an organ of the corporation. Under clause 100, when they delegate functions to a committee of directors, or to a managing director, or, under clause 116, when they delegate functions to officers, what they are doing is assigning management functions to these people. It is not delegation in the normal sense of a delegation from the directors, as principals, to agents. When the directors act in this capacity the directors are the corporation, or, as it is more commonly put, the guiding mind of the corporation. When they delegate, there is no question of the directors being personally responsible, as principals, for the acts of the persons to whom they delegate authority under this statute. Where a managing director or an officer has authority that he has obtained from the directors to act, then he has the authority to bind the corporation, but not the directors personally. They are never personally liable as principals. The one time when the directors can be personally responsible is where in respect of a delegation of this type they commit a breach of clause 117, particularly the duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances—in short, they should not delegate to incompetent people or to dishonest people. In addition, having given this power to some people, they must maintain some reasonable surveillance of the activities of the committee of directors or managing director or officers who exercise their powers on behalf of a corporation.

Senator Connolly: In practice, is that not done by the committee of directors or the managing director reporting under good business practice to each meeting of the board of directors the work that he has done, or that they have done since the last meeting? That is normally the way in which directors comply with the tests as directors. But as you set them out in clause 117 it seems to me that any company that has a committee of the board, a management committee or an executive committee or call it what you will, or a managing director, they get reports from them as they get them from the officers at each meeting of the board.

Mr. Howard: Yes, that is good practice, and Mr. Purdy Crawford does that every day. I am sure that he would underline that that is normal practice. Under this bill that will be essential practice beause the directors in order to protect their rights to dissent under clause 118, or to seek indemnification under clause 119, must know what is going on in the corporation. However, there is a considerable period of time between the point when the committee actually exercises its powers and the time when it formally reports to the directors at the next meeting of the full board of directors.

The Chairman: Mr. Howard, ordinarily directors' meetings are held once a month, once every two months or once every quarter, and that is a long time between drinks, to use your phrase. Now you have a committee of directors and you have a managing director and in the meantime it would appear that subclause (4) of clause 110 imposes a continuing liability on the directors for what the managing director or the committee of directors may do. They have quite a run at the affairs of the company. Now are you suggesting that if the directors do not keep in touch with these people, the managing director and the committee of directors on a day-by-day basis, that they are likely to be subject to liability if anything happens to the company? Why should there not be some specific provision that if there is due care and diligence exercised by the directors in the appointment of a managing director, that that is a defence?

Mr. Howard: I do not want to imply, Mr. Chairman, that the directors have to have weekly meetings. If they have monthly meetings or even quarterly meetings, that would be adequate. But they cannot delegate functions to committees or to officers and then turn their back on what is going on in the corporation. What I am saying is that if they comply with the standards set out in clause 117(1) then maybe they will have fulfilled their duties.

The Chairman: Maybe—that is the word you used, but that is not good enough for me.

Mr. Howard: Well, what I cannot do is to set out a very general duty-of-care standard in quantitative terms.

Senator Connolly: I think you have done so in clause 117. I was going to ask the chairman whether he thought that the test set out in clause 117 might meet the requirement posed in his question.

The Chairman: Clause 117 says:

> Every director and officer of a corporation in exercising his powers and discharging his duties shall—

"Exercising his powers" I would imagine would include the appointment of a managing director or a committee of directors.

> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Now, Mr. Purdy Crawford, in your view this does not seem to go far enough?

Mr. H. Purdy Crawford, Counsel to the Committee: Mr. Chairman, I shall speak to this briefly. I do not disagree very much with anything that Mr. Howard has said. My only concern is that subclause (4) of clause 110 will not be interpreted the way he thinks it will be interpreted. If it is interpreted the way he thinks it will be interpreted, then I have no quarrel with him whatsoever.

The Chairman: Stop right there. What do we do in order to make sure that it will be interpreted in the way he says it will?

Mr. Crawford: I think we could make a very minor amendment. Let me tell you why he has been so eloquent in telling you why he thinks it would be interpreted in the way he has suggested. Let me also tell you why I have some concern about it, and I think it is ambiguous. Subclause (1) of clause 117 imposes upon the directors and officers the duty to act honestly and in good faith and to exercise care and diligence in exercising their powers and discharging their duties. One of their powers and duties is to manage the business and affairs of the corporation. Now they have to act diligently and with due care in managing the business and affairs of the corporation. But then we come to clause 110(1) and also subclause (3) which, subject to certain limitations, gives powers to delegates. But then immediately following in subclause (4), as I understand it, notwithstanding the power to delegate in clause 110(1), this does not relieve you of any liability imposed by law, and one of the liabilities imposed by law is to manage the business and affairs of the corporation. So I have a problem in the context of subclause (4) as to whether it will be interpreted to achieve the results that Mr. Howard hopes it will. So we are not really talking about any difference in principle, but I am just afraid it will not accomplish the results he is suggesting it will.

Senator Laird: But the chairman asked you specifically if you could propose an amendment to eliminate that danger.

Mr. Crawford: Well, our suggestion—and there is magic in words—is that subclause (4) might have added—I shall read it in the way it might be changed:

> The appointment of a managing director or committee of directors does not relieve the directors of a corporation from any liability—

And this is where it changes—

> —from the liability imposed by law upon them having regard to the express authority conferred in subsection (1).

The Chairman: The aspect of clause 117 that bothers me is that it speaks of:

> (1) Every director and officer of a corporation in exercising his powers and dicharging his duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence—

However, the appointment of a managing director, or a committee of directors as provided in clause 110, (4) does not relieve the directors of a corporation from any liability imposed by law.

Perhaps clause 117 deals with each director and his conduct, whereas clause 110 applies to the conduct of all the directors in the appointment of a managing director. I would like to have it made certain, beyond Mr. Howard's interpretation, at which in one time he used the word "maybe", whether he meant it.

Mr. Howard: I would like to withdraw that, Mr. Chairman.

Senator Flynn: Mr. Chairman, I believe I have the solution: We should simply delete subclause (4), as it is useless. If Mr. Howard is correct, it is useless.

The Chairman: That is correct.

Senator Flynn: Because clause 117 remains, and clause 110 stands by itself.

Mr. Howard: Mr. Chairman, may I reply to that? Logically that is quite correct. The provision in this subclause is simply to make it absolutely clear to directors to be on guard: they cannot abdicate their responsibilities by delegating work out to others. Tha is all it does; it is a warning.

Senator Laird: Mr. Howard, what do you think of Mr. Purdy Crawford's proposed amendment?

Mr. Howard: Notwithstanding my unlimited respect for Mr. Purdy Crawford, particularly in view of all the work he and members of his firm have done in assisting us to improve this bill, that additional word does not help me one little bit. It simply amplifies the provision, anyway. When we speak of any liability imposed by law we could probably say liability imposed by clause 117. We actually thought about it but, since it is just a warning section, anyway, I do not see how amplifying it really helps. We do not wish to change the substance. He is certainly not introducing a different standard of care, and I am sure he would not even wish to imply that.

Clause 117 is the standard and all it says is: Take care; you are still responsible, notwithstanding that you have delegated these functions. However, that does not mean that you are personnally responsible for the actions of the directors and officers, or a committee of them, but you must be careful in appointing them and maintain reasonable care in maintaining surveillance over their activities."

Senator Laird: Secondly, what is wrong with Senator Flynn's suggestion to delete clause 110(4)?

Mr. Howard: This is just a matter of whether or not this is a very useful warning to directors and as I say, it was included in the New York bill for that reason.

The Chairman: Clause 117 might be more effective, so far as the directors are concerned, if we did not have clause 110(4). Maybe the solution of this problem is to strike out clause 110(4).

Senator Macnaughton: That is also my view, because Mr. Howard may not be around for ever and we would have to rely on others for an interpretation.

Mr. Crawford: I agree with the comment. As a matter of fact, our original suggestion was to delete this subclause, my concern being that if it does not mean anything the court is apt to look at it and endeavour to find a meaning, which might be that meaning about which I am concerned.

Senator Macnaughton: Exactly; it is the door.

The Chairman: Mr. Crawford, will you make a note that as of the present moment the opinion of the committee is that clause 110(4) should be deleted. There will be debate later in that respect.

Mr. Howard, I take it you have nothing more to add right now with respect to this subject?

Mr. Howard: No, but I strongly recommend that you consider how important that is as a red flag to directors, to remind them of their exposure to liability on such occasions.

Senator Cook: Clause 117(3) is just as much a red flag, is it not?

The Chairman: Do you not consider clause 117(3) to be a warning to directors?

Senator Macnaughton: I have a solution Mr. Chairman; I suggest that we eliminate subclause (4) and take Mr. Howard out for lunch!

Mr. Howard: I cannot be bought off so cheaply, Mr. Chairman!

The Chairman: We should consider for a moment, Mr. Howard, clause 109(2), which appears at the top of page 77. You will remember that we had some discussion recently with respect to the point that this bill requires a majority of the directors to be Canadian and a quorum must be a majority of the board. However, in the case of illness of one Canadian director a meeting could not be held.

Senator Macnaughton: Or in the event of strikes, or anything else such as that.

The Chairman: My point is that the board would be hamstrung. The suggestion I made during that discussion was the very provision contained in the jury system in the United States, which may be three more members sworn, who have been approved for jury service, than are required for a panel. Fifteen jurors might be sworn in, although only 12 are needed. Then in the event of one of the 12 becoming ill, one of the additional three would take that juror's place and the trial could continue. That is only one method of dealing with the problem. Mr. Crawford, you had suggested one other way of dealing with it. Mr. Howard, the floor is yours to tell us how we can cure the situation that the bill, in its present form, provides that there could be a board of directors which could not function.

Senator Laird: Before Mr. Howard replies, unless my memory fails me, I suggested a proposition to Mr. Crawford at that discussion that there be provision for substituting a senior officer of the company, under such circumstances, who was not a director. I believe Mr. Crawford more or less agreed that that might be a solution.

Mr. Crawford: That is correct.

Senator Laird: What do you think of that, Mr. Howard?

Mr. Howard: That is really a variation of the jury panel scheme suggested by the chairman. Under the English act, for example—and, I believe, still under the British Columbia act—a directors' meeting in his place. We have not provided for that in this legislation, for very good reasons. This bill imposes considerable personal liability on a director who does not faithfully carry out his functions—indeed, who does not with adequate care carry out his functions. Therefore we do not consider it fair to impose such a liability on someone who is a temporary alternate and is asked to make an important decision at a meeting of directors. To avoid the basic problem raised by clause 109(3)—that a Canadian majority of directors, for physical reasons, simply could not convene—we have included two provisions in an attempt to break any log jam.

The first is clause 109(8), which provides for a telephone meeting. The alternative solution is under clause 112, that is, a written resolution in lieu of a meeting. We have tried to make the formalities for holding these meetings so simple and flexible that there is always a way to get around these physical difficulties. If, for example, you have a Canadian director stranded at the airport in Montreal, there is no reason why he cannot get on a conference telephone and participate in the meeting that way, at least in respect of any major issue.

The Chairman: It is not that easy to get to a conference telephone if you are stranded at an airport, because quite likely the reason for being stranded has to do with traffic blockades, and I do not expect that they have conference telephones at the airport.

Mr. Howard: Of course, there could be an ordinary telephone used at the airport, so long as there is a conference telephone elsewhere. I am not here to promote Bell Canada, but Bell Canada does offer some very extraordinary services with respect to these conference arrangements by telephone. There are practical ways to get around the impasse.

The Chairman: A Canadian director may be seriously ill for a period of time. Therefore he is not available. There are only two courses to follow: call a meeting and remove him—

Senator Flynn: I think that is a solution.

Senator Connolly: Or do it by writing.

Senator Flynn: I do not think there is any other solution—to provide in the by-laws that he shall be removed.

Senator Connolly: If he is there for a long time, he could approve a resolution. Is it section 112, you said, where it is done by writing?

Mr. Howard: Yes, sir.

Senator Macnaughton: Where is the telephone clause?

Mr. Howard: Subclause (8) of clause 109.

Senator Connolly: Mr. Chairman, I do not think this is much of a problem. Perhaps I am minimizing it.

Senator Flynn: Unless you have a very small number of directors, one may create a problem.

Senator Cook: What happens if there is only one director and he dies? How is he replaced?

Mr. Howard: There are special provisions under the bill that permit his heirs to carry on with the administration of the corporation. Of course, in those circumstances, it is very simple to elect one more director. Usually, in a closed corporation, we would expect that in the corporation's constitution there will be some provision—

The Chairman: But there may be a problem there. At a directors' meeting, this clause requires that a majority of directors present must be Canadian.

Senator Laird: Mr. Chairman, your example of what could happen in the event of illness is a perfect example, because I have gone through this under the Income Tax Act. I had a case at one time in which there was an assessment of $600,000. The taxpayer was alive but in a coma. He had to personally sign the notice of objection. What could I do? I was at the mercy of the department. They let me sign on his behalf. Had it not been for the goodheartedness of the department, I would have been out of luck.

Senator Connolly: Is that not a normal thing, senator?

Senator Laird: No.

Senator Connolly: He had given no power of attorney?

Senator Laird: No. There was no way I could get any relief under that act. That man was in a coma.

The Chairman: At an earlier period in time under Ontario law, directors of a mining company could give a proxy, and someone could attend the directors' meeting on their behalf. I am not in favour of that.

Senator Cook: I am beginning to think that it is up to the director not to get himself in that position.

The Chairman: Not to get ill?

Senator Cook: No, to have another director around the place. We cannot provide against everything in the act. If someone is in a coma and he is the only director, there should be another director around, on the board, so that he would not find himself in that position.

The Chairman: But until something is done, you cannot have a meeting.

Senator Flynn: Then do something.

Senator Cook: Do something before it happens. That's my point.

The Chairman: What do you do?

Senator Flynn: You replace him, I suggest.

The Chairman: It is an important aspect—

Senator Flynn: It is only in the case of a small board of directors that this may happen.

Senator Cook: It could happen because of an airplane accident, but outside of that—

Mr. Howard: I wanted to pick up Senator Flynn's point. He is saying that it only happens where you have a small board of directors. The policy thrust of these provisions is to require more Canadian directors. If you are running into these problems, enlarge your board, put more Canadians on the board, so that you will not run into this problem. That is the bias in these sections.

The Chairman: You are saying that you should put more Canadians on the board than the bill requires?

Senator Flynn: That is right.

Mr. Howard: Yes; or alternatively enlarge the board so that you have a greater group of Canadians.

The Chairman: Even if you enlarge the board, say, to 11, six of them must be Canadians; is that right?

Mr. Howard: That is correct.

The Chairman: Why does not the same situation occur? If I do not have six Canadians present, I cannot have a meeting of the board.

Mr. Howard: That is true in that one case. What you can do then is have a much smaller quorum than a full board

meeting, and still have a meeting. That means that some who do not qualify cannot vote at the meeting.

The Chairman: There is a provision in here with respect to a quorum.

Mr. Howard: It is on page 77, subclause (2). The quorum rules are very flexible. They are deliberately made flexible to resolve problems of this type. With a board of eleven, if the articles so provide, there could be three men as a quorum.

The Chairman: You referred to subclause (2) at the top of page 77. But subclause (3) says:

> Directors, other than directors of a corporation referred to in subsection 100(4), shall not transact business at a meeting of directors unless a majority of directors present are resident Canadians.

So we have a problem even there.

Senator Flynn: It is only there that you might have a problem. With a board of five, you would have three Canadian residents and two foreign directors. If one of the Canadians is sick, you would not have a majority at the meeting.

The Chairman: If you had a board of five and you had three Canadians, as you must have, you then provide for a quorum of two. Then, this says—

Senator Connolly: But you cannot. You have to have a majority.

The Chairman: It says that two must be Canadian.

Senator Cook: You may have eleven directors, six of whom are Canadians. Your quorum might be three, but you still have to have six Canadians if all the board is present.

Senator Connolly: I think that perhaps we are trying to refine this a little too much. It seems to me that the safeguards are pretty broad here. I do not suppose the law can actually provide for every individual case, but human ingenuity can. Directors' meetings are held, as you so well know, Mr. Chairman, without the actual—

The Chairman: Not so well now.

Senator Flynn: But you have a good memory.

Senator Desruisseaux: This situation occurs in many countries. I wonder if Mr. Howard acknowledges what has been done in this particular case in some of those countries?

Mr. Howard: There are a number of countries, such as Sweden, Switzerland and Australia which do have similar rules. If you will, Mr. Chairman, I can furnish details to the committee. The United Kingdom and the United States generally do not have such rules.

The Chairman: Not to labour this too much, in subclause (2) at the top of page 77, there is provision under which directors may, by some provision in the articles or bylaws, provide for a minimum number of directors requiring to constitute a quorum. If we take the famous example of five directors, the ordinary quorum would be three. But you could provide for a quorum of two. But you must still have three Canadians on the board. It then says that the board cannot act unless the majority of directors present are Canadians.

Senator Cook: That is right. That is my point.

Senator Flynn: But if you provide that, Mr. Chairman, you are locking yourself into this problem. It is because you are doing it; it is not because of the act. When you look into this, there is really no problem, so long as you accept the principle that the majority of directors should be Canadian and the majority of directors present at the meeting should be Canadian. If you do that, you can arrange your by-laws as a consequence.

The Chairman: If you are short one Canadian and you want to hold a meeting, there is no authority under this bill for directors to move without notice, I take it, or the shareholders to move without notice, and you are losing time. I am thinking in terms of removing a director who is ill and putting someone else on, and then accepting the resignation of that director after the meeting. But he might like the job—

Senator Beaubien: —and refuse to resign.

The Chairman: Do you have any suggestion?

Senator Flynn: I would say that these problems could exist notwithstanding this new provision respecting a majority of Canadian residents, because you could have that today.

The Chairman: That is right. What I had hoped we might get from you, Mr. Howard, reserving all your rights, is your suggestion as to how we might resolve this problem—not an argument to the effect that in your opinion it will work all right. Let us forget that for the moment.

Mr. Howard: I was going to characterize that by saying that I agree with Senator Flynn. I have no suggestion other than what is set out in the bill.

What we tried to do, first of all, was to put in a very strict rule, which both the House of Commons and the government wanted, that there must be a majority of Canadian directors in all corporations incorporated under a federal act of Parliament. Accepting that principle, we then went on to make it as flexible as possible for the corporations to structure their internal affairs so that the rule in question would not be a handicap in the practical operation of the business. As I have pointed out, there are various alternatives, including a resolution in lieu of a meeting, telephone meetings, the enlargement of the board to allow for a greater reservoir of Canadians to make up a quorum, or the possibility of a director resigning and being replaced by the remaining directors, if through permanent illness, or something of that nature he is unable to continue.

The Chairman: The suggestion you make as to the enlargement of the board would be to enlarge it beyond the statutory requirement that a majority of the directors must be Canadians? What you are saying is appoint more Canadians in excess of the statutory requirement.

Mr. Howard: Yes, Mr. Chairman.

Senator Macnaughton: In relation to a small company, who pays the extra costs of the extra directors? That could be a considerable expense to a small company.

Mr. Howard: That is colouring the matter a little bit. If it is a small company, usually it is a wholly-owned subsidiary of a multinational company. We handle many thousands of these cases and we know that in Canada that is

the usual structure. There are, of course, some exceptions; there are some corporations in Canada which are small and which are subsidiaries of small U.S. corporations. In such cases, we have to concede that the circumstances are extraordinary. We know that the shareholders of such corporations put great pressure on their Canadian lawyers to act as nominee directors. That is a matter of conscience.

The Chairman: I think we have just about shaken this, Mr. Howard. What is the next item?

Senator Macnaughton: But have we shaken Mr. Howard?

Mr. Howard: Yes, Mr. Chairman.

The Chairman: I am not sure that we have shaken him. There is a point that we have not resolved. I should not think there is unanimous agreement with your statement, Mr. Howard, that this clause is all right and that we should fear no evil and fear no harm; that it will work out. We just cannot look at the bill in that way.

What is the next item that you want to deal with?

Mr. Howard: As I said, Mr. Chairman, a lot of these are non-controversial. Clause 116 is the analogous problem and concerns the delegation of functions to officers of the corporation. Again, this is very flexible. You will notice that under (a) what it delegates to officers are powers to manage the business of the corporation. "Affairs" is defined in a very general sense to cover, essentially, relationships between management and the shareholders, or among parent corporations and subsidiary corporations and their respective shareholders, the purpose being to distinguish "affairs" from the actual business being carried on by the corporation.

In this resepct, the conclusion was, that only powers to manage the business should be delegated to officers. In other words, they should not have powers to interfere in what are really the arrangements between the directors on the one hand and the shareholders on the other in the ordinary case.

This has been questioned. I would personally object to giving the officers the power to manage the affairs of the corporation. I think only the directors should have those powers. I know Mr. Purdy Crawford might want to speak to this issue.

Senator Cook: Clause 114 is new to me. Is that a new philosophy, or is that common in company law?

Mr. Howard: Clause 114 was not included in the earlier proposals that we prepared, senator, because in our view that is, essentially, bankruptcy law and should be set out in the Bankruptcy Act. However, there have been so many delays in the preparation of the bankruptcy bill that our minister felt we should not remove this provision, which is in the present Canada Corporations Act, but should leave it in this legislation until we do have a new Bankruptcy Act which will apply to all corporations across Canada. At such time as we have a new Bankruptcy Act, that act will, in effect, abrogate this provision.

The Chairman: Perhaps members of the committee will recall that I raised a question on second reading in relation to the provision in this bill concerning unanimous shareholder agreements in that such agreements may simply make the directors figureheads. Through unanimous shareholder agreements, shareholders may carry out the functions of the directors. There is nothing in this bill, as I see it, to relieve the directors in those circumstances from the specific liabilities that are set out in the bill, one of which being that they are jointly and severally liable for wages.

Mr. Howard: Clause 140, subclause (4) on page 106 of the bill, Mr. Chairman, states clearly that where shareholders take over the functions of directors, they also assume the responsibilities.

The Chairman: All clause 140(4) says in relation to the unanimous shareholder agreement is that the shareholder has all the rights, powers and duties of the directors and that the directors are thereby relieved of their duties to the same extent. But it does not say their liabilities.

Mr. Howard: As a matter of statute drafting, we never negate exceptions. What we do is refer either to the duty or to the liability. What we state here is that where a shareholder takes over a director's functions he is deemed to be a director. To the extent that he is deemed to be a director, the real director is relieved from his obligations.

The Chairman: But they still remain directors.

Mr. Howard: Yes, sir, but they are relieved of any obligations and the shareholders are then deemed to be directors responsible for those obligations.

The Chairman: You have two problems there. One is that in your articles you have a limit on the number of directors. Now, under the unanimous shareholders agreement, you will have the shareholder who is a party to the agreement having all the rights, powers and duties of a director. If you have a number of shareholders who are parties to a unanimous shareholders agreement, then you have a number of directors, which would exceed the limit, and I still say the only thing you relieve the real directors of the company of is their duties. But you do not relieve them of their liabilities.

I take it that when you use the word "liability" in certain clauses of the bill you mean liabilities, not duties.

Mr. Howard: Liability only arises in respect of a breach of a duty. Of course, if under clause 117 he has no duty, then he cannot possibly have any liabilities.

The Chairman: There is the statutory liability because he is a director.

Senator Cook: There is no breach of a duty in clause 114. That is a strict liability.

The Chairman: Yes, that is a liability. The employees are not paid, for example, so the directors are liable.

Senator Flynn: They would not be relieved of any liabilities incurred before the shareholders take over; the directors retain that liability, no doubt. So what you are thinking of is subsequent liability.

The Chairman: Yes.

Senator Flynn: If there is any doubt, it would be easy to correct that.

Senator Connolly: Could we get a practical example of that? Are we thinking here, Mr. Chairman, of the situation where you have a Canadian company incorporated under this act in which all the shares are owned by an American parent company. The company qualifies with the number of Canadian directors and so on, but all of a sudden the American parent company decides that it is going to run

this thing. It is not going to listen to the Canadian directors and it prescribes a certain course of action and by a unanimous shareholder action resolution—or whatever the step is—something is done which makes it impossible for the employees to be paid.

The Chairman: Yes?

Senator Connolly: And these Canadian directors then would have to face the question as to whether they have a liability to those employees. That is something imposed upon the directors not only from without the company in Canada but from outside the country. It is a matter of share ownership. What is the position? What does Mr. Howard say about that?

Mr. Howard: Our position on this is that if somebody goes in as a nominee director in circumstances such as you have described, then he should get a very broad indemnity agreement from the parent corporation before he agrees to act as a nominee. If he does not get that, then he should not put himself up as a nominee director.

Needless to say we thought about these problems and we wanted to make sure that these nominees did not become an empty facade.

Senator Cook: One does not recognize a nominee director. He is a director, period.

The Chairman: That is not dealing with the problem I have raised, Mr. Howard.

Mr. Howard: Your problem is that there could be some strict liability under the statute that a director is liable for.

The Chairman: Yes.

Mr. Howard: And he might not be able to get indemnity for it, because the parent corporation cannot indemnify him even if he has an indemnity agreement.

The Chairman: Are you suggesting that with respect to this liability for wages he could get an indemnity agreement from the company? That is not worth anything.

Mr. Howard: What he would do is get it from the parent corporation, where it is a wholly owned subsidiary. Remember that in clause 140, essentially we are talking about corporations which are closely held and where it is a unanimous shareholder agreement. It is, in effect, an incorporated partnership. That is the normal case that we are dealing with here. We could have gone out in clause 140 and tried to draft a number of clauses to cover rather exotic cases. Indeed, we looked carefully at German law where they had a special statute applying only to closely held corporations. We felt that that was not necessary, first, because the federal government is not in the business of trying to promote small closely held corporations, at least with respect to their formation at the federal level, and, second, because we thought we could handle the problem adequately by delegating out to the shareholders themselves the responsibility to think about the arrangement they want in effect as partners under a unanimous shareholder agreement.

The Chairman: But you have not. All you used is the word "duties."

Senator Flynn: I think it would be well to clarify that. Would you allow me, Mr. Chairman, to put the question to Mr. Howard in connection with clause 140(4). Is there any provision to prevent this clause from going contrary to the rule of a majority of Canadian directors? If you have only one shareholder, he can decide to take over the duties of the directors, and there is no more majority of Canadian directors. Has this problem been raised or discussed?

Mr. Howard: The law requires that every corporation must have one or more directors. It also requires a majority of Canadian directors. Where the corporation is a wholly owned subsidiary of a foreign corporation we have no illusions that Canadian directors are suddenly going to go in and take control of the management of the affairs of that corporation, or the business and affairs of that corporation. Obviously, if it is a wholly owned subsidiary it has been set up for tax reasons as a Canadian subsidiary, but is really run essentially as a branch operation of a multinational corporation.

The Chairman: Mr. Howard, would you stop right there, please

Mr. Howard: We know that is the real world and we have never had any illusions in respect of such a case about Canadians taking over control of the business. However, they must be there, They are directors and they are always entitled to state their views.

Senator Flynn: But they are relieved of their duties.

Mr. Howard: Yes, that is correct. We wanted to relieve them of their duties.

The Chairman: But you see, Senator Flynn, there are two points here. First, you have a unanimous shareholders agreement. In other words if the shareholders agree, and there are one or more of them in that agreement, they can take on all the rights and responsibilities of the directors. But you still have that board of directors, because if you do not maintain a board where you have the majority being Canadians you just have not a viable corporation under this bill.

Senator Flynn: That is right. But that is a very good way of going against the rule. It makes the law entirely inefficient. Even if we have no illusions, it seems to me that we should be logical. If we set a rule, we should hardly provide a way for getting round it.

Senator Connolly: This completely frustrates the provision for having a majority of the board Canadians. This can frustrate that completely.

The Chairman: It is possible.

Senator Connolly: Let us take an example, Mr. Chairman. Suppose American companies are prohibited from dealing with companies in enemy countries. Suppose the directors of a Canadian subsidiary decide that they would like to do so. And it is perfectly permissible in Canadian law to sell something, say, to Cuba, whereas U.S. law forbids it. Under this provision I suppose the parent company owning all the shares in the Canadian corporation could override the Canadian directors and say, "No, we are not going to deal with Cuba because the Trading with the Enemy Act in the United States does not allow it, and we are not going to contravene that act."

The Chairman: There is no requirement that the shareholders be Canadians.

Senator Connolly: No; of course not.

Senator Flynn: But the directors have some responsibility.

Senator Connolly: This is a rough situation, I think.

The Chairman: There is a second aspect of this that you should consider, too, in addition to having a unanimous shareholder agreement—that is, among the shareholders. You may also have a unanimous shareholder agreement that is entered into with a third person who is not a shareholder. There is provision for that. Now, how far do you envisage, Mr. Howard, that the provisions of a unanimous shareholder agreement as between the shareholders and a third party might go, so far as the duty of a third person who is not a shareholder and not a director, is concerned?

Mr. Howard: He would only have his duties that arise under the agreement, which is normally, of course, a financing agreement.

The Chairman: It may be a financing agreement; and it may, in certain circumstances, put him in a controlling position.

Mr. Howard: Yes, to the extent that he could control the company, through the financing agreement, by appointing a receiver, or through some other technique.

Senator Flynn: Can this situation, envisaged in clause 140, be a permanent one?

Senator Cook: I was going to ask the same question.

Senator Flynn: Could this situation be a permanent one?

Mr. Howard: That is, under a unanimous shareholder agreement?

Senator Flynn: Yes.

Mr. Howard: Yes, if the parties to the agreement in fact agree that it should continue for a long period of time. That would be permanent.

Senator Flynn: In those circumstances the board becomes a facade.

Mr. Howard: We keep colouring this by getting back to the case of the wholly owned subsidiary of the foreign controlled corporation. Now, that is a very common case in Canada, admittedly, but nobody ever intended that the Canadian director provisions in here should somehow permit the Canadians to come in and totally displace the powers of the foreign corporation. If that is to be done, that will change the whole nature of foreign direct investment in Canada. The only concern here was to make sure that they would have to have Canadians in that corporation, and they would have to listen to the views of those Canadians, who would presumably state the Canadian viewpoint.

Senator Flynn: Yet they do not.

Mr. Howard: Yes. They have to have a board of directors.

Senator Flynn: But they do not even have the duty to advise the shareholders. If you do not have that duty you are certainly not going to say anything. Why do you need that?

Mr. Howard: But there is only one shareholder.

Senator Flynn: Not necessarily.

Mr. Howard: We are getting into the whole question of foreign direct investment something that cannot be resolved under this bill. All this bill says is that you must have a majority of Canadian directors. You might not listen to them, in these circumstances, but you have to have them, and they are entitled to state their views. Furthermore, if they think the head office is riding roughshod over them, they can resign and publicize what they are doing.

I do not know about the rest of you, but I learned quickly in my practice in Quebec that the corporations most sensitive to local Quebec problems were the multinational corporations. Not the Canadian controlled ones, but the foreign controlled one were the most sensitive, because they had some experience with these problems. Personally, I do not see this as a great problem.

Senator Flynn: Do you have that problem in the present law?

Mr. Howard: Which problem? The unanimous shareholder agreement?

Senator Flynn: The unanimous shareholder agreement and the shareholder agreement.

Mr. Howard: No, this is new in the law.

Senator Flynn: Why do you need it?

Mr. Howard: Mainly because, right now, the common law does not permit the directors to abdicate any of their responsibilities, and as a result, under the common law, even where you have two shareholders under what is, in effect, an incorporated partnership, they cannot run their affairs through their agreement, they have to go through all the corporate formalities to run their affairs, which is, of course, just a waste of time.

Senator Flynn: Do you not think it is illogical that on the one hand you are trying to impose more liability and responsibility on the directors, and at the same time you allow them to get into a situation where they are relieved entirely of their responsibilities and put everything on the shoulders of the shareholders?

Mr. Howard: The shareholders, under the unanimous shareholder agreement, are the whole corporation. Of course the shareholders should carry all of this responsibility if they have what is, in effect, a corporate partnership.

Senator Cook: All they have to do, under the articles, is convene an extraordinary directors' meeting and dismiss the directors. There is no need for all this.

Mr. Howard: They must have directors at all times.

Senator Cook: But they can dismiss them and replace them by others.

Mr. Howard: Yes. If they wish to play that game and face the public censure they can do that; but I have just stated that corporations are very sensitive to that kind of accusation.

Senator Cook: It is not a game. Suppose Senator Flynn and I and other senators are Canadian directors of corporation X. Because we have a dispute in policy with the corporate shareholders, you say that under the bill they can have a unanimous agreement which virtually makes us *functus officio*, and so they can. But why not have a much more sensible way of doing it? They could convene an extraordinary general meeting, get rid of us, and put in a lot of other Canadians who can work instead of us.

The Chairman: You know, Senator Cook, you could have added something there. Why the need for a unanimous shareholder agreement if the shareholders who have their money in the company are not satisfied with the way the directors are carrying on? They can remove them.

Senator Cook: That is what I am saying, yes.

Senator Flynn: Otherwise, you put them on the shelf.

The Chairman: Yes, but you still leave them with their liabilities.

Senator Flynn: I agree that that would be the next thing to look at, but it seems to me that it is not in this direction that the act was going up to now—giving more responsibility to the directors.

Senator Connolly: It seems to me that this is a relieving section, that it is put in there because you have the requirement to have Canadian directors. If the parent company, or the head office of the parent company, decides to remove the directors from the direct operation of the company, then if, by clause 140, or whatever it is, they are relieved of their duties, they should be relieved of their liabilities too.

The Chairman: I have a question I want to put to Mr. Howard. A reading of this part of the bill concerning directors—the directors do this, the directors have the power to do that, they may designate to somebody, they may make some appointments, and so on—raises this question in my mind: Suppose, in such a situation, you have a unanimous shareholder agreement, by virtue of which a shareholder will have all the rights and duties of a director. Now, which director does the bill mean when it is talking about these different functions and powers? Does it mean the directors that exist by reason of the unanimous shareholder agreement, or does it mean the directors who have been elected directors of the company and who have been put on the shelf?

Mr. Howard: Clause 140 (4) clearly states that the persons who are liable will be the shareholders who are deemed to be directors by virtue of the operation of the unanimous shareholder agreement. There is no ambiguity about that.

Senator Flynn: What would be the consequence if we were to remove clause 140? What would happen if we were to delete it?

Mr. Howard: This is one of the most useful clauses in the bill with respect to most of the corporations in Canada. I would be most concerned if we were to throw out the baby with the bath water. Remember that the red herring in here is the Canadian director provision as it applies to wholly owned subsidiairies of foreign controlled corporations. I stated, they are essentially branches of foreign business.

The reason they are incorpored, or the reason they may come into Canada at all, is to get inside our tariff barriers and take advantage of our tax laws. That is exactly the world we live in. If we are going to change that whole world, it certainly should not be done through a corporation law. What we are trying to do here is to require them to have Canadian directors, as I stated, and if they try to ignore those directors, or to deal roughly with them, then it is up to those Canadian directors to publicize that fact and embarrass that corporation. As I stated, most corporations are sensitive to that.

Senator Flynn: Well, why do you not say that the directors are thereby dismissed? That would be more frank.

Mr. Howard: In the normal unanimous shareholder agreement, of course, it might say, for example, that the three of us here will assume all of the powers of the directors, for the sake of simplicity, knowing that we have all the obligations of the directors, too; and we set out in our agreement, as we would in a partnership agreement, just how we are going to control that business, whether it is through a majority vote, or through some other system.

Senator Flynn: Yes, but what about the directors?

Mr. Howard: In the simple case I give the three of us would be the formal directors too, named on the list of directors.

Senator Flynn: But the others?

Mr. Howard: But we would really run the business through the unanimous shareholder agreement. That would be the essential constitution of the corporation.

The Chairman: But how could it be that if the directors are relieved of their duties?

Senator Flynn: According to Mr. Howard they are still directors but they have no duties.

Mr. Howard: In 99 per cent of these cases the persons who are the named directors are also shareholders. That is how most corporations in Canada are set up. Now aside from a few public distributing corporations, all the corporations are closely-held corporations. This clause is there to recognize that fact. The public distributing corporate is very much the exception.

Senator Flynn: As the chairman pointed out, you can change the directors, if you want to, in that case.

Mr. E. Russell Hopkins (Law Clerk and Parliamentary Counsel): You mean under present law?

Senator Flynn: Under the present law. And without this, if you have only one shareholder, you can decide who the directors are going to be. I do not see why you really need this clause 114.

Mr. Howard: As I said before, one of the most difficult provisions in practice right now in dealing with a close corporation is that the shareholders, although they do so under law, cannot take direct control over the management of the business of the corporation. This clause clears up that ambiguity, and it is a most desirable clause. I say that first of all because that is the way the world works and, secondly, because you manage to obviate a great deal of useless formality. By focusing on the problem of the Canadian director issue, you start getting away from the real substance of the clause—that is, to look at most corporations that are closely held, and simply legitimate the close corporation agreement.

For example, in the predecessor bill we had some special rules here about the majority of Canadian directors, and so on. But we took them out of this version because they did not mean anything. To a certain extent you have to depend upon the good faith of a foreign corporation that has a wholly owned subsidiary in Canada to listen to its directors and to be sensitive to their criticism.

The Chairman: Well, if you look at clause 140(4), and you start out with a unanimous shareholder agreement

then that agreement has this effect: It says that a shareholder who is a party to such an agreement has all the rights, powers and duties of a director to which the agreement relates to the extent that the agreement restricts the discretion or powers of the directors to manage the business and affairs of the corporation. So I conclude that if I stop there then there could be terms and conditions in that agreement which would restrict the duties of the directors or it may just put them on a shelf, depending upon what the shareholders want. But the thing that bothers me is that there is the question as to who is the director that the bill talks about in those circumstances. Take, for example, clause 116 where it says:

> Subject to the articles, the by-laws or any unanimous shareholder agreement, (a) the directors may designate the offices of the corporation—

And so on. Who are the directors who are being given that power?

Mr. Howard: Excuse me, Mr. Chairman, that is the whole point of the unanimous shareholder agreement. It determines those issues. That is the point to it. As you probably know now, most closely held corporations do have shareholder agreements, and they resolve those problems through those agreements.

The Chairman: Mr. Howard, you have a way of saying "that is the very point of the agreement." But that does not give me any answer to the question I am asking. I want to know what your view is of clause 116 if the directors are relieved of their duties, as the clause says and as they could be in a unanimous shareholder agreement? Who then is the director under clause 116 who is given certain authority?

Mr. Howard: That would depend upon the agreement. Let us suppose that you and I set up a closely held corporation and draw up a unanimous shareholder agreement. In that we decide that you and I will appoint the officers and delegate certain functions to them. Then if you and I cannot agree on that, our lawyer, Mr. Purdy Crawford, has a tie-breaking vote. That is a typical provision. That is exactly how we would resolve our problems. We would go through each of the major management issues and we would resolve them in that way or in a similar fashion. But there would be no need for any ambiguity about who the directors are and so on. There is no question as to who has clear and unambiguous power to make major decisions with respect to the business and affairs of the corporation.

The Chairman: You know, when you say, "There is no doubt" or words to that effect, that does not answer anything. You have formal directors?

Mr. Howard: Yes, sir.

The Chairman: The instant before there is a unanimous shareholder agreement you have formal directors who are the statutory directors of the company, and they have duties, and they have power and they have liabilities. Now when you have a unanimous shareholder agreement, those directors who have been elected as directors still remain directors.

Mr. Howard: That is correct.

The Chairman: And then you are going to have another set of directors who have not been elected by any of the formal procedures in this bill, and they are directors only because they are parties to a unanimous shareholder agreement which says that they have the rights and duties of a director. But they may have that without being a director.

Mr. Howard: Under the definition of "director" in this bill as under the Canada Corporations Act, anybody who carries out the function of a director may be held to be a director. But that is not really pertinent here. The point is they are deemed to be directors, and as I say, it would be a most extraordinary case where the formal directors named in a notice of directors would be any body different from a party to a unanimous shareholder agreement. As I say, you can focus on one unusual situation, that is where the corporation is a wholly owned subsidiary and, in short, only has one shareholder. But that is not the usual case where you want to use these agreements. They may use them, and indeed directors of these corporations if they want to absolve themselves of liabilities may want to get into such an agreement to ensure that there is no liability being imposed upon them.

The Chairman: I can see value in a unanimous shareholder agreement, but I want to make clear, notwithstanding your positive assertions that everything is all right, the differentiation between what we could call the formal directors and those who become directors by virtue of the unanimous shareholder agreement. What happens then to the liabilities imposed on the directors under this bill? How are they relieved of them?

Mr. Howard: As I mentioned earlier that depends upon the unanimous shareholder agreement. It is up to the parties and their counsel when drafting the unanimous shareholder agreement to clarify these issues. It is difficult for us to write out all these agreements or to contemplate the many terms of these agreements and set them out in the statute. Indeed, we consciously delegate that function out to the shareholders and their counsel.

The Chairman: I am not asking that you put all that in the statute. Did you have something to say on this, Mr. Crawford.

Mr. Crawford: My comment on this is that I think the concept of the unanimous shareholder agreement is a useful one as a corporate tool for closely-held corporations.

The point can be illustrated by the case of a financier who is prepared to lend money to a small group, but requires some control over the operations that might come within the normal area of the VP (Finance). He might require the right to designate the VP (Finance). As you know, apart from this provision, an agreement that the directors would elect the VP (Finance) and the person so designated would restrict their discretion would be unenforceable.

Secondly, very great care would have to be taken in drafting such a unanimous shareholders' agreement to ensure to what extent the directors would be relieved of what would otherwise be their duties. However, if it were done carefully and did remove the duties, there is no doubt in my mind that a court would decide that it had removed the corresponding liability.

The Chairman: Would you stop right there, please. The corporation hires regular employees, to whom it pays wages. Would you say that a director of a corporation has as one of his duties the hiring of employees?

Mr. Crawford: If I were drafting the unanimous shareholder agreement in an area in which, as in my illustration,

the VP (Finance) wanted to have control of money paid to employees, I would specifically provide that it was the duty of that person, and I would therefore relieve the directors of the corresponding liability.

Senator Connolly: That would be done in the agreement.

Mr. Crawford: It would be done in the agreement. My third point is that if the government was completely consistent in its philosophy of this bill dealing with Canadian resident directors, an outside person who, for example, was given authority which would otherwise be that of the directors, as in the case of a managing director earlier discussed, would have to be a Canadian resident. It would also provide that to the extent any group of persons is given the authority which the directors might otherwise have, that would have to be a majority of Canadian residents. I am not advocating that, but simply illustrating the philosophy.

Senator Flynn: It would be logical.

The Chairman: Again to use my favourite expression, I think we have shaken this particular question fairly thoroughly.

Do members of the committee wish to raise further points?

Senator Flynn: We were about to deal with clause 116. I may be returning to an argument against clause 110(4), but in clause 116 provision is made that:

> 116. Subject to the articles, the by-laws or any unanimous shareholder agreement,
>
> (a) the directors may designate the officers of the corporation, appoint—

Et cetera. If clause 110(4) were of any use, do you not consider that there should be a provision of the same type at the end of clause 116? We are granting the power to delegate certain responsibilities. Mind you, I do not believe it to be useful, because clause 117 provides for the liability or responsibility of directors. However, if in the case of a managing director the other problems mentioned in clause 110 arose, it would have to be covered by clause 116 to the same extent.

Mr. Howard: Probably it would have been more logical to include such a provision in clause 116. However, the conclusion was that there would be no reason for it, because there is no ambiguity. There is no question that the directors cannot delegate functions of directors to the officers, because officers can deal only with the business and not the affairs of the corporation.

However, when dealing with a committee of directors there is an immediate implication that such committee of directors can do everything that a quorum of the full board of directors can do. That is why the red flag was set out in clause 110(4). We felt there was absolutely no doubt when dealing with the appointment of officers and we want to make sure of that when speaking, particularly, of a committee of directors. That is the reason for the distinction. It could be repeated if, indeed, it is relevant at all.

Senator Flynn: It could serve the purpose.

Senator Connolly: Mr. Chairman, Mr. Howard makes a distinction between "the business of the corporation" and "the affairs of the corporation". In the minds of most people there is neither distinction nor difference, but he apparently has examples of what he means by "affairs", as distinct from "business of the corporation". Would he tell us something on that point?

The Chairman: They are defined.

Senator Connolly: They are defined?

Mr. Hopkins: In the definition section.

Senator Connolly: Yes, well, that is how he described it a few moments ago. He dwelt on the relationships between the directors and the shareholders. I am afraid it leaves me without a clear idea of the meaning of the word "affairs".

Mr. Howard: I believe your difficulty, Senator Connolly, is that these are, of course, quite general concepts, "business" on the one hand and "affairs" on the others. We were most reluctant to define either but, subject to criticism, we finally did add the definition of "affairs" to the bill and, indeed, to this version of the bill. It was desired by some to make a little more clear when a shareholder is entitled to make a proposal concerning the business of the corporation and so on. It was considered that this distinction would make it clear in such cases.

Senator Connolly: Is this general policy in administration?

Mr. Howard: Those words are again general concepts which no one could define in watertight compartments, any more than we could put "business" and "affairs" in watertight compartments. Indeed, there are many affairs that can be defined as business, and vice versa. That has been one of the common law problems with the application of the proposal provisions. However, we acquiesced and included the definition of "affairs", simply because it helped to clarify the meaning, but, there was no question of there being any hard and fast rules in the legislation anywhere as to "business" and "affairs".

Senator Connolly: In the event the shareholders wished to put forward a proposal and attended on their solicitor, who granted it, he might find himself in a very grey area between "business" and "affairs". What is your opinion, Mr. Purdy Crawford?

Mr. Crawford: I agree that clause 116 (a) troubles me a little. One situation falling within the definition of "affairs," for example, is the relationship between the company and any of its officers. As Mr. Howard mentions, in the real world the fact of the matter is that many of the relationships with the officers such as, for example, pension plans and the employee benefit plans for junior officers, are taken care of by the senior officers and not to any great extent in some cases by the directors. The inclusion of the distinction between "affairs" and "business" would prevent any delegation of such functions.

Senator Connolly: That is not the business of the corporation.

Mr. Crawford: As I read "affairs", it is not. That is the relationship between the company and its officers, although apparently it is also the relationship between a company and its employees. I do not know whether that is business or affairs.

Senator Connolly: The business of a company may be to explore and develop for nickel. This is a pension plan, or an employees' savings plan, and it is not the business of the company.

Mr. Howard: That is a good illustration. I am sure Mr. Crawford would agree with me that normally a pension plan is characterized as being one of the affairs of a corporation. For that reason, tremendous detail is required to be set out in the proxy material under the proxy rules, because these incentive payments can be a very subtle way for management to take large amounts of additional compensation out of the corporation. It is the kind of thing that is always subject to careful shareholder scrutiny, because you are not talking about exterior business, you are talking about internal affairs, incentives being paid to officers, even junior officers, under these plans. Again, I admit there will be grey areas. What we have tried to say under clause 140 is that when you run into distinctions between business and affairs, or practical problems where lawyers are trying to characterize what really are affairs as business functions, you can make an application to the court under clause 140 to resolve the problem. There are other examples where you cannot go to a court to resolve that problem unless you want to make a specific application. We have found the distinction generally useful. We can find no reason to keep it out of the bill, although we did not include it in earlier drafts of the bill.

Mr. Crawford: The logic, as I see it, is that you cannot delegate the officers something to do with arranging for a medical benefit program, but you can delegate officers authority to commit the company to a %500 million project which relates to the business of the corporation.

Mr. Howard: With respect, Mr. Crawford, I think that is loaded. What you are saying is that you cannot delegate. Of course, the directors have full power to deal with this, but they must make full disclosure about what they are doing in this area to the shareholders in the proxy material. But under section 97, there is no question of the broad powers of directors to deal with business and affairs.

Mr. Crawford: With all due respect, Mr. Howard, if you give directors specific authority to delegate to officers the power to manage the business of the corporation, by implication you have not much authority to delegate any power to manage the affairs of the corporation.

Mr. Howard: In that case, I would agree with you. You are saying in respect of setting up a specific pension plan, and so on. Yes, under these rules, that would have to be approved by the directors before it was set up.

The Chairman: And subsequently by the shareholders.

Mr. Howard: Well, the directors could decide to issue, but they would have to give shareholders full notice of it having been done.

Mr. Crawford: My point, basically, is that it is not flexible enough in permitting delegation in the affairs of the corporation, and it is too broad in permitting delegation in the business matters of the corporation. Our suggestion was to put in the word "affairs", and also to put in general wording to the effect that "such power to delegate as the circumstances may seem reasonable",the theory being that if it were a big corporation you may delegate more than you would in a small corporation, and the courts would develop the concept. However, it is not really that significant.

Mr. Howard: Would not the courts develop that equally well under clause 117? You are getting back to the general standard of care in clause 117.

Mr. Crawford: Yes, except that I do not think the court can develop any concept about delegating affairs, because of your wording.

The Chairman: Is there any further discussion on that point? What is the next point, Mr. Howard?

Mr. Howard: We have already discussed it in great detail. I do not know if it now elicits any real interest. I am referring to section 117, "Duty of care of directors and officers". That is, of course, the core section here. I think it is almost beyond debate. There is general consensus about the desirability of such a rule. Every director now accepts it as being, if not an altogether desirable part of life, then an inevitable part of life.

Senator Flynn: This concept is the same as that of "un bon père de famille» under the Civil Code.

Mr. Howard: Yes, except the standard is slightly qualified. "Un bon père de famille» has stricter liability than the director has under here. Again, we are getting to a very general wording.

Senator Connolly: Motherhood!

Senator Laird: Mr. Chairman, since we have jumped around a little, have we any intention of doing anything about insiders, because I have a pet peeve on that point?

The Chairman: We have been jumping around. When we get to clause 140, we are getting away from the directors provisions. Have you concluded your comments on the various directors provisions, Mr. Howard?

Mr. Howard: If I may, there is a question here regarding insiders. You can never look at any one section of the bill without looking at the others. The bill is that articulated.

Senator Laird: I would draw to your attention one of my pet peeves. Let us take clause 121(2)(b) and clause 125(2)(b). You will note that they refer to insiders as being directors of subsidiary corporations.

I will admit that not many companies in Canada are affected—just a small number—but it is a very important point economically. Frankly, it is a nuisance provision. What does a director of a subsidiary, say, in the Argentine, know about the affairs of the holding company, and why should he be included as an insider? It is a nuisance. It adds to the vast volume of work already imposed on companies to carry on business. Is there any sense in this?

Mr. Howard: The real problem, of course, is that what the law is trying to get at is the insider with inside information. In most cases, if he is a director or officer of a subsidiary, he does have insider information and should be required to file and should be subject to liability. As you mentioned, in exceptional cases, where there is a great distance between a holding corporation and a subsidiary corporation, it is quite simple to obtain an exemption, and, indeed, it will be easier under this bill than under the present law. Mr. Sparling grants these all the time. Mr. Sparling, how many have been granted or are granted in a year?

Mr. Fred Sparling, Director (Corporations Branch), Department of Consumer and Corporate Affairs: I am not certain of the number, but definitely subsidiaries, and the officers and directors of subsidiaries, are in a position to know inside information even before the officers and directors of the parent company. It can be very important

insider information. For instance, let us take the geological subsidiary of an oil company. The geologists turn up something, and that company knows it before the directors of the parent company. The marketing division of a company knows what are the prospects in marketing before the insider of the parent company. So it is important that anyone who is in a position of knowing material facts about the parent company should have to report.

Senator Laird: I suppose that is an example of where it could be important—

Mr. Sparling: It is a practical example. We run into it all the time.

Senator Laird: I was thinking that you have subsidiary companies here and there. What would a director of such a company know about the affairs of the parent company?

Mr. Sparling: There are a lot of exceptions. That is why we have the subclause which permits you to get an exemption from having to report.

Senator Laird: You do assure me that it is not all that difficult to get such an exemption?

Mr. Sparling: Our policy at the present time, senator, is to even solicit the companies to file applications for exemption so that they can be cleared up, and that they know and we know who should be reporting.

Senator Laird: I hope you stay in your present position for a long time, Mr. Sparling.

Mr. Howard: Contrary to popular belief, Senator Laird, we do not collect paper for the sake of collecting it. We even try to discourage people from sending it in.

A good illustration of this concerned a pulp and paper corporation which had a subsidiary in Finland, the directors and officers of which could neither read, write, nor speak English. For that reason, we did not think it proper to impose disclosure under Canadian law on them. So, of course, we exempted them.

Senator Laird: That is rather reassuring.

The Chairman: Have we finished with Part IX?

Mr. Howard: For the most part, yes, Mr. Chairman. I just want to point out that this bill attempts to be very reasonable under clause 118 with respect to a dissident director so that he can absolve himself from liability. It is also very flexible in respect of indemnification under clause 119.

There are strict rules to prohibit any abuse of the indemnification powers, but we do try to be reasonable and flexible under that Part.

That gets us through Part IX.

The Chairman: Part X deals with insider trading. I believe we have already dealt with that.

Mr. Howard: Yes.

The Chairman: Part XI deals with shareholders.

Mr. Howard: We have been into Part XI, particularly with respect to clause 140. Most of Part XI, of course, is pro forma, dealing with time and place of meetings, conduct for holding meetings, notices of meetings, and so forth.

I might add, I am pleased to see Mr. Purdy Crawford here today. He was our bête noire with respect to these notice provisions. I think he is happy with them. If he is happy, quite frankly I am happy, considering I drafted them 30 times. I am not saying he is responsible for anything that is wrong in this Part, but I certainly think he raised most of the practical problems.

The Chairman: I take it you are not saying there is anything wrong.

Mr. Howard: I would not admit that, Mr. Chairman.

The Chairman: Well, at least that is a start.

Mr. Howard: I do stand to be corrected. I have been corrected many times with respect to this bill already.

Senator Macnaughton: Perhaps we should hear from Mr. Purdy Crawford.

The Chairman: Dealing with the shareholders provisions, Mr. Purdy Crawford, what comments, if any do you have?

Mr. Crawford: Apart from the proposal provisions, which are a matter of substance, we were concerned about the good housekeeping aspects of the bill. We were concerned with the ability to fix a record date and the timing of it for purposes of giving notice of meeting or voting at the meeting would be one that was feasible to work with; we were concerned that if a shareholder did send in a proposal that there was sufficient time to act on it. In other words, if the proposal arrived 30 days before the annual meeting, it would be too late. That was changed so that now the proposal must arrive 90 days before the previous annual meeting.

With respect to the technical working areas with which we concern ourselves, we were not, on the whole, looking at great points of substance. We felt they worked reasonably well as presently drafted.

Mr. Howard: If I might add, Mr. Chairman, the two really controversial provisions in this Part are clause 131, the shareholder proposal, and clause 140, the unanimous shareholder agreement.

The Chairman: Was there not a provision about any person having the right to demand a shareholders list?

Mr. Howard: That would come under clause 132, Mr. Chairman, but that is, essentially, a shareholders list for use by the scrutineer at the meeting of shareholders.

The real right of a shareholder to obtain a shareholders list for any purpose is back in Part IV.

The Chairman: And we have been over that.

Mr. Howard: Yes. As you will recall, that is set out in clause 21.

Unless there are some questions, I have no other points to raise with respect to Part XI. I have already discussed extensively the two pertinent clauses.

The Chairman: Have you anything further to say on Part XI, Mr. Purdy Crawford?

Mr. Crawford: No, Mr. Chairman.

The Chairman: We can move on to the next part.

Mr. Howard: My intention, Mr. Chairman, was to start out discussing Part V. I suggest we go back to it. We have

yet to deal with Part V, Part XIV on fundamental changes and Part XIX on remedies. Once we have done that, we will have completed our review of each part of the bill. I suggest we start at Part V as it fits in nicely with what happens in respect of fundamental changes under Part XIV and remedies under Part XIX.

Part V starts at page 18 of the bill, clause 24.

The Chairman: That deals with corporate finance.

Mr. Howard: I would never say there is anything revolutionary in this bill that, indeed, we have not tried, but certainly the underlying philosophy of it is that we should get rid of not only the empty formalities but also the useless mythologies that have become engrafted on the statute.

If you look at clause 24, for example, you will see that no par value shares are permitted. In short, all shares are no par value shares. It is also required that they be fully registered. Under this bill there will be no more so-called warrants or bearer shares permitted to be issued. Also, under clause 5 of the bill, partly paid shares are prohibited. These were just archaic institutions that had some meaning in the nineteenth century but which have no practical meaning today.

I raise these points only because you may want to ask questions on them. Otherwise, I will just skim through them.

One of the other very simple and, we think, very proper rules in this bill is set out in clause 26, requiring all consideration received in respect of shares to be credited to a stated capital account.

The Chairman: What is the theory behind the idea of describing the money that is paid for shares as being the stated capital of the company?

Mr. Howard: From an accounting point of view, what you have set out in your capital account under this bill is the stated capital, and that may arise in respect of the issue of shares, for example, for buildings, or properties, or the issue of shares for money. Regardless of what the consideration is, you must credit that to the capital account, and that will be your stated capital as set out in the financial statement.

The Chairman: There would not be such a thing, then, as issuing shares at a premium?

Mr. Howard: No, it would not make any sense to talk about issuing at a premium.

The Chairman: They are all no par value shares. You may issue them at different prices at different times, but you would not make a comparison on the price today and a higher price three days away and say, "Well, that is a premium as against the earlier price."?

Mr. Howard: That cannot happen, Mr. Chairman.

The Chairman: Anything that is received in respect of the sale of no par value shares goes into a separate account called a stated capital account?

Mr. Howard: That is correct. The reason for doing this was to get away from fancy accounts, such as contributed surplus, paid-in surplus, and so forth, which make it look like there is some kind of a surplus arising from excess earnings which can be distributed to shareholders.

The Chairman: But you can still have those accounts in your balance sheet.

Mr. Howard: If an ongoing corporation has such accounts in its balance sheet now, and the corporation is continued, then those accounts will be continued until those surplus accounts are used up.

Normally, contributed surplus and paid-up surplus will not arise under this bill. Paid-up surplus might be set up if there is a donation of shares back to the corporation, but normally not. Even in those circumstances, it will just be a reduction of the stated capital account in respect of those shares.

The Chairman: There will still be what we call an earned surplus account.

Mr. Howard: Most certainly an earned surplus account, and there may be other surplus accounts.

The Chairman: Yes.

Senator Connolly: What about the case of the transfer of shares for consideration other than money as, for example, property? I see there is a subclause here which deals with that. In practice is there anything to provide that property transferred or shares issued because of services rendered to the company either before incorporation or after incorporation should be valued in a certain way or that a certificate of valuation should be provided? Is that concept developed at all?

Mr. Howard: The act does not put in a lot of detailed rules about appraisals, but, of course, in order to show that they are complying with the duty provisions under this clause 117, if there is any doubt about what the corporation is getting in exchange for these shares, then evaluations will have to be received by the directors.

Senator Connolly: It is a matter of prudent management.

Mr. Howard: That is correct, as it is under the present act.

Senator Connolly: Mr. Howard mentioned warranty shares issued in bearer form. Can he just tell us something about that.

Mr. Howard: Under European law, they do have provision for fully registered shares, but, in fact, most shares are issued in bearer form. Just as we issue debentures under trust indentures, the shares just say, "Issued to bearer," and the dividends are paid to a bearer who actually puts his name into the corporate transfer agency office stating that he is the holder of it. Indeed, normally a bank holds that share for him.

One of the problems in Germany, for example, is that all of these bearer shares are held in the custody of banks and the banks receive the dividends and allocate them to clients' accounts.

As an adjunct of this practical mechanism the banks get tremendous voting control over the business corporations and you start getting these intermediaries in between the shareholders and the actual corporations.

The philosophy of this law is that you cannot compel shareholders to act responsibly to control the affairs of the corporation. But we want to make sure that they have full opportunity to act responsibly, if they want to, and that is why all the care has been taken with respect to the notice

of shareholders' meetings, proxy materials and details of the business and affairs of the corporation to be furnished in the proxy materials and in the financial statements that go out to the shareholders.

Under the present Canada corporations law, some years ago somebody introduced the concept of warrants. These are not warrants as most of us know warrants, which are usually options or rights to acquire shares of the corporation. Under the present Canada Corporations Act, a warrant is, in fact, a bearer share on the European model. We find that undesirable because it so completely frustrates the idea of using the proxy as being a means of continuing at least the residual control of the shareholders over the management of the affairs of the corporation.

Very few corporations use these bearer shares in fact, but there are a considerable number of outstanding shares issued by several very large Canadian corporations.

Senator Flynn: There will not be any change in the registered shares. They can be put in the name of the trust company.

Mr. Howard: Yes, that can happen, but there are special rules here to make sure that in most cases the intermediary who owns those shares either must pass on the proxy materials to the shareholder or must get instructions from the shareholder concerning the voting of those shares or the intermediary cannot vote them.

Senator Flynn: Is that not the present state of the practice?

Mr. Howard: There is a slight variation on the present state of law. In fact, we have shifted the emphasis. Right now the intermediary can vote, unless he has instructions to the contrary. Here we say that he cannot vote unless he has positive instructions empowering him to vote on behalf of the official owner.

Senator Laird: In writing?

Mr. Howard: In writing.

Senator Beaubien: Mr. Howard, if you have shares and they are in the nominee's name in the bank, do you say that they cannot be voted without referring them to the owner or without receiving instructions from the owner?

Mr. Howard: Normally it is not a problem of the bank, because the bank is going to hold the shares in the name of its client. The real problem is with stock brokers who want to hold them in street form, that is, in a broker's name, in order to comply with the stock exchange clearing house rules. Therefore we have limited the registrant rules to the stock broker case. We are not too concerned in Canada about a bank or a trust company, or indeed a mutual fund, voting the shares in which others have the beneficial ownership. That has not been a serious problem to date. Therefore, we did not try to cover expressly that problem in this bill.

Senator Beaubien: If I have my shares in the name of RoyCan.

Mr. Howard: Then RoyCan can vote those shares.

Senator Beaubien: And there is no limitation here?

Mr. Howard: No limitation whatever.

The Chairman: There would be a limitation on brokers, though?

Mr. Howard: Yes, there is a limitation on brokers holding a client's shares for the broker's convenience in the broker's name.

The Chairman: I should like to have you look at clause 32 on page 23. I notice that this deals with the acquisition of a corporation's own shares and the limitations on that. I am a little curious about subclause (2) paragraph (b). Subclause (2) says:

> A corporation shall not make any payment to purchase or otherwise acquire shares issued by it if there are reasonable grounds for believing that—
>
> (b) the realizable value of the corporation's assets would after the payment be less than the aggregate of its liabilities and stated capital of all classes.

I am just curious why you have chosen to use the expression "realizable value" instead of the "market value."

Mr. Howard: At one stage we had in the standard "fair market value." However, a number of accountants pointed out to us that the most common case is where there is no market for the assets of the corporation. They said that if there was a market, obviously they would try to find out what the fair market value was, but that was not the frequent case and, therefore, they said, "Give us a more flexible standard." They recommended "realizable," and therefore we used that broad standard which, of course, includes markets, or, where there is no market, includes what is a reasonable negotiated price or a reasonable liquidation price.

The Chairman: The point is that the realizable value may be lower than the market value in the sense that it depends on how and under what circumstances you would be making a disposition of the assets.

Mr. Howard: Yes, sir, that is true. That is why they preferred "realizable," again. If we stated "market" they might not be able to get the market value, where it is a forced liquidation sale. That is why a more flexible standard was used. There might be no market at all, but even if there is a market, the circumstances might be such that you are putting a large volume of assets out in a market that is a thin market and cannot absorb all of those assets. Therefore, they have to be sold at a sacrifice price.

The Chairman: If you are dealing with a large block of shares held by the company and they are listed shares, what is the realizable value in your opinion? How do I approach it? I look at the market prices.

Mr. Howard: Yes, if there is a market.

The Chairman: I say a list of stocks that is traded in, but if it is a large block it may be that "realizable value" is a better expression, because sometimes if it is known, as it is, that there is a large block on the market, it means that the price will start to go down.

Mr. Howard: If the market is thin, indeed, just by realizing you will force the market down.

The Chairman: That is right. So in those circumstances the realizable value might be a price that would be greater than if you went out and tried to liquidate on the market.

Mr. Howard: That is correct. That applies equally to an inventory of automobiles or anything else, for example. I believe the accountants were correct in suggesting that term "realizable" so that we would not put them into an artificial frame.

The Chairman: I think it is safer.

Mr. Howard: I might summarize all of these clauses, Mr. Chairman. In clause 30 we say:

> Except as provided in sections 31 to 34, a corporation shall not hold shares in itself or in its holding body corporate.

A lot of people have asked why we bar or continue to bar a subsidiary from holding shares of its parent body corporate if in fact the parent can buy its own shares anyway.

The Chairman: If they buy their own shares, may they re-issue, or must they cancel?

Mr. Howard: No. Under this bill the shares must be cancelled at once. They cannot be held as assets by the corporation.

The Chairman: Therefore they cannot be re-issued.

Mr. Howard: Having regard to the way this bill is cast, they can issue other shares, assuming they are permitted to do so under their articles. They can issue other shares as simply as they can promissory notes. It is very flexible in this respect. The real controls are on those standards concerning obtaining adequate consideration for the shares to be issued.

The Chairman: If they want to issue shares, they can always create more shares.

Mr. Howard: Yes, and that is very simple. I was going to say that in clause 30 we continue this common law rule that the subsidiary cannot hold shares of the parent, because of two problems. One is the consolidated group—that is, the parent and all of its subsidiaries. If you look at them as a consolidated group, you may find that the group is insolvent, and in those circumstances we do not want a subsidiary acquiring shares of the parent.

Second, it is very misleading to have a subsidiary holding the shares of a parent corporation. Obviously it should not be able to vote those.

Also, it is a very misleading asset in the subsidiary because, in fact, if they show them at acquisition cost, and the actual value of the parent's shares has declined substantially, it could be a very misleading asset. So we felt that the simplest way to resolve the problem was the arbitrary way of continuing to prohibit a subsidiary corporation from holding shares of its holding corporation.

Now, aside from that, in clauses 31 to 34—you have to read them together—for the first time this bill does legitimate the acquisition by a corporation of its own shares; but as I mentioned, the shares must be cancelled at once when they are re-acquired. They cannot be held as an asset.

The Chairman: They can accept the shares in payment of a debt.

Mr. Howard: There are some few exceptions to this. That is the extraordinary case. But I was going to say, secondly, that it is always subject to these strict solvency tests; and thirdly, there will have to be, of course, a disclosure made of these acquisitions.

Senator Connolly: Not in the annual statement? I suppose the disclosure goes in the books of the company?

Mr. Howard: No, it will be reflected in the annual financial statements also. There will have to be an explanation of why the stated capital has decreased over that period of time. It is normally contained in an extensive footnote.

I might add, too, that any corporation acquiring its own shares is, by definition, an insider. We want to make sure that management cannot use inside information to acquire shares to the prejudice of outsiders who do not have the same information.

The Chairman: I was wondering if you would look at clause 36 for a minute. It is on page 25.

Mr. Howard: Yes. You will find the re-acquisition of shares rules, the redemption of shares rules and the reduction of capital rules all follow roughly the same pattern, because they are all variations on the same theme of reducing capital.

The Chairman: What bothers me in clause 36 is this:

> Subject to subsection (3), a corporation may by special resolution (a) extinguish or reduce a liability in respect of an amount unpaid on any share; and—

How can there be an amount unpaid if you cannot issue partially paid shares?

Mr. Howard: Because of the transition provisions under this bill. There may be a lot of outstanding partly paid shares when a corporation is continued under this. They may have been outstanding for many years, in fact, in a closed corporation. We just want to legitimate their extinguishment in here.

The Chairman: This is after continuance.

Mr. Howard: Yes. This is really a transition provision, because after continuance there is no doubt that this particular kind of share cannot arise.

The Chairman: So that if a company that is presently in existence, and has partially paid shares outstanding, its continuance will not make it subject to the requirement in this bill that shares must be fully paid.

Mr. Howard: That is right. It can continue with the shares outstanding, as they are, and this gives them an opportunity quickly and easily to clear up such a situation.

The Chairman: Yes. Are there any other clauses there that we should look at?

Mr. Howard: I will not take you through clause 37. That is the technical, accounting section that makes sure there is no possible misrepresentation through these transactions.

I should point out—and again I certainly would not impute any fault to him if something is wrong in this—that we have had enormous support from Mr. Leigh Bishop, of Ogilvy Cope in Montreal on these particular provisions. Indeed, I think Mr. Dickerson and I must have drafted them 20 times in the light of the criticisms that came in, but they were most useful to clear up a lot of technical problems. Above all else Mr. Bishop made it clear to us that these were really different ways of achieving the same objective, and therefore that we should, as far as possible, make the procedures and the standards as closely analogous as possible. This we have tried to do.

The Chairman: In connection with the payment of dividends, is there some reason for not specifically providing for the declaration of dividends, for instance, by directors? I notice that clause 40 provides:

> A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that—

And then you have certain conditions.

I had assumed, since the directors had the management of the business and the affairs of the corporation, and part of that job is the determination of dividend payments, that it is inherent in the bill that the declaration should be made by the directors.

Mr. Howard: Yes, that is clear in clause 40. The reason it is drafted in this way is that after a declaration is made, that becomes a liability of the corporation, and we wanted to put limitations in there in order to—

The Chairman: A corporation can act by its directors, or it can act, in some ways, by its shareholders.

Mr. Howard: Yes, but the directors here, as I have mentioned many times, have no limitation on their powers to manage the business and affairs of the corporation, and there is no question, anywhere in this bill, of shareholders coming in and somehow interfering.

The Chairman: I am thinking that if you are asked to give an opinion as to whether certain dividends have been properly declared, you cannot put your finger on any particular thing in this bill which says that the directors shall declare dividends.

Mr. Howard: No. Throughout this bill we very frequently just say "a corporation," as I say, on the assumption that the directors are the guiding mind of this corporation. They do all of these things. Nothing is done directly by shareholders except through the unanimous shareholder agreement, under clause 140, if it exists.

The Chairman: But then, is it suggested, Mr. Howard, that if you have a unanimous shareholder agreement, you could get a dividend payment via that unanimous shareholder agreement?

Mr. Howard: Oh, indeed. If you and I had a corporation, and we had a unanimous shareholder agreement, I am sure that that is one of the provisions we would scrutinize most closely, to determine who was going to get out dividends, and at what time. That is a very difficult issue, because of the tax situation.

The Chairman: The unanimous shareholder agreement would have to provide for a declaration of dividends.

Mr. Howard: Yes. It would expressly do so.

The Chairman: Otherwise the unanimous shareholders agreement would have to give the corporation the right to pay dividends

Mr. Howard: Yes. That is correct in effect, but I do not think we should digress on that. To get back to clause 40, there is no reason, I suppose, why the clause should not state that the directors "shall not declare or pay a dividend if there are reasonable grounds for believing that the corporation is . . ." and so on. As I say, it is a matter of drafting technique, which arises throughout the bill.

Mr. Crawford: I have a question, Mr. Howard, on that. Would you look at clause 25(1)? Do you draw any inference, one way or another, from the fact that the power to issue shares is specifically given to the directors? If you look at clause 32(1), the power to acquire shares is silent, and we have just been discussing clause 40, where the power to pay dividends is silent.

Mr. Howard: Well, the reason for the technical wording of clause 40 is that we have two things here. The directors declare a dividend, but the corporation pays the dividend—the directors do not, obviously. In order to get around drawing these distinctions, we simply stated that "a corporation shall not declare." That means that the directors of the corporation shall not declare or that the corporation "shall not pay a dividend." Now, we would have worded it that way to avoid the awkwardness. There is certainly no subtle distinction intended.

The Chairman: But then in clause 41(1) you say:

> Subject to section 40, a corporation may pay a dividend in money or property or by issuing fully paid shares of the corporation.

So there again you have the positive statement or affirmation that the corporation "may pay."

Mr. Howard: We are only focusing on "to pay" there whereas in the other we mention both "to declare" and "to pay."

The Chairman: But in clause 40 it is negative—they "shall not declare or pay" while in clause 41 they "may pay."

Mr. Howard: But that is assuming that they have already passed the hurdle of clause 40 which is the solvency test.

The Chairman: So that in order to be able to give an opinion that a dividend is properly declared, you would have to look at clause 41 and also clause 40 to see if those conditions are met.

Mr. Howard: Well, clause 41 does not bring in any standards. All it says is that you can pay it out in property or you can pay it out in money or shares if you have satisfied the conditions of clause 40. But in issuing an opinion you have to focus on clause 40. That is to ensure that the solvency standard—the litmus test in clause 40—has been complied with.

The Chairman: But I do not think that a person who is asking for an opinion would be satisfied to be told what the corporation could not do in relation to dividends. He would want to know if the dividend has been validly paid.

Mr. Howard: Well, I hope he has not declared it yet, Mr. Chairman, before he asks for the opinion. That is the usual case.

Mr. Crawford: This is a small point, Mr. Chairman, but I think logically clause 32(1) should have said, consistent with clause 25(1), that a corporation may purchase or otherwise acquire shares issued by it for such consideration as the directors may determine. In other words, it should have added "for such consideration as the directors may determine." When you are issuing shares it is for such consideration as the directors may determine, so I suppose if you are purchasing them, then logically it should be the same. But I do not suppose it is very important.

Mr. Howard: Again the standard of care applies as in clause 117 and, of course, the fiduciary duty applies back to both of these acts. We tried to avoid any subtle distinctions among these acts to ensure that the general standards set out in clause 117 would apply to all cases.

The Chairman: Is there anything else on this part, which only goes to page 30? I am looking for a convenient time at which to adjourn.

Senator Beaubien: I think it is a good time now.

Mr. Howard: I have nothing else that I would like to raise on Part V.

The Chairman: Then I suggest we adjourn now. I would like to get through the rest of this bill today, so I suggest that we resume when the Senate rises.

Senator Connolly: There is another meeting that has been called for in this room when the Senate rises. There was a notice of it on my desk.

The Chairman: Well, this room is ours today. I am informed by Mr. Jackson that the other meeting has been cancelled. So we will resume when the Senate rises this afternoon. I am told that there should be just a short sitting of the Senate because only certain items on the Order Paper will be proceeded with today.

Senator Connolly: I understand that most of the bills that came to us last night will not be dealt with until tomorrow.

Mr. Howard: Mr. Chairman, you have already told me that you do not have strict sanctions that you impose if we are a little late, but we would prefer to be early. Could you give us a closer idea of the time you will resume?

Senator Beaubien: Can we not leave the Senate anyway, Mr. Chairman?

The Chairman: We are not supposed to sit when the Senate is sitting, and we did not ask for permission to do so. I would suggest, Mr. Howard, that if you are here earlier than 3 o'clock, you might not find us here.

Mr. Howard: We will be here at 3 o'clock.

The committee adjourned.

The committee resumed at 3 p.m.

The Chairman: We have now arrived at Part XIV, which starts at page 125 and the heading is "Fundamental Changes". In clause 167 I am just trying to recall anything that may have been raised here in the committee. I think the Manufacturers' Association objected to the requirement that a change of head office or a change in the number of directors should require an amendment to the articles. As I say, the matter should be treated in the same way as it is currently being treated under the Ontario Business Corporations Act, by the simple filing of a special resolution. What have you to say about that, Mr. Howard?

Mr. Howard: I presume they mean a special resolution of the shareholders. If so, then there is no substantial difference. Some of United States acts, like the Delaware Act, for example, empower the directors to make these changes—that is, a change of name or a change of the place in which the registered office is located.

The Chairman: If you do it in the manner as provided in the Ontario Business Corporations Act, by special resolution, you require a shareholders' meeting and you require 66 ⅔ per cent.

Mr. Howard: Yes, the same as here. Here it will require 66 ⅔ per cent—in other words, a two-thirds majority which is a special resolution under this bill. This means, Mr. Chairman, that under Ontario law you do not have to go through the formality of an amendment to the charter. You just have to file a resolution.

The Chairman: A special resolution with two-thirds of the shareholders.

Mr. Howard: Yes, and they get away from making a formal amendment to the corporate charter. If you look at this carefully, you will see that we talk about the change of place in which there is the registered office and, of course, it can change its address in that place, say, the city of Toronto, as often as it likes and we do not care about that, but we do want a notice of registered office to be filed with us. We feld that rather than put in a bunch of different formalities, we would put in all of these changes in one clause as a matter of administrative convenience. Now they are probably concerned that it would be very costly and time-consuming, to make these changes, but in fact we are drawing up a fee structure that will make it reasonably cheap for a corporation to go through these. It might cost $100 or something like that, but it is still a very nominal sum from the point of view of a corporation. It is a matter of procedures we are talking about and it does not involve a great cost. But the formal approval of the shareholders is still required under both systems. We just try to keep it uniform.

Senator Flynn: Will the director require standard forms for these things?

Mr. Howard: We will have some 30 forms designed so that as far as possible and where we are dealing with technical formalities a secretary in a law office who is reasonably trained will be able to complete the documentation.

Senator Flynn: In other words, you will require uniformity in the procedure?

Mr. Howard: We will certainly encourage it as far as possible through the regulations, and will try to make it easy for people to comply by furnishing the standard forms to them that they in turn can complete and send back to us.

Senator Flynn: Then clause 173(1) reads:

> 173.(1) An amendment becomes effective on the date shown in the certificate of amendment and the articles are amended accordingly.

Will that be the date of the resolution or the date of the issue of the certificates, do you know?

Mr. Howard: It will only be the date of issue of the certificate.

Senator Flynn: It will not come into force before the issue of the certificate?

Mr. Howard: No, we will not give a retrospective date. That is covered under another specific provision. We will allow somebody to apply and give him a prospective date, but we will never allow him to come in and apply for a retrospective date, for example, for tax-planning purposes.

The Chairman: The suggestion of the Canadian Manufacturers' Association was that the date should be the filing date and not the date of the certificate that the director issues.

Mr. Howard: But, of course, many applicants come in to us wanting a future date. They do not want the filing date, and we are quite willing to give them a future date so long as they never ask us for a date in the past that ante-dates the filing date.

Senator Connolly: That is satisfactory. That has been the practice for many years.

Mr. Howard: That is the practice now.

Senator Flynn: Not necessarily. For the incorporation you usually have the date of the letters patent, or not of the letters patent but generally of a letter acknowledging receipt of the application.

Mr. Howard: The date of receipt of the application, yes, sir. We will give them a certificate as of that date or as of a subsequent date, but not of an earlier date.

Senator Flynn: Well, if it is the date of the receipt, then that is all right. I thought that the certificate would bear the date of the sending of the directive.

Mr. Howard: Oh, no. It will be the date of application or any subsequent date requested by the applicant.

The Chairman: What clause is this?

Mr. Howard: This is clause 173, covering the date of the issue of the certificate.

I do not like to jump around like this, but if you go to page 197, subclause (3) of clause 255—it is back here in the general part because it applies to all of these formalities and is referred to throughout the statute.

The Chairman: It says: "may be dated as of the day he receives the articles, statement or court order pursuant to which the certificate is issued . . .". That covers it. I do not know what the Manufacturers' Association was thinking about.

Mr. Howard: Remember that is an old brief, and we may have changed this part responding to the criticisms that they raised. I would like to be able to say that we were so clever that we picked it up ahead of them, but I am not sure. We might have picked up their criticism.

The Chairman: Well, we won't object if you attribute to yourselves an exercise in ingenuity.

Mr. Howard: I suppose the best way to go through this Part, Mr. Chairman, is clause by clause, because this is probably technically the most difficult part of the statute, and in the amendments part we have just tried to legitimate every kind of amendment that is normally made in a corporation.

The Chairman: Particularly starting with the amalgamations as set out in clause 175.

Mr. Howard: Before that I should like to go to clause 168 and the intervening clauses. This has to do with constraints on the transfer of shares of a publicly distributing corporation. This same concept is contained in the present Canada Corporations Act. I only call your attention to it here because under the present Canada Corporations Act the detailed rules concerning constraints are set out in a schedule to the statute. But under this bill they will be prescribed by regulations instead of being set out as a schedule. The reason for that is that the wording under the present act simply has not been applicable and in a practical context does not make sense. And because it is in the statute we have not been able to adjust it as we have acquired more experience. Not many corporations, of course, want to place constraints on their shares.

The Chairman: I suppose constraints on share transfers might very well be administrative rather than legislative. And if it is, then it will be quite properly the subject matter of regulation rather than having it put in the statute. What would you think of that, Senator Flynn?

Senator Flynn: I would like to have a specific case.

Mr. Howard: From our point of view, if I may, Mr. Chairman, what we have tried to do is set out the substantive rule in clause 168. In the proposed regulations we propose to set out the detailed procedures, and the rights and privileges that attach to or that are a consequence of putting constraints on shares under clause 168. It is difficult until we have more experience with these provisions to come up with an ideal set of provisions and put them into a statute.

We already have draft regulations relating to this, and we are certainly willing to disclose them to any member of this committee at any time, if he wants a more detailed idea of what our problems are. I can certainly tell you what our problems are with respect to having these locked into a schedule in the statute as under present law.

The Chairman: I think we would like to see in what directions they are reaching out in regulations. This is dealing with shares that are already outstanding.

Mr. Howard: Yes. It can affect both shares outstanding and, of course, the contemplated issue of shares.

Senator Connolly: It could affect shares outstanding?

The Chairman: Our particular interest, I think, would be with the shares that are outstanding. If you have a right, as the statute gives it, to constrain the issue or transfer, the transfer perhaps would interest us more than the issuing, because that could be accomplished by amending the articles.

Mr. Howard: Yes, this has to be done by an amendment to the articles of the corporation putting or placing a constraint on the transfer of the shares.

The Chairman: If I have authorized capital and I have different classes of shares and the corporation, in relation to the unissued shares, wants to change the classes and change the terms, they could do that, meeting the requirements of the bill, by an amendment of the articles.

Mr. Howard: But generally under this act when any amendment is made to the articles—although only intended to affect the prospective issue of shares, because it tends, for example, to put a constraint on transfer—it has an immediate impact on outstanding shares. All of the same formalities must be gone through and the same safeguards must be applicable. Therefore, we do not distinguish, on an amendment, between issued and unissued shares. If it affects a class of shares, then the act must be complied with.

Senator Connolly: You are not telling us, are you, that the regulations which you propose to issue will affect existing contractual rights?

Mr. Howard: The amendment of the articles under clause 168 is what will affect the rights of existing shareholders.

Senator Connolly: It comes from the company?

Mr. Howard: Yes, the shareholders. That is correct. All we set out in the regulations are the mechanical background and how you implement this after the shareholders have made their decision under clause 168.

Mr. Crawford: Mr. Chairman, it might be important for Mr. Howard to point out the shareholders' right to dissent and the right to have an appraisal with respect to this.

Mr. Howard: I should point out that in addition to requiring a two-thirds vote under clause 168, under clause 184(1)(a), there is an appraisal right. This was a very sensitive point, but finally the government concluded that if you were actually constraining the transfer of a share and to that extent limiting the market, the liquidity of the market for that share, then when a corporation decides so to constrain the transfer of its shares, a shareholder should have the option to require the corporation to buy his share from him at an objectively appraised price.

The Chairman: This covers shares distributed to the public. Assuming those shares are listed, the stock exchange is interested in how you proceed to change or restrict the terms and conditions.

Mr. Howard: Oh, yes, indeed. It is a very serious matter.

The Chairman: So we have to be sure that all those elements are properly considered.

Mr. Crawford: Interestingly enough, the stock exchange submission on this point was, as I recall, that the right of appraisal should not be contained in the act. They were looking upon it as a means of assisting and enforcing the Foreign Investment Review Act.

Mr. Howard: In part, yes. You will notice in subclause (5) on page 127 that the regulation-making power in this clause is very clearly set out so that you will have an idea what the effect of the proposed regulations will be.

The Chairman: First, there is a safeguard that is, that a dissenting shareholder can get out and get his money. I mean, if he is not satisfied with what is proposed to be done by the majority, he can take his money.

Mr. Howard: Yes. Really, what we are talking about here are publicly traded shares. If he is really upset and there is a market, he will go and sell his shares on the market and buy other shares. If that is not a practical escape for him, then he can invoke the appraisal right.

Senator Connolly: What is the clause you are referring to?

Mr. Howard: Clause 184(1)(a). It refers back to clause 168.

Senator Flynn: Does that right belong to the shareholders of what you would call private corporations?

Mr. Howard: No, but if it is a closed corporation, and if they have an unanimous shareholder agreement, they can place any constraint they want on the share transfers.

Senator Flynn: If it is unanimous, yes, but, if it is not, and if the shares are not offered to the public, and if there is any dissent, what is the recourse of the dissenter?

Mr. Howard: Again it is exactly the same remedy which applies.

Senator Flynn: What is the difference between the two, then?

Mr. Howard: In respect of this particular topic there is no difference between the publicly distributing corporation and the socalled closely held corporation. The extraordinary thing here, although it exists under the present law, is that we are allowing a publicly distributing company to place a constraint on share transfers. Before this was done under the present law it was consider heresy.

Senator Flynn: I remember.

The Chairman: Then the action by the shareholders is not a simple majority. It is a special resolution which means a two-thirds vote. So with respect to the minority, even a dissenting minority, there must be two-thirds of the vote against what the dissenters regard as being their interest. The dissenters can get their money back, then. I would think that is a satisfactory solution. If the dissenter dissents, obviously it means that he does not think too much of the majority shareholders. Therefore, he may want to get out of there. So he has a right to.

Senator Flynn: I agree with that idea. I was just trying to make a distinction between what we used to call public and private corporations.

The Chairman: Clause 168 applies where any part of the distribution has been to the public. So that would not deal then, with what we call a private company.

Mr. Howard: Any corporation, no matter how many shareholders it has, provided it has not distributed its shares to the public, can place constraints on the transfer of its shares under this bill.

The Chairman: Yes, that is the essence of a private company, is it not?

Mr. Howard: In effect, yes.

Senator Connolly: Mr. Chairman, I am a little confused about clause 168 (1). So far what we have been saying is that this authorizes the company by a special resolution to constrain the issue or the transfer of its shares.

This is a rather small point which I am sure can be cleared up in a second, but what I am particularly interested in are the words:

> —for the purpose of enabling the corporation or any of its affiliates to qualify under any law of Canada referred to in the regulations
>
> (a) to obtain a license to carry on any business;
>
> (b) to become a publisher of a Canadian newspaper or periodical; or
>
> (c) to acquire shares of a financial intermediary as defined in the regulations.

It seems to me that this is mixing oranges and apples or oranges and bananas.

Mr. Howard: They are, seemingly, on the surface, odd mixtures. Paragraphs (a) (b) and (c) in the present act are regulated businesses which must be Canadian businesses in order to qualify to obtain a license or to obtain a benefit under the Income Tax Act.

Now, the major difference between clause 168 and the present law I did not elaborate on here because I do not think there has ever been any dispute about it. In addition to those three categories (a), (b) and (c), we expand it in the preamble in order to make it possible for any Canadian corporation to constrain transfer of its shares. That is not true under present law. As I say, that has not engendered any controversy over the last few years, and I did not think to mention it; but that is the essential difference.

Senator Connolly: That is all I need on that.

The Chairman: Now I want to get at the amalgamation clauses.

Mr. Howard: I do not want to skim over those too quickly. Clause 169 is mechanics; 170 is the class vote. We tried to go a long way to give class shareholders protection here without giving them absolute veto power.

The Chairman: They have a right to vote separately, and the vote has to be in the form of a special resolution, so there is the same protection as for the ordinary shareholder, only it is voting by class.

Mr. Howard: That is right. It is to ensure that the ordinary shareholders, or other classes, cannot use their majority power in order to detract from the existing rights of the minority group in a class.

The Chairman: You cannot mix the votes of various classes of shareholders to try to achieve a majority that way.

Mr. Howard: Mr. Chairman, I think we can jump to clause 174 now, which is the clause dealing with the restatement of articles. This is a new concept. It simply gives the directors powers to consolidate in one document the entire constitution of the corporation. It is just a matter of administrative convenience.

The Chairman: It certainly would be handy, if you have a whole series of amendments, maybe years apart, and you have to go through them all.

Mr. Howard: Yes. I have seen some of them, working for the department, that were two to three feet high—the original letters patent plus all of the supplementary letters patent.

The Chairman: You are not the only one who has seen some of those things; I have seen them too.

Mr. Howard: That gets us to the amalgamation provisions, Mr. Chairman.

The Chairman: Now, clause 175. This is where we get into a little heavier going. There is provision for almalgamation, and those provisions are, in form, not unlike the Ontario Business Corporations Act.

Mr. Howard: Yes. They are similar. Certainly the emphasis here is on the so-called confluence theory; that is, that no entity is killed, and no new entity is created; but there is a confluence of two or more tributary corporations, if we can call that, into one main stream.

The Chairman: What you are trying to do is to give statutory effect to the Supreme Court of Canada decision in the Black & Decker case.

Mr. Howard: Well, yes. The Black & Decker case does reflect this philosophy, and rightly so.

The Chairman: Their philosophy was that if you say the two companies continue in the almalgamated company, that means that they are still entities. How that mystical rite is performed, I do not know, or what you see in it that is there I do not know; but they say it is there, and I suppose you have to be a believer in some things.

Mr. Howard: Well, I do not know. I accept Mr. Sparling's certificates as an article of faith when I get them. I act on them, and of course they are proof that cannot be controverted under this bill, as you will see in a later part.

The Chairman: I think one of the judges in the Black & Decker case became theological and philosophical in his analysis of the difference between "cease to exist" and "each almalgamating company continues in the amalgamated company;" yet it is shed of all its property, it is shed of all of its functions and rights, its liabilities are taken over by the amalgamated company; but yet, somehow or other, if you have the right mystical approach, it is in there, in the amalgamated company. It is strange, the mystery with which we sometimes surround some of the law.

Senator Connolly: You mean there was no Latin aphorism to approve it, to justify it?

The Chairman: Well, it would be unusual if there were not, but I cannot think of one.

Mr. Howard: I was just going to say that any Latin we had in the bill we very carefully removed from it in the earlier drafts.

Senator Connolly: That is a great mistake.

Senator Cook: It is not one of the official languages.

The Chairman: Now, the amalgamation provisions start in clause 176, really, where it sets out what they shall do upon entering into an agreement.

Clause 177 prescribes what shareholder approval is required—notice of meetings, et cetera. If there are different classes of shares, you have a vote by class.

Mr. Howard: In addition, you will note here that under subclause (3) of this clause, whether or not he is otherwise entitled to vote, a shareholder is entitled to vote in respect of an amalgamation, which also triggers his right to an appraisal.

The Chairman: Oh, yes. Shares that may not ordinarily carry the right to vote, on an amalgamation, have the right to vote.

Then we come to 178.

Mr. Howard: Clause 178 is just a matter of administrative convenience, to enable corporations to consolidate what are wholly-owned subsidiaries.

The Chairman: Yes. If they want to bring the wholly-owned subsidiary and the holding company together—

Mr. Howard: Then the directors themselves can do that, without any reference to the shareholders.

The Chairman: That is right. That is clause 178.

Now clause 179, the articles of amalgamation. This is the procedure for going to the director. Now, when the articles of amalgamation go to the director, has he any authority, under this bill, to refuse to accept them, and to refuse to issue a certificate?

Mr. Howard: Normally not. If they come in incorrect form, that complies with the statute—and this applies to all provisions under this statute—then the director must issue a certificate, and if he does not do so within 20 days the applicants have the right to apply to the courts to get an order to compel him to issue a certificate.

The Chairman: Well, the director has to be satisfied that this is not some kind of an escape route to avoid liabilities.

Mr. Howard: Yes. Normally, because of the continuance concept that we have, we do not think anybody could escape liability, anyway.

Mr. Crawford: There is one point here. I do not disagree with it, and it has to be here, but it should not escape the notice of the committee. The documentation that is filed has to conform to law. It may not come up in an amalgamation. It is any filing under clause 255, which is referred to in 179, proposing to do something that the director thought did not conform to law. In those circumstances he would refuse to issue the certificate, or whatever it may be.

The Chairman: Clause 255?

Mr. Howard: Yes. That is the general filing section on page 196.

Mr. Crawford: This is in the Business Corporations Act of Ontario, too. You have to have some protection, and if you disagree with the director as to whether it conforms to the law or not, of course, you go to the courts and have it litigated; so it is not necessarily automatic, if you were proposing some sort of an organizational structure that the director thought might not conform to the law.

The Chairman: What is the remedy if the director says you are not conforming to the law?

Mr. Howard: Clause 239. Under that clause you go to court and try to convince the court that the director is wrong. That is paragraph (a) in clause 239. This is to make sure somebody would not have to go by way of prerogative writ—for example, *mandamus*—in order to compel the director to act. There is a very simple procedure here, by way of summary application to the court, to go in and request the court to order the director to act in accordance with the law.

Senator Connolly: In Ontario you do that by way of notice of motion, I suppose.

Mr. Howard: Yes. The bill itself provides that it may be done by originating notice of motion or petition, depending upon the jurisdiction in which the action is brought.

Senator Connolly: In the Civil Code courts, though, it goes by petition.

Mr. Sparling: They do not have chambers under the Civil Code.

Senator Connolly: No. What would you do, Senator Flynn? Just make a petition to a weekly court?

Senator Flynn: For what?

Senator Connolly: To comply with clause 239—an appeal from a decision of the director.

Senator Flynn: Oh, I don't know if you have it. It could be by a petition, of course

The Chairman: If you do not accept the decision, you have a right to apply to the court. I notice here that at least they do not force you to go to one particular department.

Mr. Howard: We do not permit you to go to the federal court. You can go to the Superior Court.

The Chairman: Where does it say that?

Mr. Howard: The definition of "court" excludes the Federal Court. We had it at one time in the draft but it has been dropped out in the meantime. Claude 241, which says that the application can be made in a summary manner by petition, originating notice of motion, or otherwise as the rules of the court provide.

Senator Flynn: It would be the rules of the Superior Court of Quebec that would apply.

Senator Connolly: The only reason I raise this is that sometimes some of these remedies— that are available to the common law provinces by way of an originating notice of motion, which is a very simple thing—in the courts of Quebec require a writ to be issued. I take it that this can be done by way of petition.

Mr. Howard: This can be done by way of petition. But you cannot generalize any more. Under the new Code of Civil Procedure in Quebec they do have a generic provision which enables you to bring on in practice court, which is very much like chambers, a summary application to resolve the question.

The Chairman: The answer is that you have "court" defined in the definition section and it includes the courts in the provinces. And you have a right of appeal to the court of appeals of that province, from any order made by a court under this bill. So I think there is ample protection there.

Shall we move on to clause 180, paragraphs (e) and (f)?

Mr. Howard: This is the provision which you raised earlier and criticized.

The Chairman: By this time, my views are well known on that. On page 136, the bill says:

> (e) a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation or its directors or officers may be continued to be prosecuted by or against the amalgamated corporation or its directors or officers;

The addition of the words "or its directors or officers," in my view, as I have pointed out before, is meaningless, because the directors and officers of the amalgamating corporation may not be the directors of the amalgamated company.

Senator Flynn: That is right.

The Chairman: Secondly, even if they were, the cause of action arising as against the amalgamating company cannot be transferred to the directors of the amalgamated company. It can be transferred to the amalgamated company itself, since it takes over the liabilities and the assets of that, but not the directors.

Senator Cook: An order could be made, surely?

Senator Flynn: The last point I would be willing to permit. On the first point, when the directors of the amal-

gamated company are not the same, I do not see how you can sue them for something done by the amalgamating corporation or its directors.

The Chairman: I would say that, even if the directors of the amalgamating company are the same directors as the directors of the amalgamated companies, they cannot be sued in their capacity as directors of the amalgamated company.

Senator Flynn: Why worry about their capacity, if they have incurred criminal liability of any kind while a director of the amalgamated company, why could they not be sued?

The Chairman: They are still directors and officers of the amalgamated company.

Senator Cook: Is it not supposed to mean that you do not get clear of your liability by amalgamating?

The Chairman: That is all.

Senator Cook: Surely the directors must be the same directors, they must have been directors of that company when the cause of action arose?

The Chairman: Yes. If this section is talking about liability, it is a liability of one of two or more amalgamating companies. And if the directors have had anything to do with that, then that is an existing or pending cause of action against them. In so far as the amalgamating companies are concerned, the liabilities are carried forward into the amalgamated company but not the liabilities of the directors and officers.

Senator Flynn: No, they are not. Agreed.

Senator Cook: Amalgamation does not affect that at all.

Senator Flynn: You say the directors or officers of the amalgamated company?

The Chairman: That is all you do and this bill, I think, ended in this section at the words "the amalgamated company" but the additional words "or its directors or officers" were added in the committee in the other place.

Senator Flynn: Was it necessary to do that for the purposes they had in mind? For instance, the directors or officers of the amalgamated company, they remain liable whether they say it or not?

Mr. Anisman: Mr. Chairman, I believe it might be necessary to have all of the provisions of liability of directors or officers for an offence which is committed with a corporation, require *mens rea* in one form or another. The problem which requires this section may arise in the event that two corporations amalgamate and one of them has committed an offence but the amalgamated corporation, the subsequent corporation, is the one that is prosecuted. Now, the directors of the previous corporation who were involved in that particular offence would still and should still be potentially liable for that offence.

Senator Flynn: Agreed.

The Chairman: No one is arguing against that.

Mr. Anisman: The problem, sir, is that if the subsequent corporation is convicted and this provision is not here, those directors might not be liable for acts which they were involved in prior to the amalgamation.

The Chairman: By what strange theory of law do you evolve that?

Senator Cook: What has the amalgamation got to do with directors' liability?

Senator Flynn: The directors are not becoming a new person?

Mr. Anisman: The directors are not becoming a new person, but the provisions state they are liable only where the corporation commits the offence; and it is the amalgamated corporation that is being convicted, not the amalgamating corporation.

Mr. Crawford: Mr. Chairman, if that is true, is not the converse true? Very often in these amalgamations, it is two different interests that are amalgamating and the board of the amalgamated company will not be the same as the board of the predecessor company. There may be a new board, which may have one or more of the directors of the predecessor company. What about the new directors? I would have thought this wording referred to the directors of the amalgamating company.

Senator Cook: That is the trouble.

Mr. Howard: Mr. Chairman, I really did not intend to get into this again, because I have more or less stated my case before. The point is that this provision does not impose liability. It continues existing liability of a corporation where a director has knowingly done something wrong, or has not used due diligence as a director of an amalgamating corporation, then that liability continues—the corporate liability and the individual liability.

Let us assume that after an amalgamation, in the amalgamated corporation we have a totally new board of directors, all new individuals. There is no way under this bill that any liability can be imputed to any one of those new individuals if it was a wrong done by a director in an amalgamating corporation.

The Chairman: I say that as a matter of law that is perfectly true. Why have you put it in, then?

Mr. Howard: To make it absolutely clear, beyond any doubt, that the liabilities do continue or, to put it more accurately, that to go through the amalgamation does not wash out anybody's liabilities, either of the constituent corporation or a director or officer.

The Chairman: Mr. Howard, look. First of all, you must have "a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation or its directors or officers." Now, presumably, by some method you propose that that may continue to be prosecuted against the directors of the amalgamated company in their capacity. It has to be something that is in existence against the directors of the amalgamating company. You cannot carry that forward and say that that continues as against the directors of the amalgamated company.

Senator Flynn: When you say "or", you could switch them?

Mr. Howard: I believe there is no argument about the substance here at all.

Mr. Crawford: May I ask Mr. Howard a question? What do you do about the person who was a director of the company which was being prosecuted and is not a director of the amalgamated company at all?

Mr. Howard: Under this provision his liability continues.

Senator Cook: Not under this provision. Under the law, but not under this provision.

Senator Flynn: Because he is not any longer a director of the former company.

Senator Cook: If a man has an action pending against him and he resigns from the corporation, then he is still liable and it does not matter if he resigns because of a statutory amalgamation, he is still liable.

The Chairman: Those words, "or its directors or officers"—I agree with Mr. Howard that you could not prosecute them, so then why put it in there?

Mr. Howard: You mean the new directors of the amalgamated corporation?

The Chairman: Yes, so why put it in there?

Mr. Crawford: Mr. Howard, if the person who is not a director of the amalgamated company but was being prosecuted as a director of the predecessor company remains liable, why do you have to put a provision in here to make sure that he remains liable if he becomes a director of the amalgamated company?

The Chairman: That individual is liable in any event. It does not matter whether he has any title or not.

Senator Connolly: What were the circumstances of this? Was it the result of representations coming from outside that caused those words to be added?

Mr. Howard: What caused all of the controversy, sir, is that we had added them to paragraph (e) in Bill C-213 but had not added them to paragraph (f). For the sake of logical symmetry in the House Committee we decided they should be added to paragraph (f). Up until that time they had caused no comments at all or at least we had not received any comments on them. Everybody understood that we were going to the continuance theory as expressed in the Black & Decker case and everybody agreed with it, but with the addition of these few words in paragraph (f) people have now focused on whether or not we are imposing some new kind of liability. We are not, and we are making it clear that we are not.

Senator Cook: I think it should be clear that they could be prosecuted notwithstanding the amalgamation.

The Chairman: It seems to me that perhaps you have something more to say, but now Mr. Howard knows our views and he knows my views that the words "or its directors or officers" in both (e) and (f) should come out because it is meaningless as it is now. If you have a conviction against the amalgamating company and against the directors and officers of that amalgamating company, there is no way you are going to transfer that conviction to the directors of the amalgamated company. The amalgamated company is responsible for any conviction of the amalgamating company and is liable for the penalty, whatever it may be, but other than that it is a new theory to think that you can transfer criminal liability.

Senator Flynn: It is clearer under (f) that it could apply to the directors or officers of the amalgamated company because it is ajudgment in favour or against the amalgamating company or its directors or officers. But we have already started at that time. We are saying that if it is against the corporation, it may be against the amalgamated company and if it is against the directors of the amalgamating corporation then it continues against them. It will be clearer under (f) than it is under (e) in my view.

The Chairman: Have you anything to add, Mr. Howard?

Mr. Howard: I think I have exhausted my comments on this.

The Chairman: You have made your heroic stand?

Mr. Howard: Yes.

The Chairman: Mr. Anisman, you have done your best?

Mr. Anisman: Yes. I have done my best.

The Chairman: Mr. Sparling.

Mr. Sparling: I have nothing to add.

Mr. Howard: I should point out, Mr. Chairman, that the identical provisions are set out in subclause (6) of the next clause, 181, dealing with interjurisdictional transfer.

Mr. Crawford: We should amend them both.

Mr. Howard: I did not concede that point, Mr. Crawford, but if they are to be amended, then we should not amend only one.

Senator Flynn: I think the amendment should delete "or its directors and officers" in the fourth line of (e) and in the last two lines—"against an amalgamating corporation may be continued to be prosecuted by or against the amalgamated corporation." We should end it there. We should delete also the two places where you use the words "or its directors or officers". It is obvious that when you have started a proceeding against a person you may continue against that person.

The Chairman: We can deal with both subclause (6) of clause 181 and (e) and (f) of clause 180.

Mr. Anisman: If I may, Mr. Chairman, I am not advocating anything in this regard, but it seems to me that there may be a distinction between two corporations which are already under this act and a corporation coming under this act. Because what we may be saying then is that the directors are coming under federal law and there may not be provision similar to those in here in this act which imposes liability on them for any offence of the corporation under provincial law. I think there are in most provinces, but it is possible that there may not be. Since the provisions under this act which do impose such liabilities may require *mens rea* it seems to me that you may want to continue the liability of the former corporation, the corporation being continued, from a previous time against its officers if it is convicted after continuance, and there might be a purpose in keeping "or its directors or officers" here.

Mr. Crawford: When you think about the situation it is quite different. In an amalgamation you are putting together two companies with possibly different directors and officers, and here you are moving a company from one jurisdiction to another. You are importing a company from a province to a federal system.

Senator Flynn: But that would be covered by provincial law in any event.

Mr. Crawford: And it would cover a situation where you were bringing a company from a foreign or provincial jurisdiction under this act.

Mr. Howard: Let us say an Alberta corporation is coming under federal jurisdiction.

The Chairman: There is still the problem that no rights exist against the amalgamating corporations or the directors of the amalgamating corporations—at least the rights that are against an amalgamating company may be carried forward against the amalgamated company that results. That is on the sound theory that all the assets have gone into the amalgamated company, and if the amalgamating company is fined, then you have to have the right to go against the amalgamated company to get the fine paid.

Mr. Howard: And that applies equally to the continuance concept?

The Chairman: That is right. But not when you are dealing with officers and directors. That is a different thing. When you are dealing with personal liability, that personal liability cannot be transferred.

Senator Flynn: You should say "or its directors or officers as the case may be." You cannot transfer a conviction against the corporation into a conviction against an officer or director. You may say that a conviction against a director may be enforced against a director.

The Chairman: I think that perhaps this is the answer in subclause (6) of clause 181. If you continue a body corporate that is not a federal corporation, but it is accepted into the system and continued as a corporation under this act, then what you are saying is that in that continuance that if there are liabilities either of the company or of the directors of that company, then they still exist. That is all right. I think we were still approaching subclause (6) on the basis that you had an amalgamation but subclause (6) does not deal with an amalgamation. It deals with the continuance of a body corporate under this statute, and it may have existed originally under a provincial statute or it may have been a foreign company.

Senator Cook: What is an existing cause of action? Suppose you continue a body corporate under this act and a couple of years afterwards it is discovered that before the continuation took place the company has been guilty of an income tax fraud, is that an existing cause of action?

The Chairman: Well, it says it continues. You are not dealing basically with amalgamation in subclause (6).

Senator Connolly: This is what flows from amalgamation.

Senator Flynn: You seem to be indicating here that the officers and directors of a company are the continuation of the company in a certain case: "may be continued to be prosecuted against the corporation or its officers or directors". You could abandon against the corporation, because it has no assets, and switch to the officers or directors in a case like that, as you do for instance when somebody dies. You sue the heir. But I think here you should say, "as the case may be." If it was started against the directors, it can be continued against the directors, but not switched.

The Chairman: No. You start out with the body corporate, not with the corporation under this bill. So you have a body corporate and that body comes into the system by a process of being continued as a corporation under this bill. So then you still have the same body corporate; only now it is a corporation under this bill. It has committed some offence or has been guilty of some charge or at least has been liable. So then what happens to the right which existed and could have been asserted against that body corporate before it became a corporation? What happens to that now? Here, as I read subclause (6), all it says is that any of these rights that are defined here, that existed against the body corporate before it came into this bill, are continued against the corporation.

Senator Flynn: Agreed.

The Chairman: That is all it says.

Senator Flynn: That is all we need.

The Chairman: And that is all right.

Senator Flynn: In the same way, if we take out all references to directors and officers, we are in the clear.

Mr. Howard: But the difficulty then is that this is exactly what we tried to avoid in order to make sure we were not giving any absolution to directors and officers of the predecessor corporation, because of the fact of either an amalgamation or a continuance. You raised a good example when you mentioned income tax fraud. I believe that is dealt with in section 242 of the Income Tax Act, which states that where there is, say, a tax fraud, then the corporation or its directors or officers who acquiesced or agreed to the offence are also liable. It is similar to a few provisions in this bill.

The Chairman: Oh, I see your point now, Senator Flynn. While it is a body corporate there are certain existing causes of action, and then that body corporate is continuing and becomes a corporation. Now the existing cause of action would be, say, against the body corporate and against the directors and officers. When the body corporate is continued as a corporation, certainly you can continue the existing cause of action. That is a reasonable thing.

Senator Flynn: Yes.

The Chairman: But the point is that if that right existed against those individuals who were directors or officers, it is still there; and it is there not because they are directors and officers of that corporation, but because they were directors and officers of the body corporate.

Senator Flynn: Certainly. The offence was committed before the company became a corporation or before the amalgamation took place. Therefore, you can sue them. There is no doubt about that.

The only problem you have to deal with here is the change in the corporate set up. You do not have to deal with the change in the individuals because the directors at that time are still physical persons who can be sued.

Mr. Howard: I agree with Senator Flynn, Mr. Chairman. This wording was in here just to make that abundantly clear.

Senator Flynn: I think you are going too far.

Senator Beaubien: It is too clear.

The Chairman: I still think that the words "or its directors or officers" should come out.

Senator Flynn: We should delete all those references, as far as I am concerned.

The Chairman: They should come out, yes.

All right. What is the next item?

Mr. Howard: Fortunately, Mr. Chairman, there are not too many clauses left in this part. I have not been too successful.

Clause 182, Continuance (export). This is an unusual provision. It concerns federal corporations wanting to go out for some reason into another jurisdiction. At one time we had a provision in here giving to the Director of the Corporations Branch the complete discretion to permit or prohibit a transfer out. A lot of people pointed out that that was contrary to the general philosophy of this bill, barring the exercise of such broad discretion. Therefore, we have substituted standards. If the Director is satisfied that the rights of shareholders will not be detracted from, then he must approve the continuance. There is still a subjective element in that decision of the Director, so it has been made appealable.

The Chairman: According to the scheme of this, if you have a corporation under this bill, where the shareholders authorize it and the corporation wishes to continue in another jurisdiction, clause 182 provides certain terms and conditions under which that may happen, if the jurisdiction into which they wish to transfer will accept them.

Mr. Howard: Yes, sir. That is an assumed condition throughout.

The Chairman: So you require provincial action or something in the provincial law?

Senator Flynn: I think the scheme is quite interesting.

The Chairman: I have been trying to get this into the law for a long time.

Mr. Howard: I believe in the 1966 amendments you proposed this, and we have been working on it on and off since that time.

The Chairman: Don't tell me you used the language I used then. I have forgotten what it was.

Mr. Howard: I do not recall. Certainly, the concept is the same: that we should allow these transfers back and forth without trying to hold on jealously to corporations.

Again in subclause (9), if you look at paragraphs (d) and (e), you will see that we will not allow corporations to go out, if there is any question of absolution. So it is the same problem arising again. We must look at these three provisions together, because the wording is parallel.

The Chairman: Unless it is clean, you will not let it go.

Mr. Howard: If the directors or officers will be absolved from liability. It is exactly the same wording as clause 180 and clause 181.

Senator Flynn: Do not come in by the back door. We do not need that.

Mr. Howard: We are consistent.

Senator Flynn: You are trying to be.

The Chairman: I do not know whether it is "consistent" or "persistent."

Mr. Howard: The point is that we do not want anybody escaping liability by moving out of the jurisdiction. That is all.

The Chairman: You have fallen into the same error though, have you not?

Senator Connolly: I just wonder whether those words may not be justified in this case, Mr. Chairman, even if you are right on the first three cases.

The Chairman: Then let us analyse it. What paragraph (d) says is:

> (d) a civil, criminal or administrative action or proceeding pending by or against the corporation or its directors or officers may be continued to be prosecuted by or against the body corporate or its directors or officers—

Now, if they are the same ones, yes. If they are different directors—

Senator Flynn: What you have in mind is that the provincial legislation, for instance, would have the effect of absolving the directors or officers of the corporation continuing under the provincial jurisdiction. You do not want that to happen. " . . . may be continued to be prosecuted by or against the body corporate," or I would say, "the directors or officers of the corporation." Then you would cover the point.

Mr. Howard: Yes, Senator Flynn, and the wording you suggest would clarify what I think is just a slight ambiguity in wording. I believe we all agree on the substance.

Senator Flynn: "Or the corporation," here, would be clear.

The Chairman: The only thing about (d) is that it may well be that when the corporation moves into another jurisdiction and becomes a body corporate, there may be different directors.

Senator Flynn: But if I say, "the directors or officers of the corporation," I am referring to the corporation before it continued.

The Chairman: Well, this is the reverse situation here.

Senator Flynn: Yes, but look at the body corporate, or the directors or officers of the corporation. You add "of the corporation", and you change "its" for "the". "The directors or the officers of the corporation". There they refer to the corporation which is continued under the laws of another jurisdiction.

The Chairman: But, you see, you are dealing with a cause of action that exists against a corporation at the time it wants to move out of the jurisdiction. Now, then, they want to maintain that right, and that is perfectly all right, both against the corporation and against the officers and directors of that corporation; but then, when the corporation becomes a body corporate, they want to continue the action against the body corporate, and the officers and directors of that body corporate. Now, they may be different people.

Senator Flynn: That is why I say you should refer to "the directors and officers of the corporation", because as far as they are concerned they will give the permission to move, if they have made sure that you can continue against the body corporate—the new body corporate—and the

directors or officers of the corporation moving out. That is what they want to make sure of—that they could do it.

The Chairman: If you said, "either against the body corporate or the officers or directors of the corporation."

Senator Flynn: That is right.

The Chairman: Yes.

Senator Connolly: Mr. Chairman, you are using the word "corporation" to aply to a company covered by this proposed bill.

The Chairman: Yes.

Senator Connolly: But you are using another set of terms: "a body corporate".

The Chairman: "Body corporate" is an incorporated body that has not been incorporated under this bill.

Mr. Howard: By definition, a "corporation", in the definition section, is a corporation incorporated or continued under this law.

Senator Connolly: All right. Thank you.

The Chairman: Well, I think we have dealt with that. Is there anything in the borrowing powers, Mr. Howard?

Mr. Howard: I do not think there is anything particularly extraordinary here except in subclause (2), where we talk about a sale, lease or exchange of all assets. Again, the appraisal right arises, as you will see under clause 164. For example, if the directors of a corporation decide they want to sell out all the assets, and, in effect, convert a manufacturing corporation into what is a closed end investment company, or something akin to that, then the shareholders must approve of such a sale, and the appraisal right also applies.

The Chairman: Yes. Well, that is really dealing with a situation where the company is selling its undertaking.

Senator Cook: Before we leave 182, Mr. Chairman, we want to tidy up (e), too, do we not? Subclause (e)?

Senator Flynn: That is the same thing. Subclause (e) needs to be tidied up. Subclause (d) and subclause (e) would require the same change.

Senator Cook: Subclause (e), on the next page, requires the same tidying up.

The Chairman: Yes. You should also add there, "the directors or officers of the corporation".

Mr. Crawford: Mr. Chairman, on clause 184, the right to dissent, it is the appraisal right we have been talking about.

The Chairman: We were just talking about subclause (2) of clause 183. We have finished with that.

Mr. Howard: Yes. I think we are through clause 183, unless somebody wants to raise something in respect of that clause.

The Chairman: It is reasonable. Now, 184.

Mr. Crawford: The reason I wanted to mention that is that the right to dissent applies if you want to sell substantially all your assets, but there are a couple of queries by the CMA here that maybe Mr. Howard could speak to. The first one is that they suggest that the right to dissent should only apply if the company is not a public distribution company. If it is a public distribution company you can sell your shares on the market.

Mr. Howard: I would like very much to reply to that one, Mr. Chairman, because this is something that has recurred again and again in respect of this section. Needless to say I have come armed to deal with it.

Mr. Anisman, here, who studied at the University of California, at Berkley, had a professor there named Eisenberg, to whom he feels very indebted. Professor Eisenberg just happened to write what is probably the best article on this topic of appraisal rights that has been published in many years.

He pointed out, in respect to this issue, that the appraisal right, when you are talking about publicly distributed securities, always raises this question of the marketability of securities. You cannot, because a corporation was at one time a publicly distributing corporation, and still has, in theory, that status, assume from that that there is a market for its shares, or indeed, even if there is a market, that there is a market with any real liquidity or depth—and by "depth" I mean that you can trade any substantial number of shares in that market without causing a substantial lowering of the market price.

Now, there are three reasons that are very forcibly argued by Professor Eisenberg as to why the appraisal right is required, even in respect of a publicly distributing corporation.

The first is, as I mentioned already, that it is very difficult to define what you mean by "a market", and you cannot assume the existence of a market because there was once a distribution to the public.

The second point, and this is probably the more important, is that where a shareholder's expectations are based on the corporation itself, and not on the vagaries of the marketplace, he should be able to invoke this appraisal right and seek to require the corporation to repurchase the shares.

This is particularly important where a shareholder has a very substantial block of shares—let us say eight per cent of quite a large company, but one that does not have a very liquid market, or, as I say, if a liquid market, a market that is very thin. In those circumstances there may be a very large difference between what the fair appraised value of those shares is, and what the apparent market price is.

This is certainly borne out by the common law decisions if you talk about the difference between actual price and what may be a price in any specific market, and this distinction has been drawn in a number of places.

The Chairman: Mr. Howard, it is quite clear, if you make that assumption, that though the dissenting shareholder may have a substantial block of shares, he is still a minority shareholder, though he does not approve of what the majority proposes to do, and some part of its stock is in the public hands. Now, when you have those conditions, those who have any experience in the market at all know that if the information is abroad that there is a block overhanging the market, or that you have tried to liquidate a block, the price is going to go down, and it will go down until that block is out of the way, when it may go back up. So what may be unfair to the minority shareholder, because he just has too many shares.

Senator Cook: Also, it could be a question of timing. Just recently, there have been a number of take-over bids at market price which, in my opinion, and in the opinion of a lot of people, is much less than the appraised price of the shares.

Senator Flynn: The other situation may also be found, where you have a block of shares, and because you have a block of shares, even if it is eight per cent on ten per cent, you will get a higher price than the market price.

The Chairman: You could. The fair value could be higher than the market value.

Senator Flynn: It could, because you negotiate, very often, with individuals, when you have a block of shares. It seems to me that you could ask the advice of the very experienced broker at the end of the table here.

The Chairman: Why should not the dissenting shareholder be able to walk out with the fair value of his shares, rather than be stuck with the market price at the time he dissents?

Senator Flynn: I would way that in most cases the market price would be the price at which the shares would be appraised, in any event.

The Chairman: I do not think so.

Senator Flynn: I think so. I mean, if you have only a few shares in a very large corporation, after all—

Senator Cook: —the proposed change might have a bad effect on the shares, so he would want to get the appraised value as it was before the change, not after.

Senator Flynn: But what you have in mind here, when there is opposition to the appraisal, is, because he thinks that there is going to be some nuisance value to the corporation, any small shareholder may try to have his shares appraised rather than accept selling on the market. Then I think it is not realistic to think that a very small shareholder will use that provision of the law.

The Chairman: Would you want to say "the fair value or the market value, whichever is greater"?

Senator Flynn: I am satisfied with this. I am supporting it.

Mr. Howard: May I add a comment to that. Professor Eisenberg also covered this in respect to the appraisal when he underlined that from a shareholder's point of view it is what he calls "a remedy of desperation." The provisions are complex. You have to have a very large amount involved before you can justify action. It is relatively expensive, simply because they are technical. Thirdly, you are not sure of the result. You may go through all this procedure and get an appraisal that is less than the market price. Fourth, it is a taxable event. If he goes through this and gets money for his shares, that is a realistic penalty he will have to pay. He might prefer not to go through that. There are all of these built in limitations on this.

I might add that Professor Eisenberg raised one other point. This is that the appraisal right is very useful as a constraint on improvident management. If a management wants to sell all of the assets of the corporation and in effect convert it into a closed company, an investment company, if enough shareholders dissent and ask for an appraisal, then the directors will have to abandon that particular initiative and continue with the corporation as it was. I agree with Professor Eisenberg that that is a very useful purpose for it. We give management a lot of discretion there under this because the shareholders have some reasonable constraint over that power.

The Chairman: Mr. Howard, there is an expression I use very often: "When you have sold something, wrap it up!"

Mr. Howard: I was just trying to—

The Chairman: I expressed a view and Senator Flynn expressed a view and I think that point might very well be the consensus in the committee.

Mr. Crawford: Mr. Chairman, in all fairness I think you might give Mr. Anisman a right to say something about Professor Eisenberg, whom he knows so well.

The Chairman: Well, if he is right, he is entitled to talk about him.

Mr. Anisman: Mr. Howard is not quite correct. Professor Eisenberg did not teach me. I have never spoken to him. But I am very, very impressed by his article which is entitled "The Legal Roles at Shareholders and Management in Modern Corporate Decision making." It is in volume 57 of the California Law Review published in 1969.

Mr. Howard: Mr. Chairman the next item is Part XIX.

Mr. Crawford: What about reorganization?

Mr. Howard: This is the issue you wanted to raise today.

The Chairman: We had a letter from the firm of Tilley, Carson & Findlay, indicating their experience in connection with amalgamation and reconstruction. It raises an issue. I think they also sent a copy to Mr. Howard. It is an actual experience and I wonder if you are in a position to deal with it.

Mr. Howard: I am certainly prepared to deal with the reasoning that underlies all of Part XIV, and I am prepared to explain why we did not put in the usual arrangement or reconstruction provisions that are set out in the English Companies Act, in the present federal act, and in a number of provincial acts.

The Chairman: I am wondering if you would deal with it in this way—first, state what the problem is here.

Mr. Howard: The problem that Mr. Sedgwick has raised in his brief to the committee, is that although we have contemplated continuances in and out of the jurisdiction, amalgamations, sales of assets and so on, there still might be some corporate transactions that have not been contemplated here that should be legitimated by the statute.

We analyzed this problem very carefully once before. We analyzed particular transactions to see if there were any we had not expressly covered here. We came to the conclusion that we had covered all known transactions that required to be legitimated by statute and particularly to be approved by shareholders. It could be that there are some transactions that we missed. Mr. Chairman, I have just made up some notes in response to this, so that I could state briefly why we came to this conclusion. Our reasoning briefly is as follows:

The arrangement and reconstruction provisions originated in the English Companies Act (now ss.206-208), which were essential there for two reasons: first, the English

Companies Act applies to corporate reorganizations in case of insolvency because the U.K. Bankruptcy Act does not apply to companies; and second, the English Companies Act is deficient with respect to the legitimation of amendments, amalgamations, inter-jurisdictional transfers, and extraordinary sale, lease or exchange of assets.

Rather than follow the vague English model, we analyzed the purposes of these provisions excepting insolvency cases, which must be handled under the Bankruptcy Act in Canada we determined the kinds of transactions that arose, and then proceeded expressly to legitimate such transactions in the specific provisions relating to amendments (s.167), amalgamation (ss.175-180), interjurisdictional transfers (ss.181-182), extraordinary sale, lease or exchange of assets (s.183), and a reorganization to give effect to a bankruptcy court order, which is section 185 of the bill.

As I say, it is possible to have some kind of transaction that we have not contemplated, but we do not think that there is, and until someone can demonstrate to us we would be most reluctant to put in some vague thing about reconstructions that should be court approved, without being shareholder approved.

The Chairman: Let me add this, so as to make the core of the thing clear. This was a proposed arrangement between two companies and it really involved an amalgamation and they were going to transfer the shares of the subsidiaries to a newly incorporated company. Secondly, they were going to exchange, there would be an exchange of shares of the subsidiary company for shares of the new company on a one for one basis. What Mr. Sedgwick had to say was this:

> The first part of the proposed arrangement, the transfer of shares of subsidiaries, is expressly within the definition of an "arrangement" under section 193(1)(*d*) of The Business Corporations Act of Ontario and section 134(4) of the Canada Corporations Act.
>
> The second part of the proposed arrangement, the exchange of shares, is not expressly within these definitions but we understand that, on the basis of common law authorities as to the meaning of arrangement, the Ministry of Consumer and Commercial Relations has been satisfied that an arrangement under section 193(1)(*d*) of the Ontario Act does include an exchange of shares. The Ministry does not propose to oppose the application for approval of the N & C arrangement in the Supreme Court of Ontario.
>
> The provisions of section 134(4) of the Canada Corporations Act have not been carried over into section 167(1) of the proposed Canada Business Corporations Act. To the extent that a proposed "arrangement" under the Canada Business Corporations Act involved a "sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation," section 183(2) would apply. An "arrangement," such as the proposed N & C arrangement, involving an exchange of shares would not, however, appear to be possible under Part XIV of the Canada Business Corporations Act, and, it is submitted, could not effectively be achieved by agreement.

The only answer that it would appear that we want from Mr. Howard is, first, why were not the provisions of section 134(4) of the present Canada Corporations Act carried into section 167(1) of the bill? Do you agree that the transaction that has been quoted in this brief would not qualify under section 167(1) of this bill?

Mr. Howard: I will answer the two questions. You asked why we did not bring in the arrangement and reconstruction provisions. The answer is simply, as I stated earlier, that we felt they were superfluous.

To answer the specific question, would this particular transaction qualify as an amendment under section 167—no, it would not, because it is not an amendment. What they are talking about is an exchange of shares between two companies.

The Chairman: You said "amendment." You meant an arrangement?

Mr. Howard: No, Mr. Chairman, the question was whether it would qualify as an amendment under section 167—and there is no amendment here.

Senator Flynn: You say they would not need any amendment to do that?

Mr. Howard: They do not need any statutory support at all to carry out an exchange of shares.

Mr. Crawford: That is not quite right, I do not think, Mr. Howard. As I recall, the blessing of the court for an arrangement results in being able to require the shareholders of N & C, northern and central, to in effect exchange their shares for shares of the new company.

Mr. Howard: We may be getting to the heart of this in fact by going to the court where they can dispense with the need for shareholders' approval and also the appraisal.

Mr. Crawford: They had shareholders' approval—three-quarters.

Mr. Howard: They had shareholders' approval.

Mr. Crawford: And re-organization.

Mr. Howard: As I pointed out, I did not want to go into all this. There is an Ontario corporation, a gas corporation and two Alberta ones. For some reason they did not want to amalgamate both subsidiaries. Therefore they set up another Alberta subsidiary and they issued the shares of the new Alberta subsidiary in exchange for the outstanding shares of the other two Alberta subsidiaries. Now, quite frankly, Mr. Crawford, I do not understand why that would require the consent of the court at all.

The Chairman: It is a scheme of arrangement.

Mr. Howard: But anything is a scheme of arrangement and if you are going to do it that way then you have to run into a court with everything.

The Chairman: But your first answer that it was superfluous to carry forward the provisions in the present act—in what sense are you saying it was superfluous? Simply because the bill already dealt with the same problem?

Mr. Howard: It deals with all these fundamental changes that can be made in the corporation. If there is some consequential transaction such as an exchange of shares among corporations that have been created, that does not have to be legitimated under this bill.

The Chairman: It is not germane?

Mr. Howard: Not to corporation law; it is a matter of contract law.

Mr. Crawford: I told Mr. Howard earlier that I would like to think about the point that Tilley, Carson have raised and subsequently respond as to whether there are any legitimate areas not covered in this bill that the committee is considering. What in fact happened was that he could not do it as a matter of contract. The present shareholders of Northern and Central, the top company and a regulation company will end up as shareholders of a company on top of Northern and Central, a non-regulated company, and you could not have forced them to exchange the shares without the reorganization proceedings. But I would like to give it some thought.

Mr. Howard: I too would like to know more about the facts there.

The Chairman: Well, you have a letter from Mr. Sedgwick and you can write and ask him for the details and we can think more about it. Maybe there should be some additional information.

Senator Flynn: Under the Ontario act is there the same provision for dissenting shareholders?

Mr. Crawford: I think the appraisal rights in Ontario are limited and they are with respect to closely-held corporations. They have not bought Mr. Anisman's Professor Eisenberg's theories.

Senator Flynn: But if you have that remedy under the proposed bill for dissenters, then you do not need the court's approval for a scheme like that. If anybody objects he can go to the appraisal provisions of the act and that solves it. Otherwise, you could impose with a court order.

The Chairman: There is a further question I want to ask Mr. Howard. Do you agree that this transaction could be carried out under section 134(4) of the present Canada Corporations Act?

Mr. Howard: In theory anything could be carried out under the present act so long as there was no insolvency involved. Like the English act it does not mean anything. It just says that the court puts its *imprimatur* on a transaction and that is approved no matter what it does to the rights of shareholders. We have tried very hard to avoid that under this bill. We say exactly what the formalities are and what the related rights of shareholders are before the transaction can be completed.

Senator Cook: Did you say that the fact that one of the companies was a regulated company had some bearing on this?

Mr. Crawford: I think if you are on to the proxy material, one of the objectives was to have the top company, the company that was not regulated or not a utility—you still have all the utility companies down below but they have a holding company up on top which is not a utility and that is not regulated.

Senator Cook: I wondered if there was any other law besides company law that had a bearing on the transaction?

Mr. Crawford: Yes, you have to have the consent of the Ontario and Manitoba public utilities boards.

Senator Flynn: It could have affected the rights of minority shareholders.

The Chairman: Well, we will mark time on this and study it.

The remaining part we have to deal with is Part XIX, beginning on page 183. I have indicated to Mr. Howard that we might call 5 o'clock a good time to adjourn.

Senator Flynn: I was hoping for 4.30.

The Chairman: Well it is almost that time now. We certainly could not deal with it in two or three minutes. Part XIX deals with remedies, offences and penalties. Now, Mr. Howard, if you want to start this in the most expeditious way.

Mr. Howard: Mr. Chairman, I do not want to rush through this because this part is central to the operation of the whole bill and is certainly the most innovative and most imaginative part.

Senator Flynn: Do you not think, Mr. Chairman, that if it is that important we should adjourn now and deal with it on another occasion?

The Chairman: Well I would hate to be rushed on Part XIX.

Mr. Howard: I was going to suggest that I would run through the more highly complicated portions. But if you would rather review it on your own and then come back, that would be all right with me.

Senator Flynn: The only problem is that if you start, then we might start questioning.

The Chairman: I think perhaps we should adjourn now and let you know when we can have another sitting. It may be on Tuesday. It depends on a number of things. The Senate is sitting on Monday night to deal with the income tax bill on second reading. There probably will be debate in the Senate on Tuesday on the income tax bill. But if that bill does not get to the committee for Wednesday morning, then Wednesday will be open. We have something else to do on Wednesday too because we are about ready to submit a draft of a report on the competition bill for the consideration of the committee. It could be that we might find time on Tuesday afternoon.

Senator Cook: How about Tuesday morning?

Senator Flynn: There are two committees on Tuesday morning, Legal and Constitutiomnal Affairs and Foreign Affairs.

The Chairman: I was thinking of Tuesday afternoon.

Senator Flynn: After the adjournment of the Senate? Because we are going to deal with the Income Tax Bill in the Senate.

The Chairman: There may not be any time. What is the feeling about Tuesday evening?

Senator Flynn: That could be arranged.

The Chairman: What we want is to get to this as quickly as we can.

Mr. Howard: I must say, Mr. Chairman, that we are concerned about getting behind on the income tax bill and the competition bill.

The Chairman: Yes, of course.

Senator Cook: Mr. Howard, how long do you estimate that it will take us to deal with Part XIX? Would you say an hour or an hour and a half?

Mr. Howard: Yes, I would say an hour to an hour and a half.

Senator Cook: Then could we do it Tuesday evening, Mr. Chairman?

The Chairman: In any event, Mr. Howard, we will let you know as soon as possible what arrangements have been made for the next hearing.

The committee adjourned.

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THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

Issue No. 31

WEDNESDAY, MARCH 12, 1975
THURSDAY, MARCH 13, 1975

Complete Proceedings on Bill C-49, intituled:

"An Act to amend the statute law relating to income tax"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

28756—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Haig
Beaubien	Hayden
Blois	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
	Walker—(19)

Ex officio members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, March 11, 1975:

"Pursuant to Order, the Senate resumed the debate on the motion of the Honourable Senator Hayden, seconded by the Honourable Senator Bourget, P.C., for the second reading of the Bill C-49, intituled: "An Act to amend the statute law relating to income tax".

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

Minutes of Proceedings

Wednesday, March 12, 1975.
(40)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: Bill C-49—"An Act to amend the statute law relating to income tax".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Hays, Laird, Macdonald (*Cape Breton*) and Macnaughton. (11)

Present, not of the Committee: The Honourable Senators Heath and Lafond. (2)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel; A. Peter F. Cumyn and Thomas G. Hierlihy, Consultants to the Committee.

WITNESSES:

Department of Finance; Tax Policy Branch:

Corporations and Business Incomes Division:

Mr. A. E. J. Thompson, Director; and Mr. L. Saltman.

Personal, Commodity and Estate Taxes Division:

Dr. J. R. Allan, Director.

International Tax Division:

Mr. R. A. Short, Director.

Revenue Canada—Taxation:

Tax Base Research Division:

Mr. D. L. H. Davidson, Director; and Mr. C. D. McDonald.

Provincial and International Relations Division:

Mr. W. B. Blanche.

Registration Division:

Mr. Weil.

The Committee proceeded to the examination of the witnesses with respect to the above Bill.

At 12:20 p.m. the Committee adjourned until 2:30 p.m. this day.

2:30 p.m.
(41)

At 2:30 p.m. the Committee *resumed* its consideration of Bill C-49.

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Everett, Flynn, Hays, Laird, Macdonald (*Cape Breton*), Macnaughton and Molson. (13)

Present, not of the Committee: The Honourable Senators Heath and Manning. (2)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel; A. Peter F. Cumyn and Thomas G. Hierlihy, Consultants to the Committee.

The Committee further examined the witnesses with respect to the said Bill.

At 5:00 p.m. the Committee adjourned until 9:30 a.m. Thursday, March 13, 1975.

Thursday, March 13, 1975.
(42)

The Committee met this day at 9:30 a.m. to give further consideration to Bill C-49—"An Act to amend the statute law relating to income tax".

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Flynn, Hays, Laird, Macdonald (*Cape Breton*) and Molson. (11)

Present, not of the Committee: The Honourable Senators Denis, Heath and Smith. (3)

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel; A. Peter F. Cumyn and Thomas G. Hierlihy, Consultants to the Committee.

WITNESSES:

Department of Finance; Tax Policy Branch:

Corporation and Business Incomes Division:

Mr. A. E. J. Thompson, Director; and Mr. L. Saltman.

Personal, Commodity and Estate Taxes Division:

Dr. J. R. Allan, Director; and Mrs. A. Vaucrosson.

International Tax Division:

Mr. R. A. Short, Director.

Revenue Canada—Taxation:

Tax Base Research Division:

Mr. D. L. H. Davidson, Director; and Mr. C. D. McDonald.

Provincial and International Relations Division:

Mr. W. B. Blanche.

Registration Division:

Mr. Weil.

At 10:10 a.m. the Honourable John Turner, Minister of Finance, appeared before the Committee to explain certain areas of Government policy, particularly those areas respecting taxation of the resource industries.

At 11:05 a.m. the Committee *resumed* its examination of the departmental officials.

At 12:10 p.m. the Committee adjourned until 2:30 p.m. this day.

2:30 p.m.
(43)

At 2:30 p.m. the Committee *resumed* consideration of Bill C-49.

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Desruisseaux, Everett, Flynn, Hays, Laird, Macdonald (*Cape Breton*) and Molson. (12)

Present, not of the Committee: The Honourable Senators McNamara and Heath. (2)

In Attendance: Mr. A. Peter F. Cumyn and Thomas G. Hierlihy, Consultants to the Committee.

It was *agreed* that the material prepared by the consultants be printed as Appendix "A" to these proceedings.

At 3:00 p.m. the Committee proceeded *in camera*. It was moved by the Honourable Senator Laird that the Bill be reported without amendment.

In amendment, the Honourable Senator Flynn moved the following:

> "That clause 4 of the Bill be amended by adding thereto, next after line 8 on page 7, the following:
>
> "(6) Subsections 4(2) and (5) and subsections 7(1) and (5) and any other provision of this Act to the extent that it is necessary and incidental to or consequential upon those subsections or any of them shall not come into force and have effect as law except upon proclamation of the Governor in Council following upon the expiration of the 15th day of April, 1975." "

The question being put on the motion in amendment, the Committee divided as follows:

YEAS 2

NAYS 6

The motion was declared *lost*.

The question being put upon the main motion, it was declared *carried*.

At 3:25 p.m. the Committee adjourned until 9:30 a.m. Tuesday, March 18, 1975.

ATTEST:

Frank A. Jackson,

Clerk of the Committee.

Report of the Committee

Thursday, March 13, 1975.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-49, intituled: "An Act to amend the statute law relating to income tax", has in obedience to the order of reference of Tuesday, March 11, 1975, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

Salter A. Hayden,
Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, March 12, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-49, to amend the statute law relating to income tax, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

Senator Connolly: Mr. Chairman, I wonder whether I could ask a question and perhaps get information that we might need later. Yesterday, Senator Hays put some very interesting information on the record in the Senate about the take to the federal and provincial governments, and to the industry.

The Chairman: I have prepared an order for the presentation of the evidence that these members from the department will give. I have indicated the order to them, and I think they have come along having given their consideration to it on that basis. I think it would be more orderly to do it in this fashion, because if we are going to jump with questions all over the lot it will be confusing. Mineral resource taxation and natural resources industry treatment are two of the subjects. The first subject matter that I have discussed with these men that we should deal with would be the treatment of individuals. Then I thought we would move into certain corporate treatment, and then into mineral resources; that is, the mechanics of it and so on, not the policy factors but the mechanics. Then we would move into FAPI and partnership. We will get an orderly record that way, rather than having sporadic questions. I heard Senator Hays yesterday afternoon; I understood what he said, and I liked it as information. However, we also had a good contribution from Senator Manning last night.

Senator Connolly: An excellent one. Mr. Chairman, I rather anticipated you would be following an order such as the one you have now described, but what I am asking for is that some material be prepared so that when we reach the question of mineral taxation we will have a document in front of us, which I think some of these gentlemen could prepare very easily. Very simply, what I ask is this. Senator Hays spoke with reference to exported oil, and about a month ago the Canadian Petroleum Association gave it to us in percentage figures on domestic oil. I wondered whether by the time we got to the problem of resource taxation we could have some figures from the department showing the percentage of take to the federal and provincial authorities, and to the industry, both for the Alberta offsets and after, arising out of the budget that we are now considering, with reference to both domestic and exported oil. It might be helpful to these people if this document that was given to us by the Canadian Petroleum Association were given to them.

The Chairman: We anticipated that. A copy is being prepared of the revised statement that was given to us by Mr. Martin and Mr. Cochrane. That was subsequent to the change in November of the royalty position of Alberta. We will have that when we reach that subject. That is why I want to push a little further down the list, so that it will be available.

Senator Buckwold: Mr. Chairman, I know you are anxious to get going and I do not want to prolong this discussion. I may be wrong, but from my knowledge of the situation this royalty involves resources industries other than just the oil industry. I would hope that in any papers we may get to give us some background information the effects on other industries involved would be drawn to our attention.

The Chairman: We have men sitting at this table—and I am not referring to the chairman!—who, in my view, have the capacity to deal with questions in any related field or otherwise, so when we get to a subject matter and they give an explanation the thing will be open to questions. I am just trying to achieve an orderly record, which I think is highly desirable. That is why I said that instead of just saying, "Here is the panel, go ahead and ask questions," which would be sporadic and all over the lot, and we would not get concentration on each problem, for the opening we should deal with what I call the treatment of individuals, which covers about eight items on the list I have. It covers the deductions that are available to individual taxpayers, deductions for interest and dividends, bonus from Canada Savings Bonds, deductions for pension income, the age exemption, the registered home ownership savings plan, the registered retirement savings plan and the registered educational savings plans. We will have them all in a package. It will be comforting to have that.

Although perhaps I should not voice a criticism so early on, Mr. Thompson, one of the most difficult features in handling Bill C-49 has been that we did not have an index. About the only way you could find yourself in the bill would be to go to the act and find where the subject matter was dealt with there; then you would spin the pages over until you found it mentioned somewhere, which might be at page 149 or at page 250; you would be spinning the pages, and the pages are not designed for spinning; you might slip two or three at a time and find you have missed one. Maybe another time we could get an index.

Mr. A. E. J. Thompson, Director, Corporations and Business Income Division, Tax Policy and Federal-Provincial Relations Branch, Department of Finance: I think that has been the traditional way of preparing bills in the house. The Department of Justice presumably would be responsible.

The Chairman: We all subscribe to tradition, but when it interferes with the speed and comfort of finding things in a bill we are ready to let tradition stand aside.

Mr. Thompson: I will pass on your thoughts to the Department of Justice.

The Chairman: Don't worry, I will myself too.

Mr. Thompson, will you tell the members of the committee those who are here with you today and their relationship to this bill, and then call on the man in your group who will deal with the treatment of individuals?

Mr. Thompson: Three of us are directors in the Tax Policy and Federal-Provincial Relations Branch of the Department of Finance. I look after the corporate and business income area. Dr. John Allan is director in charge of the Personal, Commodity and Estates Tax Division. Mr. Alan Short is the Director of the International Tax Division. Each of us in turn will take care of the areas as they come up. The personal area today will be handled mainly by Dr. Allan.

We also have with us officials from Revenue Canada (Taxation). Mr. Don Davidson is director of the Tax Base Research Division there, and he and his staff will be available to give comments on the administrative interpretation and application of the provisions in Bill C-49.

The Chairman: Then Dr. Allan will deal with individuals. The floor is yours, Dr. Allan, and you can talk from a sitting position.

Dr. J. R. Allan, Director, Personal, Commodity and Estate Tax Division, Tax Policy and Federal-Provincial Relations Branch, Department of Finance: Mr. Chairman and honourable senators, it may be most useful if I simply start with a summary statement of some of the major developments that were reflected in the proposals relating to personal income tax. One of the most significant was the increase in the deduction from income tax. As I am sure the committee is aware, at the present time Canadian taxpayers are permitted a deduction from their tax liability equal to 5 per cent of liabilities, with a minimum deduction of $100 and a maximum of $500. It was proposed for the 1974 taxation year that the minimum deduction would be increased to $150, and for the 1975 taxation year the limits would be changed to $200 minimum and $750 maximum, and the percentage reduction would rise from 5 per cent to 8 per cent. It is estimated that the change for 1974 would reduce federal revenues by approximately $380 million, and the further increases in the deduction for the 1975 taxation year would reduce revenues by some $615 million. One of the other major changes or developments was the introduction of a deduction for interest and dividend income. This was first proposed in the May budget.

Senator Connolly: Mr. Chairman, could I stop the witness on the first point? Last night some figures were given in the Senate, discussing the very point that you are on now, about increases in deductions which remove people from the tax rolls. The figures were to the effect that in fact while, over the years, these claims have been made on behalf of the government, for eliminating people from the tax rolls, in fact the tax rolls are larger now every year. Is there an explanation as to that? Is it the explanation that people are making more money?

Dr. Allan: Basically, it is. There are really three factors that would push people on to the tax rolls. One would be the growth in the labour force, which is related to the population growth. In addition to that, for example, there are those who may have been removed from the rolls by various measures, but who, because of a growth in their income, either in current dollar terms or in real terms, tend to be pushed back on the rolls. With the indexing of the tax system, the growth of income in simple nominal terms will not be such a significant factor in pushing people back on the rolls. If there is any growth in real income, even with an indexed tax system, people will once more go back on to the tax roll.

The Chairman: You have people grow up?

Dr. Allan: Yes, that is why I mentioned the growth in the labour force, sir.

The Chairman: What effect does the indexing have on it?

Dr. Allan: By raising the exemptions each year, people who are on a very small income and might otherwise have gone on to the tax roll, would be prevented or at least delayed in moving on to the tax roll.

The Chairman: There would be no complaint about that?

Dr. Allan: I would not think so.

Senator Connolly: By and large, would you say that the people in the very lower income tax brackets are being eliminated gradually and progressively from the tax roll? The claim is made, and it is a political claim—we do not care too much about that—but in fact is it a valid claim, that they are being eliminated?

Dr. Allan: I think it certainly is. There is no question that people are being removed from the rolls by these measures. As I say, with the growth of income, particularly in the real sense, they may come back on, but there is no doubt that if they are coming back on it is by virtue of the fact that their real incomes are higher than they were at the time when they were removed. The only way we can prevent people coming back on would be to change the overall incidence of the tax system.

Senator Connolly: Increase the deductions further or in some other way?

Dr. Allan: Yes.

Senator Connolly: Thank you.

The Chairman: Dr. Allan, there is one question that it may be difficult or even impossible for you to answer. Is there any way you can give even an approximate figure as to the dollar level below which, on average, people would not be subject to income tax?

Dr. Allan: In the 1974 taxation year it is determined that any taxpayer having income of less than $1,011—beyond his exemptions, that is—would not be taxable. For the 1975 taxation year the figure is $1,395.

Senator Connolly: Taxable exemption?

Dr. Allan: Yes, that is primarily the consequence of this tax deduction, the removal of taxes to the extent of 8 per cent of tax liability.

Senator Buckwold: Mr. Chairman, as a supplementary to that, is it true that in some provinces that have tax arrangements with the federal government, as a result of this people are paying provincial income tax and no federal income tax?

Dr. Allan: That is so.

Senator Buckwold: Would you tell me why?

Dr. Allan: This particular tax cut is a federal measure; it was structured in its present form precisely to avoid reducing the revenues of the provinces. I think the origins of the measure were really related to the provision of fiscal stimulus. But this had to be done in such a way as not to impose an unacceptable cost on the provinces. We can say that the deduction is a deduction against federal tax liability and not against provincial liability. So you may find regarding someone whose taxable income is sufficiently low that as a consequence of this tax deduction he ends up paying no taxes to the federal government but he still has to pay his provincial taxes.

Senator Buckwold: This is the situation in the province that I come from, Saskatchewan, where the province has claimed, when this was drawn to their attention, that they did not have enough time to change the regulations so that they could eliminate taxpayers from the provincial roll who had been eliminated from the federal roll. Is there any validity to an argument like that?

Dr. Allan: Yes, I think it is a valid argument. It would really depend upon the timing of the federal budget.

Senator Connolly: And the provincial budget?

Dr. Allan: And the provincial one as well.

Senator Buckwold: Could that not be corrected by order in council at the provincial level?

Dr. Allan: It is rather difficult to do. You have fairly major administrative problems, for example, in adjusting for some tax changes. There may be an administrative problem in adjusting the source deduction tables. It typically takes several months to have them printed, distributed and put into use. Notice has to be provided, and so on.

Senator Buckwold: I will ask questions in this regard, then. What provinces have provincial income taxes and not federal income taxes? To make my question clear, in which provinces do some taxpayers pay no federal tax and pay income tax to the provinces?

Dr. Allan: This could be true of virtually every province. In its budget just a week or two ago, the Province of Alberta did bring in a tax cut in its taxes which was somewhat analagous to this and which is designed to accomplish precisely the effect that you are alluding to; that is, someone who did not have to pay federal income tax would not be called upon to pay provincial tax.

Senator Buckwold: Is that the only province that has done that?

Dr. Allan: To date, that is the only one.

Senator Hays: Has it just happened or has it been proposed?

Dr. Allan: It is proposed in their recent budget, yes.

Senator Macdonald: Coming back for a moment to the tax rolls, I understand that family allowances are now taxable. Does that make any substantial difference in bringing people back on to the tax rolls?

Dr. Allan: Yes, it would make a significant difference. These amounts were, as you know, substantially increased at approximately the same time as they became taxable, though the increases were much much larger than the tax liability upon them. It would raise the income for tax purposes and may have the effect of bringing some people on to the tax roll.

Senator Connolly: Who is taxable in that case?

Senator Flynn: The recipient.

Dr. Allan: On the family allowances? In the ordinary situation it would be the husband, if he has the higher taxable income of the husband and spouse.

Senator Connolly: They cannot choose?

Dr. Allan: No, they cannot, sir.

Senator Flynn: Who can claim it?

Dr. Allan: There is a choice in the sense that whoever claims the child has the deduction. But ordinarily that would be done by the person who has the higher income.

Senator Desruisseaux: I would put a question to Dr. Allan in connection with the lower paid citizens. A Senate committee has established what poverty is amongst our citizens, and has set a definite figure to establish that below that level it is poverty. I cannot remember the exact figures, but are we taxing in this area, too, that you would know?

Dr. Allan: The so-called threshold of the tax system, the level of income at which people begin to pay tax, is very close to that sort of poverty threshold. However, the increases in the exemptions which have occurred in recent years, particularly the adjustments as a consequence of indexing the tax system, have now moved the exemptions up to a point at which that sort of region is now one in which we can say that the tax system is not really impinging with any major weight at all upon those who might be below the poverty line. I do not have the numbers immediately, but, for example, we can give for family sizes the total amount of the exempt income for the 1975 tax year.

Senator Desruisseaux: That would be interesting.

Dr. Allan: We can obtain these for you before the conclusion of the hearings.

The Chairman: You were dealing with these headings.

Dr. Allan: The next major item I wish to refer to is the deduction for interest and dividend income. This was first proposed in the May budget, at which point it related only to interest income. In the November budget it was proposed that this be extended to include, in addition to interest income, dividend income. One of the major considerations in writing this was the fact that interest income is a very important component of income to the elderly in the Canadian economy. They had found that their income from various sources was seriously eroded by inflation and this particular measure was designed to focus relief particularly on the elderly. It has, of course, beneficial effects in the sense that it encourages savings and should have a favourable effect upon both saving and investment in the economy.

As you know, the minister moved an amendment to this particular proposal when the measure was under consideration in the other place. This had the effect of converting what had initially been proposed as a net deduction. As I am sure the senators are aware, Mr. Chairman, the primary reason for this was that the net methodology was subject to the difficulty that a large number of people in the

economy had borrowed funds for productive purposes that were not related to the investments which were generating the interest income against which they might wish to use the deduction. They may have borrowed, for example, with respect to a mortgage on a farm, to finance a rental real estate property or for business purposes as proprietors or partners. However, because of that borrowing and the necessity that the deduction be on a net basis, they might have been denied the right to use the interest deduction. In response to the representations to which that feature of the measure of the measure gave rise, the minister proposed that the measure be converted to a gross basis so that it was no longer necessary to deduct these business interest expenses in order to arrive at the amount against which the interest deduction could be claimed.

Senator Cook: Was that in respect of 1974 income or 1975 income?

Dr. Allan: For the 1974 taxation year, senator, the deduction is net and applies only to interest income. For the 1975 taxation year it is proposed that it will be gross and, in addition, will apply to the dividend income.

Senator Connolly: From where does the feedback in relation to the original proposal which led to the amendment come? Is it from individuals who are disaffected and spotted these aspects very quickly after the introduction of the bill, or does it come from institutional organizations?

Dr. Allan: There was a very widespread reaction to that particular proposal, senator. In particular, I think it is fair to say that the farming community very quickly perceived that since a very large percentage of farmers are actually financing their acquisition of the farms by the use of mortgages, the interest which they were paying on their mortgages, which was a deductible expense under the act, denied them the use of this particular exemption. Small businessmen also were in similar circumstances and reacted. So it was a very widespread reaction to it.

Senator Beaubien: Dr. Allan, with regard to dividend income for 1974, if someone received $3,000 in dividends—

The Chairman: That does not apply to 1974; it is only interest. 1975 is the gross of dividends and interest.

Senator Laird: For reference purposes of members of the committee, could you tell us the section involved with the amendment to which you made reference? It always helps to know the sections.

Dr. Allan: It is clause 70 of the bill.

Mr. Chairman, the next measure I would refer to is one which, again, was designed primarily to assist the elderly. This was the provision of a pension deduction which will permit in the 1975 taxation year a taxpayer to deduct up to $1,000 of his pension income from his taxable income. This, again, is really particularly aimed at alleviating the impact of inflation upon the elderly. An important consideration in this regard, also, was that this would be beneficial to those who had made an attempt to, in effect, protect themselves when they retired, but their pensions were subject, of course, to erosion by inflation similar to that suffered by interest income. These were taxpayers who had made provision for their retirement but found that provision seriously eroded by inflation. With respect to the major social welfare programs, such as Old Age Security and Guaranteed Income Supplement, they are, of course, fully indexed and the people who had made some provision for their own future were finding that they were losing their relative position vis-à-vis those relying fully upon the fully indexed social welfare programs. This particular measure did offer some protection and offset to inflation.

Senator Beaubien: Mr. Chairman, may I return to the question of dividends for the year 1975?

Dr. Allan, if someone, for instance, earned $18,000 and had $3,000 of Canadian dividends, would he be able in 1975 to deduct $1,000 from that $3,000?

Dr. Allan: Yes, he would.

Senator Beaubien: Where does that deduction come off? Ordinarily the $4,000 would be grossed up as income. Is $1,000 deducted from the $3,000 and then the two grossed up?

Dr. Allan: No, the exemption provides for $1,000 of taxable dividend, so that we would have to gross up the dividend for tax purposes and then be permitted a deduction of $1,000 from the grossed-up dividend income.

Senator Beaubien: So you would have $3,000, grossed up to $4,000 in the income tax return, and $1,000 would be deducted from the $4,000?

Dr. Allan: That is right.

Senator Beaubien: And the tax on the remaining $3,000 would be carried and 20 per cent deducted from the $3,000?

Dr. Allan: You would still be permitted your full dividend credit.

Senator Beaubien: That would make a very great difference.

Dr. Allan: Yes, it will. This is a measure which should have quite an impact on the stockmarkets and on the capital markets.

Senator Beaubien: So, if you have $3,000 in dividends and then you gross up and you have $4,000 and then you take off the $1,000 which you are allowed to deduct, you again have $3,000. Now supposing your tax rate were 28 per cent, or let us say 30 per cent for a round figure, then that would come to $900 that you would have to pay. But you say that you can take the 20 per cent off the grossed up, so that means you take off $800, so you would only pay $100. You are certainly looking at a tremendous change there.

Dr. Allan: This particular measure would not in any way affect the gross up and credit which is now permitted on dividend income. In addition, you would be permitted the $1,000 deduction that this clause proposes.

Senator Beaubien: But the $1,000 deduction comes in.

Dr. Allan: Yes, but it is an additional $1,000, senator, whether it be a dividend or interest income. The grossing up credit is basically uneffected, and what this would do would be to permit an additional deduction of $1,000.

Senator Buckwold: Could I move on to what we are doing for our old people? It is clear that some people have missed the impact of the anti-inflationary program to help older people. A person with a $5,000 taxable income, if he had a $1,000 interest revenue, which many old people have, would deduct that, and in addition they would deduct $1,000 because they are drawing a pension that is not the old age pension and so their taxable income would be reduced to $3,000. So that in fact these people, who repre-

sent a very large percentage of our elderly, will have significant relief. As a matter of fact, just looking at it, if they are on a 30 per cent basis, then their tax will go from $800 to pratically nothing.

Dr. Allan: These measures do provide a great deal of relief in such circumstances.

Senator Buckwold: I just want to draw this to the attention of the committee because I think from the point of view of 10 per cent of our population this is going to provide very great relief.

Dr. Allan: There is another factor as well, senator, and that is that in the old age deduction there is now going to be permitted an inter-spousal transfer of such part of the age deduction that the spouse herself cannot use.

Senator Buckwold: Is that the $1,000 deduction?

Dr. Allan: Actually it is indexed, so I believe it will be something like $1,174 for the 1975 taxation year.

Senator Connolly: There will be many people taken off the rolls again because of this.

Dr. Allan: This will make a major contribution toward removing elderly taxpayers from the tax rolls.

Senator Connolly: And they will stay off.

Dr. Allan: Yes, that would largely be the case.

Mr. T. G. Hierlihy, Consultant to the Committee: I am just wondering if there might not be a technical problem in section 110 which allowed the carry-over of the unused portion to the spouse. My concern there is that the unused portion, as reduced by the amount actually deducted by the spouse, can be carried over, but the amount deducted is said to be a specific amount, the lesser of $1,000 or the interest, so that if that amount is not required I would assume that it is only the amount that is required that would actually reduce the carry-over.

Mr. D. L. H. Davidson, Director, Tax Base Research Division; Department of National Revenue (Taxation): That is my understanding.

Mr. Hierlihy: This is the way it will be interpreted?

Mr. Davidson: Yes.

Mr. Hierlihy: My interpretation is that the wording should be "not exceeding the lesser of" rather than mentioning the lesser of two specific amounts, because we are saying that a specific amount is deductible. So it will be interpreted that if only this lesser amount is required, then it is only this lesser amount that will be reduced.

Dr. Allan: The next item is the disability deduction. One of the amendments proposed in the bill is to change the test to determine the eligibility of people qualifying for the disability deduction. Formerly, to qualify for the disability deduction the taxpayer had to be confined to bed or to a wheelchair during the whole taxation year. The proposed amendment would relax that very rigid requirement, and now requires simply that the taxpayer be confined, first of all, for a substantial period each day and then for any 12-month period ending within the taxation year. As it was structured before, for example, you could have had somebody confined to bed or a wheelchair for the entire day, but if the confinement constituted a period of six months in one taxation year and a further six months in another taxation year, then they would have been denied this particular benefit. Now, if they are confined for any 12-month period, that suffices, as long as any part of that 12-month period falls within the taxation year. This makes them eligible for this deduction.

Senator Macnaughton: Would you try to give us the references as you go along?

Dr. Allan: I find difficulty in doing that. We have experienced the same problem that the chairman alluded to at the beginning, the problem with the index.

Mr. Hierlihy: This is clause 69.

Dr. Allan: The next item, Mr. Chairman, is the liberalization of the medical expenses which may be claimed by tax payers. Under the existing act, the deduction which may be claimed here requires that the handicapped person be sent to a special institution, and he has to be sent to an institution—if the deduction is to be permitted—which is exclusively for the handicapped. There have been cases which have been brought to our attention where a person for various reasons may have been sent to a particular institution where they could give this handicapped person the requisite care and could in some cases provide more appropriate care than could be provided by institutions, which catered exclusively to the handicapped, but because this institution also catered to other than the handicapped, no deduction could be claimed. The effect of the change proposed in the bill would be to permit the taxpayer to claim this deduction where the institution provided the requisite care and attention to the handicapped person, and it was certified by a qualified person—in other words, a doctor—that this was the appropriate type of care for the person to receive. That, too, is in clause 69 on page 187 of the bill.

Senator Flynn: Are you sure you could not claim that amount before?

Dr. Allan: In order to claim it the special institution to which the handicapped person was sent had to be one that catered exclusively to handicapped persons. The argument has been made that there were some forms of handicap where the person actually would benefit more if he could receive the requisite attention in an environment with people who did not suffer from a handicap—that that too had a therapeutic effect—yet a deduction was not possible.

Senator Flynn: It is very much like a medical expense. It looks to me to be close to a medical expense.

Dr. Allan: Yes.

Senator Flynn: Notwithstanding the fact that the school for the handicapped would be used by other persons than the handicapped. Anyway, it is at least a clarification if it is not a clear benefit.

Dr. Allan: It certainly is.

I think some of the other noteworthy proposals contained in the bill relate to the field of deferred income plans. These are ones, Mr. Chairman, in which you expressed a particular interest. One of the major developments, as I am sure all honourable senators are aware, was the introduction of the registered home ownership savings plan. This is a measure whereby any taxpayer who is 18 years or over who does not already own a home or a house will be able to make a deductible contribution of up to $1,000 per year for a maximum cumulative contribution of $10,000. He has a deduction when the contribution is made.

The income generated within the trust will not incur any tax liability, and there will be no tax liability when the funds are withdrawn from the plan if they are used either to purchase a house or a home, or, alternatively, to purchase furnishings for the taxpayer's own home, or for his spouse's home. The major intent, of course, of this provision was to facilitate home acquisition by Canadians. It is estimated that this proposal will result in a revenue loss, a reduction in revenues that otherwise would have been obtained, of some $100 million in the 1974 taxation year.

Senator Laird: And, of course, he must not have a residence to start with.

Dr. Allan: That is correct.

Senator Laird: What about the spouse? Could she or he have a residence?

Dr. Allan: Yes. For example, with a married couple, where the house is in the wife's name the husband would in fact be able to contribute towards a registered home ownership savings plan.

Senator Connolly: What about if it is joint, as it often is?

Dr. Allan: If it is joint, both would have an interest in the property and neither would be able to contribute to a registered home ownership savings plan.

Senator Flynn: $1,000 each?

Dr. Allan: Neither would be able to contribute if they have a joint interest in the house. If neither had a home, then each would be able to contribute to their own plan, and $1,000 each is the maximum.

Senator Beaubien: Could one buy a house in the country and one buy a house in the city and both deduct?

Dr. Allan: That would be possible, yes.

Senator Flynn: Do you think this will have a big effect on the construction of residences?

Dr. Allan: Not immediately. There were measures proposed in the budget the primary objective of which was to stimulate housing construction. However, not everybody was going to be able to take advantage of these. There were many Canadians who ultimately would wish to own a home but were not able to go into the market at this particular time. This measure was really designed to benefit that particular category, and indeed possibly relieve some of the pricing pressures on the housing market. We have, although not in the immediate past, gone through a period where there was enormous demand pressure upon the housing market, which was bidding up prices at a very rapid rate. One of the functions of this measure was to encourage people to know that it would be possible, as a consequence of this sort of tax sheltered form of savings, to defer the purchase of a home and benefit from the deferral.

Senator Flynn: But you have the choice not to buy a house or furnishings?

Dr. Allan: That is correct. Should someone decide, having used a registered home ownership savings plan, they did not wish to purchase a house, it would be possible for them to roll the assets of the fund over into a registered retirement savings plan, for example, or to use an income averaging annuity, if they wished to spread out the income in that manner. They could in fact take it out in a year and suffer the tax consequences.

Senator Flynn: In fact, many people will use this without any intention of purchasing a house or furnishings.

Dr. Allan: That is certainly a possibility.

Senator Flynn: It is a certainty, I would say.

Dr. Allan: There will be those who will probably endeavour to use it in that way. I think Mr. Turner indicated that, while he recognized that that was a risk, he preferred to structure the plan in such a way as not to preclude anyone who was favourably disposed to saving for a house from doing so, in order to preclude the possible abuse by those who might try to use it in that way.

Senator Connolly: The roll-over in a retirement savings plan is also subject to restrictions. For example, if a person who has put some money into a trust like this one for a house is also contributing to a retirement savings plan to his maximum, he is precluded from putting it in there, is he not?

Dr. Allan: No, he would not be. He would be making his contribution, in the case you mentioned, to the registered retirement savings plan on an annual basis. He would also be contributing to his registered home ownership savings plan on an annual basis. When finally he decided that he did not want to withdraw the proceeds to buy a house he might chose to leave them in a plan until some later date, or he might at that point chose to roll the entire assets in the home ownership savings plan into a registered retirement savings plan.

Senator Connolly: But he would have to pay the tax on that.

Dr. Allan: No, he would not.

Senator Buckwold: As he received it?

Dr. Allan: If he withdrew the proceeds from the plan and did not use them to purchase a home, if he did not put them into a registered retirement savings plan or use them to purchase an income-averaging annuity he would immediately incur tax liability; within that taxation year he would incur the full tax liability from that.

Senator Connolly: I still press you on one point. Under a retirement savings plan the maximum, I think, if you have no other plan to which you contribute, is $4,000 a year. Is that not so?

Dr. Allan: That is so.

Senator Connolly: Suppose a man has been making that $4,000 contribution during the year, but under the home ownership plan he accumulates, say, $2,000 and decides he is going to abandon it, then he can turn that over to the retirement savings plan, even though he has exceeded his annual limit by doing so.

Senator Flynn: In other words, you can now put $5,000 aside for a retirement savings plan.

Senator Connolly: In this case, in that year it would be $6,000 that would go in.

Dr. Allan: That would be correct. That would be a once-in-a-lifetime situation, because the registered home ownership savings plan was a once-in-a-lifetime plan.

The Chairman: Dr. Allan, take this kind of situation. The husband and wife each have contributed to a home ownership savings plan and when they each have contributed, say, $5,000, they then decide the combination will produce $10,000 and that would be a pretty good down payment. So they could use that to acquire the home in their joint names. Isn't that right?

Dr. Allan: That would be so.

The Chairman: What about the situation then? Is that the end of their home ownership plan or can they keep on continuing their instalments until they hit the $10,000 mark?

Dr. Allan: No, they cannot.

The Chairman: That is the end of the plan?

Dr. Allan: Yes, at that point they would have an interest in a home and they would no longer be able to deduct.

The Chairman: They would not be eligible.

Dr. Allan: They would not be eligible.

The Chairman: If only one spouse used $5,000 of his plan to acquire a home, that would not affect his wife's position? It would end his own ownership savings plan, would that be right?

Dr. Allan: That is correct. As long as the house is not also in the spouse's name.

The Chairman: He takes it himself.

Senator Flynn: Doesn't that situation defeat the purpose, because you are suggesting that they have to delay until they have put aside the maximum allowed by law before they can buy, because if they buy before that, they cannot go along and use the additional amount put aside to, let us say, reimburse the mortgage or the interest. So you are defeating the end?

The Chairman: The only smart way would be to build it up to $10,000.

Senator Flynn: Then you have got to delay.

The Chairman: Yes.

Dr. Allan: The primary objective of the plan is to facilitate really the acquisition of the necessary down payment to purchase the house.

Senator Flynn: You assume that people will not be able to do that before ten years.

Dr. Allan: The other fact is that there is a limit; since this is a very major tax concession the amount deductible has to be limited.

Senator Flynn: I do not dispute that. I am trying to relate the plan to the objective, which is the acquisition of the house for a residence—the idea that you plan to wait as long as is possible.

Dr. Allan: The other factor is that the plan in no way precludes a taxpayer from saving outside the plan.

Senator Flynn: Oh, yes—I hope.

Dr. Allan: To the extent that you make the tax saving, the process is definitely facilitated.

Senator Connolly: Who do you think is going to benefit mostly? Is it the 25-year old making a good income but not ready to buy a house?

Dr. Allan: Certainly you have to be able to save in order to benefit, but the plan itself facilitates the saving, in the sense that if you take someone who, say, put aside $1,000 for this particular purpose and was subject to a 25 per cent tax rate, the tax saving that would result from investing in this particular way is $250, so that the saving is facilitated. I think any young people who have an opportunity to put some funds aside, to use this particular vehicle, would certainly find it a great advantage.

Senator Connolly: They would get the down payment.

Senator Buckwold: One of the features is the preclusion of those who have a summer cottage. I can understand the reasoning behind this, because a summer cottage can also be a very expensive summer home. But some people have indicated that because they have a little cabin somewhere, that wipes them out or precludes them from participating in this plan. Would it not have been possible to put a value or some means of differentiating between the little place somewhere in the woods that many couples—especially young couples—seem to develop as against this blanket exclusion that if you happen to have an interest, even a small interest in a summer place?

Dr. Allan: There certainly is a problem in that regard. It is hard to know how serious it would be. Mr. Davidson could probably speak more knowledgeably on this matter, but I suspect that it would be very difficult to police a measure which said if you owned a property of less than X thousand dollars you could still contribute to RHOSP, but if you owned more than that you would not be permitted to do so. Changes in property values can be extremely rapid, and I suspect that it would be a very difficult administrative matter.

Senator Buckwold: This is a fair way of doing it? This is the complaint that I am getting.

Senator Desruisseaux: Could the home saving plan be used to purchase a condominium?

Dr. Allan: Yes, senator it could.

Senator Desruisseaux: It does not matter where the residence is that you buy? Must it be in Canada?

Dr. Allan: It must be in Canada, definitely. The plan cannot be used to build a retirement home in Florida.

Senator Cook: In connection with this item, and also in connection with the item where people are in wheelchairs or go to special schools or things like that, when these relieving provisions are put into the law, is it the responsibility of any one person to monitor how they operate? Does any suggestion come from within the department to make relieving amendments as time goes on, or do you wait for pressure to build up from outside?

Dr. Allan: The measures really can originate internally or externally, as you can appreciate. Usually a minister receives a rather vast amount of correspondence from taxpayers who have suggestions and sometimes very pointed criticisms of the way in which the Income Tax Act is working. The minister becomes aware of these through the handling of his correspondence. He may decide that having had this particular matter drawn to his attention he really wishes the officials within the department to undertake a

technical analysis of a given proposal. Then, on the basis of that analysis, he will make a decision as to whether or not this is really an area in which a change should be made. Of course, you may well find situations too where the officials perceive certain problems in the operation of the act, and those too would be drawn to the minister's attention; and again it would be for him to make a decision as to whether or not something ought to be done.

Senator Cook: I have a supplementary question. This may not be a very fair question. Take the case of special schools and wheelchairs. How many years does it take for such an amendment to surface and to be made?

Dr. Allan: I am afraid I am not a very good person to answer that particular question. I have been in my present position for somewhat more than a year now. I certainly have seen problems identified within that time span, and responses generated. Perhaps Mr. Thompson or Mr. Short could comment on the time lag between a problem being identified and an appropriate policy response being introduced.

The Chairman: You mean, how long it takes the mill to get into production?

Dr. Allan: In effect, Mr. Chairman, yes.

Mr. Thompson: It is very hard to generalize, senator. I think medical expense is one area where there are always quite a number of items in play at the borderline. The government is continually trying to find a practical dividing line that is not subject to too much abuse and that, on the other hand, is not inequitable in certain cases.

Senator Connolly: In that case, do you get the representations from the individuals in the wheelchairs or through organizations or associations who point this out?

Mr. Thompson: Of course, Revenue Canada also in administering the law comes across innumerable points that require policy decisions.

Senator Laird: Supposing the home is acquired under this scheme and then is sold at a substantial gain—which would not be taxable because it is a residence—could the process then be repeated?

Dr. Allan: No. It could, perhaps, in the circumstances where one home was acquired through the use of the registered home ownership savings plan of the taxpayer. It would then be possible for the spouse, if she had not already used a plan, to use one for the purchase of another house. But any taxpayer may only utilize the registered home ownership savings plan once in a lifetime.

Senator Laird: Actually, I was working up to that spouse angle, thinking this is a darn good setting.

Dr. Allan: It could take ten years to build up the amount.

Senator Macdonald: Regarding the $10,000, if a person saved up to $10,000 over 10 years, would he have to pay income tax on the interest that would earn?

Dr. Allan: No, he would not, sir.

Senator Connolly: So long as it remained in the trust.

Dr. Allan: That is right.

Senator Flynn: If a house were sold a few months after its purchase, would the amount be taxable?

Dr. Allan: No, if it were a principal residence there would be no capital gains tax. It would be very difficult, as I am sure you appreciate, senator, to introduce a provision of that nature, because the move may have been made for business reasons.

Senator Flynn: I am not suggesting any amendments, but inquiring as to the possibilities offered by the scheme.

Senator Connolly: Dr. Allan, could I inquire as to the clause number of this deferral?

Dr. Allan: It is clause 100, page 249 of the bill.

The Chairman: The next heading is the Registered Retirement Savings Plans.

Dr. Allan: This is the contribution to the spouse's plan. This particular measure, Mr. Chairman and senators, was proposed in recognition, really, of the productive contribution that the wife makes to the family unit. It was felt that it was really quite appropriate that there be some provision for a taxpayer to make a contribution to a registered retirement savings plan on behalf of his spouse. Therefore the clause proposes that to the extent that a taxpayer does not use his own possible contribution to a registered retirement savings plan the unused portion may be used in order to make a contribution to a registered retirement savings plan on behalf of his spouse.

This would be beneficial in the sense that really it is a way of achieving income splitting at the time at which the income is withdrawn from the registered retirement savings plan. Some would accrue to the spouse, and to the extent that the taxpayer had his own registered retirement savings plan, some to the taxpayer himself. Both would be subject to lower marginal tax rates than would be the case were the entire contribution utilized by only one taxpayer.

Senator Connolly: What about the refinements? For example, suppose a man belongs to a pension plan and because of his contributions to that can only make a contribution of, for instance, $2,000 to the registered retirement savings plan, he is precluded from making any more because of his membership in the pension plan, so he only makes $1,000. How much can the wife put in; $1,000, or $3,000?

Dr. Allan: By the way, Mr. Chairman, this particular measure is clause 99(4), at page 243 of the bill.

In the circumstances that you have described, senator, the maximum deduction the husband would be permitted in respect of his pension plan contributions and his contributions to the registered retirement savings plan would be $2,500.

The Chairman: Dr. Allan, I notice that the language used is that when the husband is going to make a contribution to his wife's, shall we use the alphabet, RRSP, it says up to his annual limit. His annual limit could be variable.

Dr. Allan: Yes, that is so.

The Chairman: It may be 20 per cent of $4,000 plus a transfer from the home ownership savings plan of whatever is in there, instead of it being spent on a house. In view of that, is there likely to be any confusion in the language when referring to an annual limit? How would you consider it administratively?

Mr. Davidson: We would simply consider the contribution he made to his own RRSP for the year. It is up to

$2,500 or $4,000 and any balance that he would have been able to put into the plan, but did not, he may put into his wife's plan. We would ignore such things as rollovers from other plans.

The Chairman: In his home ownership savings plan he might have accumulated $4,000 or $5,000 and then given up on the idea of saving money for a house. He has a limit if he deals in the ordinary way with his registered retirement savings plan, of $2,500 or $4,000, but he may have as much as $5,000 in the home ownership savings plan. Could he, in addition to making a contribution of $4,000, transfer that money out of the savings plan to the retirement savings plan or use it to buy one of those annuities?

Mr. Davidson: Yes, I believe he could.

The Chairman: The use of the words "annual limit" is not confusing?

Mr. Davidson: There may be some confusion in connection with that.

The Chairman: But you believe that administratively it would be dealt with in this manner?

Mr. Davidson: We would certainly be kind-hearted in this respect.

The Chairman: Because he has a right to do that.

Mr. Davidson: Yes.

The Chairman: And in the right that is given, if he wished to retire from his savings plan he could avoid taxation by putting the money into a registered retirement savings plan. That is an extra right he would have, in addition to the right he enjoys, with the limits set forth, in setting up a registered retirement savings plan. Therefore, administratively it should not present a problem.

Mr. Davidson: That is right, Mr. Chairman.

Senator Flynn: I would like some clarification on this point. Presently a husband or a wife can put in $4,000, forgetting the housing provisions. However, if they do not, can the husband contribute more in favour of his wife, or can the wife contribute more in favour of her husband?

Dr. Allan: Under the act as it stands at this point, the attribution rules are such that if a husband made a contribution to a registered retirement savings plan for his wife, the benefits from that would really be attributed to the husband himself and not to the wife. This particular proposal gives the husband the right to make a contribution to the plan on behalf of the wife and the attribution rules which would ordinarily attribute the benefits back to him will not come into play.

Senator Flynn: I see. However, in any event, if at present the two are contributing $4,000 per year it would not change the situation at all?

Dr. Allan: That is correct.

Senator Laird: Is this effective for 1974? The reason I ask is that I know the trust companies have become very leery about encouraging people to do this. They tell them the act is not passed. Is it proposed in the bill to make this retroactive?

Dr. Allan: Yes, this is a measure that would be effective for the 1974 taxation year.

Senator Laird: Yes, if we pass the bill.

Dr. Allan: That is right.

Senator Laird: Of course, if we turn it down, you are in trouble.

Dr. Allan: Well, the taxpayers would be.

Mr. Hierlihy: Clause 99(3) makes reference to whichever paragraph of clause 146(5)(a) or (b) may apply to a taxpayer. Clause 146(5) refers to a taxpayer who is an annuitant under a plan. It would seem that a strict interpretation would indicate that unless the taxpayer himself was an annuitant under the plan he could not make a contribution to his wife's RRSP. I understand that that is not intended, but I would like to know that it is not going to be interpreted that way as well.

Mr. Davidson: The reason the law refers only to paragraph (a) and (b) of 146 is to make sure that the man does not have to be an annuitant. Otherwise the reference would be to 146—period. Thus there is no problem administratively whether the man is an annuitant or not and he will be allowed to contribute to his wife's plan.

Mr. Hierlihy: There had been some considerable differences of opinion in that area. It had been discussed with several people with regard to its interpretation and there seemed to have been some difference of opinion. Thank you very much.

The Chairman: We could now move on to registered educational savings plans.

Dr. Allan: That particular proposal is in clause 100 on page 244 of the bill. The major developmental change here is that the system of taxing the income generated within these particular trusts should be altered. Under the previously existing arrangement the income generated within some of the scholarship trust plans was allocated out or imputed to the subscriber. He did not actually receive the income, but the income was imputed to him and he was required to take that amount into income for income tax purposes and pay the tax on it each year. What is proposed now is that that should no longer be done, and that the income generated within the trust incur no tax liability each year. When the benefits are subsequently paid to the beneficiary under the plan, then he will have to take these amounts into income for tax purposes. These will typically be university students or students in other eligible post-secondary institutions, and ordinarily their exemptions and deductions would be such that there would be very little tax at all on the amounts generated within these plans. So this is really a relieving measure which is beneficial to the people designated.

The Chairman: Well, you have a minimum number of subscribers that must exist in order to have a registered plan, and there is no limit on the amount which each may contribute.

Dr. Allan: I believe that is correct.

The Chairman: But there may be a limit on the amount of contribution which they may deduct for tax purposes.

Dr. Allan: As I say, when they receive the benefits—

The Chairman: I am not talking about the beneficiaries; I am talking about the subscribers.

Dr. Allan: There is no deduction permitted by the subscriber.

Senator Connolly: It is not a charitable deduction; it is educational. .

Dr. Allan: The major benefit comes from the fact that the income can be generated within the trust without tax consequences until such time as it is distributed.

Senator Connolly: Is this kind of thing designed for a fairly wealthy parent who may have a big family and wants to put money aside to look after the education of his children and have it built up without having it taxed?

Dr. Allan: I do not believe that is the case.

The Chairman: It is one way of saving for the subscriber, who may be the parent—it is one way of saving the increment from taxation.

Dr. Allan: That is correct. It would certainly facilitate the saving for a university education for a low-income family, for example, because to the extent that they make the savings in this particular way, the income would be tax-free all during the period in which it is being generated.

Senator Buckwold: I believe this is done at the request of scholarship trust plans which are basically non-profit. They have developed on a very large scale to the position now where many thousands of subscribers are involved.

Dr. Allan: That is correct.

The Chairman: Until such time as this plan becomes law, does it mean that the subscriber is being required to bring the earnings on his contribution into his income?

Dr. Allan: Yes, until the plan becomes law.

The Chairman: When you say in the bill that income earned before 1972 will be designated as tax paid—now here the subscriber has paid tax on the income, so is he going to get a refund?

Dr. Allan: Well, for the income which was contributed prior to 1972 the ultimate beneficiary when he starts receiving the benefit will benefit to the extent that part of the amount which he receives will be identified and he will be told that these are amounts in respect of which tax has already been paid and therefore he need not take those amounts into his income for tax purposes.

The Chairman: I appreciate that, but the pre-1972 income in the fund, to the extent that part of it is paid out to the student, that part will not be taxable in his hands. What I am getting at is that the subscriber who prior to 1972 has contributed money to the plan, he has had to include the earnings on his contributions in his income and he will not be entitled to claim any refund in respect of that?

Dr. Allan: That is so. In effect the benefit which might otherwise accrue to him is being given to his designated beneficiary.

Mr. Hierlihy: On the death of a subscriber to such a plan, are there any tax consequences when the property passes to his children?

Dr. Allan: I understand that the structure of the plan is such that in the event that the beneficiary is not eligible to benefit under the plan—for example, if he is not admitted to university,—that implies that he is not going to be in a position to benefit—

Mr. Hierlihy: But when the subscriber dies. Let us say a wealthy taxpayer puts an amount into the plan for his children and then he dies, what is the situation?

Dr. Allan: I believe I am correct in saying that there would be no tax consequence in the event of the subscriber dying.

Senator Connolly: Is this new law?

Dr. Allan: It is. Prior to 1972 there was a requirement that the income generated within the trust be imputed to the subscriber for tax purposes, and he was required to include that amount in his imcome for tax purposes.

Senator Connolly: But it is not completely new. This type of trust was envisaged by the law prior to 1972.

The Chairman: Yes, it already existed.

Dr. Allan: They have been in existence for a considerable number of years now, and some of the plans actually have tens of thousands of subscribers.

Senator Flynn: But for a designated beneficiary, when you had a trust—and not a registered education savings plan, but a trust to provide for scholarships or anything like that—you could subscribe to them but you did not have to consider the income as your own if the beneficiary was not designated specifically.

Dr. Allan: I would think that is a technical matter of interpretation. Perhaps Mr. Davidson could help on that.

Mr. Davidson: Most plans of that sort would be charitable trusts, and there would be no tax consequences at all. It is only where there is a designated benificiary; this takes it out of the charitable trust clauses, and the new law is needed for this purpose.

The Chairman: I have a question I should like to ask you, Dr. Allan. Are there any provisions in this bill that could be described under the heading of providing some benefit or some beneficial treatment to individuals? I think immediately of the expansion of the idea of deduction for bling people and people who are confined to wheelchairs. You might mention those very briefly.

Dr. Allan: I guess there were two particular proposals, for the blind and people confined to wheelchairs. The bill proposes, in effect two changes that are relieving. The requirements regarding the degree of confinement is relaxed so that now it is proposed one could qualify if one were confined either to bed or to a wheelchair for a substantial period each day. That is a relaxation. The other relieving feature is with respect to the fact that previously you had to have been confined for the entire taxation year in order to claim the deduction. It had to be a 12-month period, but it had to take the entire taxation year. As it is now proposed, the confinement has still to be of 12 months duration, but it could be any 12-month period ending within the taxation year, so that many people who have been precluded from this particular deduction under the old provision will now be brought in under what is now proposed.

The Chairman: Heretofore you could only qualify by staying in bed?

Dr. Allan: Basically so. It had to be total confinement.

The Chairman: Is there not some provision with respect to a change in the kind of home where people may be maintained? Have they not broadened the description?

Dr. Allan: Yes, that is so. Again, previously the situation was that the home had to be one that catered exclusively to the handicapped. Now the benefit may be obtained where the person is in a type of home which may cater to others than the handicapped, but which can provide the requisite type of care.

The Chairman: Are there any limitations on that? Does the home have to offer this kind of a service to the public, rather than somebody just devoting a part of his own home to provide this accommodation?

Dr. Allan: Yes. The property has to be such that a qualified person can certify that the requisite type of care necessary for this handicapped person would be provided by that institution.

The Chairman: That it is available there?

Dr. Allan: Yes.

The Chairman: Are there any other treatments or benefits that might come in this category?

Dr. Allan: The minister will be introducing, when the bill has obtained royal assent, regulations under, I believe, section 110 of the act, which prescribes certain devices as being ones in respect of which deductions may be claimed under income tax. The act has called for those particular regulations in the past, but they are now being introduced at this particular time. These will be of a relieving nature, and will benefit a considerable number of taxpayers.

The Chairman: Are there any other questions?

Senator Flynn: No other carrots, as you would say?

Senator Macdonald: What is the increased exemption for the blind?

Dr. Allan: The amount is not changed, except to the extent that it benefits under indexing. The eligibility will be relaxed. The criteria that have to be met in order that the taxpayer be eligible are being relaxed.

Senator Cook: Are all the provisions relieving? Is there no case where the screw is not being tightened?

Dr. Allan: There are some measures that would tighten up loopholes. I think those are mainly technical changes, which have been identified. I think it would be fair to say that the major measures proposed in the bill are very substantially of a relieving sort.

Mr. A. Peter F. Cumyn, Consultant to the Committee: Dr. Allan, before we leave the area of personal measures, I should like to ask this. With regard to the change which would permit the deduction by an employee of a schooling allowance paid by his employer, where the allowance was in order to place the child of the employee in a school closest to his home of the appropriate official language of Canada, this measure appears to be more appropriate in the case of diplomats who are posted overseas than people within Canada who find themselves in the wrong community school, in order to have their children taught in their children's language. Perhaps it would be interesting to have your comments on why, for instance, the reference here is to the language of the employee and not to that of the child being sent to school.

Dr. Allan: I think I would have to say that the decision to use the criterion of the employee's language rather than the child's is really a policy decision. Certainly as an alternative it would have been possible to use the language of the child. Conceivably there may have been some administrative difficulty had the child's language been used, in the sense that many children are indeed virtually bilingual and it may have been something of a problem to determine which language was the one that should be applied.

Mr. Cumyn: Would it be any more difficult than in the case of the employee?

Dr. Allan: I would think so. Mr. Davidson is assuring me that it would be.

Mr. Cumyn: Would it not have been possible to have worded the provision rather more generously, so that where there is a bone fide case of an employee receiving an allowance from the employer, in his employer's wisdom, in order to put his child, not in a school in his own municipality but somewhere else for a language reason, that allowance would not be taxed in the hands of the employee?

Dr. Allan: Yes, it certainly would have been possible to word it in that way. As I say, the policy decision was to use the language of the employee as the determining feature. I guess one of the concerns here was that this, in effect, not be a provision whereby children could be sent, for example, to possibly an expensive private school, with a tax concession being attached. There was no desire for anything of that sort to result from this.

Mr. Cumyn: There could have been a limit, presumably, on the amount allowed.

Senator Connolly: This is policy.

The Chairman: It is not the purpose of getting instruction in any language. It is limited to either of the official languages of Canada, which means the limitation is to English and French.

Dr. Allan: Yes.

The Chairman: It does not have a broad application for the various peoples that we have in Canada of various racial origins.

Dr. Allan: No, except to the extent that they, too, would be using one or other of the official languages.

The Chairman: If there are no other questions on this subject matter, we will move next to the small business deductions. Mr. Thompson will deal with that.

Mr. Thompson: On small businesses we are concerned with incorporated small business, and the change in Bill C-49 is found in clause 81 at page 219.

Senator Cook: What is the definition of "small business"?

Mr. Thompson: It is incorporated small business that is relevant, not all the unincorporated businesses. What we are concerned about is the special corporate tax rate applying to the small business.

Senator Cook: What is a small business? Is it a business with a turnover of $500,000?

Mr. Thompson: Perhaps, senator, if I could explain the general nature of the change, that might be better than

trying to answer a specific question. It is on page 219, starting at the bottom and carrying on to the next page. As you know, the Canadian income tax system has had for some time a special rate of tax for small incorporated businesses. Following the tax reform, this low rate, starting in 1972, was 25 per cent of the first $50,000 income annually, with a cumulative limit of $400,000 of income. This meant that a company could accumulate $400,000 of earnings and pay $100,000 tax and have $300,000 of retained earnings. The lower tax rate would have contributed approximately $100,000 towards financing the equity of the business. In Bill C-49 these limits to which the lower rate applies have been increased. The annual limit goes from $50,000 to $100,000 and the cumulative limit from $400,000 to $500,000. The lower corporate rate of 25 per cent compares in 1974 to the general corporate rate of 48 per cent. So in 1974 there is a 23 point tax saving for this amount of income.

The Chairman: Would it work this way, Mr. Thompson? Let us assume a limit of $100,000 of earnings in the year. Supposing the earnings were $150,000, could you take $100,000 at the 25 per cent rate and put the surplus money into your accumulation as long as your accumulation was enough under $500,000 to take it?

Mr. Thompson: You mean, Mr. Chairman, carry over the $50,000 to next year, in case your income was lower in the next year?

The Chairman: Yes.

Mr. Thompson: No. There is no averaging provision in the rule.

Senator Buckwold: Can a small incorporated business, as defined here, pay out dividends to keep its accumulated limit?

Mr. Thompson: That is right, senator. The reason for this is really an integration caused by the lower corporate rate. When you combine the lower corporate rate of 25 per cent with the dividend tax credit there is in the legislation, the ultimate tax burden is the same as if the person had a non-incorporated business. It ends up in his personal rate. So, in policy terms, the lower rate is looked upon also as a deferment of tax and if the company in fact pays out dividends and personal tax therefore is imposed upon them, then the company freshens up its lower rate limit.

Senator Buckwold: A company could operate a small business indefinitely as long as it paid out its limit over $500,000 dividend?

Mr. Thompson: That is true.

Senator Cook: As long as it would have a surplus less than $500,000?

Mr. Thompson: Yes. If it kept paying out its surplus as dividends, it is in the same position as if it was unincorporated and in fact was paying personal tax as it went along.

Senator Flynn: It has been the intention to favour distribution of surpluses. It is the policy of our tax system to suggest that companies should distribute their earned surplus—not to accumulate more than a certain amount.

Mr. Thompson: I am not sure why you say that, senator.

Senator Flynn: Because when we had the 1971 bill, the earned surplus at that time could qualify for the payment of 15 per cent and so on but this is not the case any more.

Mr. Thompson: That was part of the transitional arrangement. In this case of a small business, the general hope would be that the tax saving would be used in the business, to help them with their finances.

Senator Flynn: Up to—

Mr. Thompson: Up to that limit.

Mr. Cumyn: Mr. Chairman, I have a question. The small business deduction is available in respect of income from an active business. There have been a number of difficulties in determining what is income from an active business. In the Unitedd States there have been two or three court decisions recently, including one in which the Tax Review Board said it did not find much guidance in the act as to what income from an active business might be, but since a company is presumed to be in business to make a profit, virtually anything it might do in pursuit of its corporate powers would be considered to be business, and a business, by definition, must be active. I was wondering if the department was satisfied by these decisions, which have all gone the way of holding the businesses to be active businesses, or whether it is considering introducing any clarification in the act.

Mr. Thompson: Mr. Cumyn, this is one of the difficult dividing lines in the act. It arises out of a policy change that came in the course of tax reform. Under the legislation before 1972, senators will recall, the lower corporate rate applied to all the income of a corporation, whether it was investment income or business income. In the course of tax reform, the government felt that it was really inappropriate to have a lower corporate rate applying to investment income, because the need for financing was where a person was trying to build up his own business. Consequently, the lower corporate rate in the legislation since 1972 has applied only to active business income, in an endeavour to make the incentive more specific.

In specific response to Mr. Cumyn's question, it is a difficult borderline. I think we hope that the courts will clarify the matter further, before we consider any policy action to amend the law. It is an area where it is difficult really to pin down the distinction in precise legal terms and for the moment we just want to wait and see how the courts handle the new definition.

The Chairman: Of course, you might try the other way of doing it, saying business income "other than" and then put your enumeration of the various kinds of passive income there.

Mr. Thompson: Mr. Chairman, it is awfully difficult to define passive income.

The Chairman: The taxpayer has to try to do it.

Mr. Thompson: Yes.

The Chairman: This use of the expression "active business" occurs in many places throughout our tax legislation. If you are running into problems now, such as you are now before the Tax Review Board, where the members of that board say that they are at a loss for guidelines, it may be we should appoint people to the Tax Review Board who have more ingenuity in finding the meaning for words.

Senator Cook: Apart from the question of interpretation itself, it is a very welcome section, I think.

Mr. Cumyn: I have a further question, Mr. Chairman. This is only available to Canadian controlled corporations. I was wondering if there had been any difficulties with other countries with whom we have tax treaties in which there are non-discrimination clauses, where they would be saying, "Here you are giving a special tax rate to Canadian companies and not to companies that our taxpayers might be controlling, and this is in fact contrary to the provisions of the tax agreement we have with you."

Mr. Thompson: We can respond to that, although I don't know whether it is relevant to this Bill C-49.

The Chairman: Could you be generous?

Mr. Thompson: I will let Mr. Short reply to that.

Mr. Short: What is the problem?

Mr. Thompson: Mr. Cumyn, there are a few measures, of which the lower corporate rate is one, which apply to Canadian residents in a different manner than non-residents. It is, therefore, a matter that comes up in tax treaty negotiations. However, I believe our negotiations are proceeding fairly well, despite this type of provision. Various countries have different methods of encouraging their own residents and in Canada we have a few provisions in the tax act. They certainly come up for discussion in treaty negotiations, but I do not think they prove to be an insurmountable hurdle.

The Chairman: The same question will arise when we discuss FAPI later on, but do not let us import that into this heading. Let us exhaust the heading of small businesses. How does the small business build up that accumulation? If they only pay the low rate of tax on $100,000 and have an income of $125,000, they are not entitled to the benefit of the lower rate.

Mr. Thompson: No, if their income starts running over $100,000 per year they can lose some benefit.

Senator Cook: But they still receive the benefit on the first $100.00.

Mr. Thompson: Yes, but the income over $100,000 tends to use up some of their cumulative limit.

Senator Cook: Unless they pay it out.

Mr. Thompson: The policy notion behind that is that the size of the income is an indicator of the size of the business.

Senator Cook: That is very important, because when we first discussed tax reform we attempted to define a small business.

Mr. Thompson: The definition here is primarily in terms of income and the accumulated income.

Senator Hays: How are the non-incorporated farmers treated?

Mr. Thompson: Their income is taxed at the regular personal rate.

Senator Hays: Therefore, in the case of a newcomer to the industry making $100,000 a year, the rate would be 62 per cent?

Mr. Thompson: At the margin, yes, that could be the case, although there are special provisions affecting farmers. For example, if they are building up their inventories they can go on a cash basis and write them off.

Senator Hays: Yes, but if a farmer elected to go on a cash basis at the beginning of his operation, there is no provision in this legislation at all to treat it as a business; it would be treated as a personal taxpayer.

Senator Flynn: He could incorporate.

Senator Hays: But only a small percentage of them have incorporated. Particularly in Saskatchewan today there are wheat farmers who were almost on relief for 20 years and have turned the property over to their sons, who are new and young and have a great obligation. They find themselves in this very high bracket.

Mr. Thompson: I would think, senator, that if they are getting into such brackets of income most of them would be incorporating. It is not that difficult to incorporate.

Senator Hays: But why should they have to incorporate?

Senator Flynn: Why would you differentiate between a farmer earning $100,000 and any other individual?

Senator Hays: I have been in both fields and in my opinion a farmer works a hell of a lot harder than the whole of the rest of them put together.

Senator Cook: What about a fisherman?

Senator Flynn: You do not know what a lawyer does.

Senator Hays: I have raised this many times in this committee, Mr. Chairman. It seems to me that fishermen, farmers and others should be treated the same. We have always treated them on the basis of the personal rate and it is a pretty risky business.

Mr. Thompson: I believe that in practice it has been found generally that once any kind of business grows to $50,000 income a year, especially after salaries, it is quite an easy matter to handle an incorporation and, in fact, it is desirable for business reasons to do so anyway. We have, therefore, not really seen that much pressure or representations to bring the two into line, as you suggest.

The Chairman: The next heading is corporation surtax.

Mr. Thompson: The corporation surtax is contained in clause 78 at pages 207 and 208 of the bill. You will recall that this measure was introduced last spring as a measure to raise extra tax revenue from corporations in order that there would be more money available to help those suffering from inflation. It is a temporary tax only from May 1, 1974 to April 30, 1975 and is imposed generally on corporations, with only certain specific exceptions. Those exceptions were made for very specific reasons and included any company claiming the small corporate rate for small businesses, manufacturing corporations, mining and processing corporations that were subject to other special rules and corporations which are really investment conduits which are effectively taxed more at a personal rate. The surcharge is 10 per cent on the corporate tax otherwise payable.

The Chairman: You mentioned exclusion of manufacturing and processing profits, the profits derived from oil and gas wells or mineral resources?

Mr. Thompson: That is right.

The Chairman: It is for a limited period?

Senator Cook: The old act was "temporary" in 1916!

The Chairman: And it does not apply to small business?

Mr. Thompson: No, any company claiming a low corporate rate is not subject to it.

The Chairman: It would appear, then, that the only grouping that would be subject to this would be various service operations?

Mr. Thompson: All service companies, including utilities. Of course, any companies with a combination of manufacturing and service would be subject to the surcharge on the service part of their operations.

The Chairman: Well, it would seem that it is said that the increase in tax liabilities is estimated to be of the order of $185 million, so it covers a lot of companies that must have substantial income earnings.

Mr. Thompson: That is right.

The Chairman: Then there is the limited period. Is there any explanation as to why the period is restricted to profits earned between May 1, 1974 and April 30, 1975?

Mr. Thompson: It was designed as a measure to meet what was hoped to be a temporary problem and raise extra revenues for that period. It is not designed to be a long-term measure.

Senator Buckwold: May I ask how this will affect provincial income tax? Does it automatically increase the take of the provinces?

Mr. Thompson: No, this is a surcharge on the federal corporate tax.

Senator Buckwold: But will the provinces take their percentage of the surcharge?

Mr. Thompson: It only affects the federal tax. The provinces make their own choice on their action.

Senator Buckwold: But normally I believe the provinces take a percentage of the federal tax.

Mr. Thompson: In the corporate tax field they take a percentage of the federal taxable income, not of the tax. In the personal income tax field it is a percentage of the tax. So if you have a change in the federal tax, then it is more likely to affect the provincial tax automatically.

Senator Cook: Basic tax does not apply in the corporate field.

Senator Flynn: It does not continue. It will end on April 30, 1975.

Mr. Thompson: That is right. You will see it on page 207 of the bill.

Senator Flynn: Is it because the situation has changed or what? Is there any reason for not continuing it?

Mr. Thompson: I am just explaining Bill C-49, senator!

The Chairman: It did not work.

Senator Flynn: Well, you cannot blame me for trying.

The Chairman: It was a good try, in any event.

Now, in selecting the next heading, we are going to be sitting this afternoon again, and I thought we might like to reserve for this afternoon, so that we could have a real run at it, the subjects of mineral resources taxation and natural resource industries so that we can look at them together and not after we have done a lot of different items. By the way, is it agreed that we should sit until 12.30 and then resume at 2.30?

Senator Connolly: But have we permission to sit this afternoon?

Senator Flynn: It is understood that the Senate will adjourn.

The Chairman: We are assured that it will be in order. Now I was going to suggest that we deal with that field of corporation elections, roll-overs, winding up, amalgamations and things of that kind now. Is that agreed?

Hon. Senators: Agreed.

The Chairman: All right, Mr. Thompson.

Mr. Thompson: Perhaps first of all, Mr. Chairman, I could make some general comments about the corporate reorganization rules and the types of changes that are found in this bill. These particular rules cover clauses 47 to 54 of the bill, running from pages 105 to 152. In general terms these amendments could be described as a further modification and technical refinement of the tax reform bill of 1972. They are concerned mainly with the timing of capital gains tax. That is to say that if two companies amalgamate and a shareholder turns over his share in company A and gets back a share in company AB, whether or not he is deemed to have disposed of his share and realized a capital gain. In the tax reform bill that became effective in 1972 there were measures for rolling over capital property under three different general kinds of situations—a statutory amalgamation, an incorporation of a business, and a winding up of a wholly-owned subsidiary. In this bill those three general sets of rules are modified, generally in a relieving way, and there is a fourth set of major roll-over provisions added in a share-for-share takeover. That is to say where one company issues its shares to take over a major interest in another company. That particular type of reorganization was not covered at all in the 1972 legislation, and consequently up until the changes in this bill there was always a triggering of capital gains tax.

If I could just comment briefly on each of these in turn to give you an idea of the major changes. In statutory amalgamations the act as it presently stands has a flow-through only if there is a significant continuity of ownership, that is to say if the shareholders giving up the shares have at least a 25 per cent interest in the merged company. Experience in the first year or two indicated that the 25 per cent continuity was a bit too rigid. There were examples of public companies merging in a bona fide business way where the continuity of interest might be 5 per cent or 10 per cent, and it was therefore decided that it was just too artificial a dividing line, and it caused too many impediments to normal amalgamations. Therefore you will find in Bill C-49 that there is no minimum continuity of percentage required. The only requirement is that the shareholder of the existing company take back a share of one class in the amalgamated company.

In the area of incorporating a business a similar type of change was made. The act the way it stands requires an 80 per cent continuity before you can roll assets into a company tax-free. This is often done when somebody wants to

incorporate his business. The idea of the 80 per cent, of course, was that the fellow was just really selling to himself, so why should there be any realization of capital gain? Here again it turned out to be a bit too rigid a test, and the only requirement under the changes proposed in Bill C-49 is that there is at least one share taken back so that there is some very small element of continuing equity interest. These particular rules in connection with incorporating a business have also been broadened out in other respects.

On the winding up of a wholly-owned subsidiary there is quite a set of rules in the present act. However, they required expansion, and the rules as set out in Bill C-49 will put this sort of transaction virtually in the same position as a statutory amalgamation. In other words, all the tax characteristics of the wholly-owned subsidiary will flow over into its parent.

In the new fourth area, share for share takeover, the shareholders who give up shares will be able to take a roll-over, provided certain conditions are met. These conditions include that the transaction is at arm's length and that the company issuing the shares in the takeover acquires at least a 10 per cent interest in the other company. The company that issues the shares in the takeover starts off with a cost base equal to fair market value.

Those are the main areas of the changes. There are also modifications of the rules affecting reorganization of the capital structure of a company and conversion from one share to another.

The Chairman: Mr. Thompson, as I understand it, we are talking about the transfer of property to a corporation. That is what we are talking about. Or are we talking about subsidiaries?

Mr. Thompson: Both, either where you are putting assets into a company or where you are pulling them out on the winding up of a wholly-owned subsidiary.

The Chairman: I am thinking of transferring property to a corporation and the corporation issues shares. The shares the corporation issues are assumed to have been transferred at their fair market value. Is that right?

Mr. Thompson: They might have been as a matter of business contract, but for tax purposes it could be a reduced amount, so that there is no capital gain to it.

The Chairman: But whatever price tag you put on the shares that are issued for the property, you put the same price tag on the property. Is that right?

Mr. Thompson: I believe that is right, yes.

Senator Connolly: You mean that contractually and ideally they equate.

The Chairman: Yes, they equate.

Mr. Thompson: For tax purposes, that is right.

Mr. Cumyn: I have a question, Mr. Chairman. At page 111 there is a new provision affecting section 85, which provides for the roll-over of property into a corporation, which I think may give considerable difficulty to ordinary commercial roll-overs. I am referring to paragraph (e.2), which provides that where, under circumstances where section 85 applies to a roll-over, it is reasonable to assume that a gift has been made by the taxpayer to or for the benefit of some shareholder of the corporation, certain unpleasant consequences follow. Could you explain how this is to be administered? It seems to me that in almost any corporate roll-over, particularly where the agreed amount is less than the amount which is the real amount at which the transaction is taking place, you could construe that a gift has been made from one shareholder to another. Where it is always in the same corporate group it does not seem right that this provision should apply. It is just taking money out of one pocket and putting it in the other.

Mr. Thompson: I think my first response would be that it must be kept in mind that it may not be all part of the same corporate group, because section 85 does not necessarily entail much continuity of ownership.

Mr. Cumyn: But many of the corporate reorganizations covered by section 85 are, in practice, within the same corporate group. I would say the majority are in fact.

Mr. Thompson: I think there is also a distinction that should be pointed out between the tax rules and what is happening in economic and business terms. These tax rules are designed to permit the reorganization taking place without triggering tax effects at that time. On the other hand, I think the rules have to assume that in the normal case the terms of the contract will retain the respective economic interests of the parties involved. The purpose of this rule is to prevent an artificial manipulation of the economic interests of the parties involved. It may be hard to administer. On the other hand, if there is not some provision of that type I would think it is too exposed to avoidance.

Senator Connolly: Could you stop there and give us an example of what it is you are talking about? What we have before us now is a proposition, I take it, where property is being transferred to a company, let us say, in exchange for shares to be issued from the treasury of that company. As the chairman points out, the property is valued, the shares are valued contractually, and the two equate. Where do these other problems arise in the course of that transaction?

Mr. Thompson: It may be difficult to readily give you a precise example in response to that.

Senator Connolly: Perhaps Mr. Cumyn can give us a specific example.

Mr. Cumyn: Let me take a case where I think perhaps it would be abused. Let us say a father wishes to roll-over a property worth $1 million into a company that belongs to his son.

Senator Connolly: For which he is to get shares in the company?

Mr. Cumyn: That is right. The suggested cost base, in other words the tax value, to him of this property which is worth $1 million in reality is, let us say, $800,000. Under section 85 as it now reads it would be open to him, without giving a thought to commercial considerations of the corporate law, to take back his consideration anywhere between $800,000 and $1 million. I think what the department is concerned about is where you would only take back $800,000 worth of consideration. They are prepared to give you the roll-over to take back one share, but they do not want also to see an economic benefit equivalent to a gift passing from the father to the son.

Senator Connolly: I thought that was it.

Mr. Cumyn: I wonder if that is right, Mr. Thompson.

Mr. Thompson: That would be the sort of thing, Mr. Cumyn.

Mr. Cumyn: In that case—if I might interject, Senator Connolly—it could have been worded that way. It could have been worded, for instance, so that this provision would only apply where it was reasonable to consider that a gift had been made by the taxpayer to or for the benefit of any other individual who was related to the taxpayer, because if we are just talking about two sister corporations, both owned 100 per cent by some major corporation—

Senator Connolly: I suppose there are two considerations here. One is that if he gets a consideration worth $1 million, then probably he has made a taxable capital gain of $200,000.

Mr. Cumyn: Except that the provision gives him the roll-over, gives him the deferral.

Senator Connolly: I realize that. I suppose the other problem is that if he takes $800,000, what he is presumed to do is subject himself to the provisions of the gift tax section, because he has made a gift of $200,000.

Mr. Cumyn: If he is in a province in which there is a gift tax he would have that problem, certainly.

Senator Connolly: That is the problem, is it, Mr. Thompson?

Mr. Thompson: Yes. Even between corporate shareholders there might conceivably be a problem of artificially creating a loss in a capital asset of one company in the course of the transfer.

Mr. Cumyn: Do you think rulings would be obtainable from the Department of National Revenue to the effect that they would not take this position that a gift had been made?

Mr. Davidson: I think that if you have a specific case we would certainly be prepared to give an advance ruling on it. Of course, it is too soon to have any ruling at the moment, because they have not looked at this new law.

Mr. Cumyn: The thing is that it applies to all section 85 roll-overs. That is the difficulty. I think it is going to be a problem.

Senator Cook: It has to be reasonable. There has to be an ultimate benefit to someone and you have to look at it and say it is reasonable to assume that this is a gift.

Mr. Cumyn: That is right, but the more the act makes reference to what it is reasonable for someone to assume, the more you end up in court asking the judge to decide whether it is reasonable.

Senator Cook: What is the alternative?

Senator Connolly: It seems to me that what the law is trying to do here is to permit the roll-over without tax consequences, but if you create artificial tax consequences then you suffer from them. Is that what the officers say?

Mr. Thompson: As a general proposition, it has to put certain constraints on the way in which the tax free roll-over is done, to avoid other tax avoidance possibilities.

Mr. Cumyn: Do you not become too preoccupied with these occasional abuses and make the act into a jungle as a result?

Mr. Thompson: It is an occupational hazard to try to strike a reasonable balance between the two. It is a continually difficult task.

Senator Connolly: Do you have much administrative work in connection with problems like those covered in these 55 pages of the bill? I often think that, as the chairman said when speaking in the house the other evening—or perhaps said it to me privately, I forget which—with the volume of law that we are getting before Parliament, we sometimes wonder whether all this is justified. Here we have 55 pages of law dealing with corporate reorganization and you get a specific problem like this and we spend time on it here in the committee, and we wonder about it. I wonder whether there is not a better way to do it, and whether it is always justified by the amount of work the department has.

Senator Cook: Each department thinks its own action is justified and the other's action is unnecessary.

Mr. Thompson: I do not think any of us want this complexity. We are continually looking for ways to keep it down. Let me make two general comments in response. One is that the business world is complicated. Even a company that wants to raise another $1 million on a bond issue has to put out a very complicated prospectus.

Senator Connolly: Exactly.

Mr. Thompson: Secondly, there is a difference in approach here, in our law as compared to the United States. We have been trying to set the rules out more clearly in law, so that the taxpayer knows where he stands—hopefully—so he can go and argue his position, if he disagrees with the administration. In the United States, in the area of corporate distributions and reorganizations, there is much more interpretive ruling, so that a taxpayer has to spend a lot of time discussing with officials his own position and getting a ruling from them. Only time will tell which is the better approach.

Senator Cook: How binding is the rule of the United States tax department as compared with those here? Do you know?

Mr. Thompson: I cannot answer in detail, senator, on that.

Mr. Cumyn: I believe they are every bit as binding as the ones here.

Senator Connolly: That is the same point that we raised at the time of tax reform and here we have it again, almost half as much again.

The Chairman: Mr. Thompson, you have made the provisions here of general application and you say they are such—at least, I interpret you to say they are—because it is a method of enabling you to put constraints on transactions that look as though they are artificial or inflated or something of that kind. What bothers me is that sometimes you make the general law so broad that the net catches the deserving and the undeserving. Could not this be approached from the point of view of some guidelines? If there are some transactions that are for artificial purposes, for the enhancement of somebody or of some group, without dealing generally with the subject could you not deal with those cases under the "other than" or "except" provisions?

Mr. Thompson: You mean, to rely on the general artificial transactions provisions?

The Chairman: Yes.

Mr. Thompson: We have one or two types of general provisions regarding the avoidance of artificial transactions provisions in the act now. The difficulty with a very broad provision is that it involves so much discretion on the part of the administration, as to when to apply it, that it seems to be unacceptable.

Senator Connolly: And every time you come in here with a new discretionary power, we jump on you!

The Chairman: The other difficulty, in doing it the other way, is that as your experience grows we keep facing continually more and more amendments.

Mr. Thompson: Yes.

The Chairman: To what extent would administrative procedures enable you, under these provisions that we are discussing, to distinguish between a transaction that is genuine in every sense and one that has something to it—to assess one and not assess the other?

Mr. Thompson: I think that what possibly you have in mind, Mr. Chairman, is in other words some kind of a "business purpose" test?

The Chairman: Yes.

Mr. Thompson: I think what we are trying to do in the law is to put words that really give that effect and try to identify the spots where we are concerned, so that instead of having a general business purpose test in the act, which might apply to the incorporation of a business, we have in the incorporation of business rules a specific direction to the administration to look out for a certain type of artificial procedure. If the incorporation is a bona fide business incorporation, I would not really think they would have any trouble with that provision, because I assume the contract would be drawn up in terms that would reflect the economic interest of the parties involved.

The Chairman: That may be your view, Mr. Thompson, and we might say, "Yes, as long as you are there we know there is that safe approach to the analysis of this question." But when we are looking at the law at this time, we cannot assume that we are going to have Mr. Thompson to deal with all the time.

Mr. Thompson: There are lots of reasonable men in Canada!

The Chairman: How many?

Mr. Thompson: Actually, the test here is in such a way that the court can decide the issue as to whether it is reasonable or not.

The Chairman: But that is a long way around the subject.

Mr. Thompson: Sure, but it is a matter set out in the law.

Senator Cook: When you say "the courts", you mean the Tax Appeal Board?

Mr. Thompson: Yes.

The Chairman: How do you go about triggering the administrative approach?

Mr. Davidson: Mr. Chairman, I assume you mean by that, how do we go about deciding whether something is reasonable or not.

The Chairman: Let us take it that the transaction has a sound business basis behind it, as distinguished from being an artificial setup designed to accomplish some personal purpose of the people who are behind it.

Mr. Davidson: If it was for business purposes and that are no shenanigans behind it at all, we would have no trouble reaching the conclusion that the exception here would not operate and they would be allowed to do it. I would imagine it would only be if we could show that there really was a definite benefit, that somebody had given to perhaps a family member or somebody else that they wished to benefit, that we would even think of questioning it. From then on the taxpayer has every right to come in and explain why he did this. So it might well be that he could persuade us not to assess.

Senator Connolly: It is a question of evidence really, is it not?

Mr Davidson: It is a question of evidence.

Senator Connolly: I suppose if we use our previous example and the shares on one side were shares in a public company, the shares shown in the stockmarket quotes would be evidence on one side. If a piece of real estate worth $1 million were involved and a reliable evaluation made by a reliable real estate firm, that would be evidence on the other side. It demonstrates the *quid pro quo* involved. Is that your point?

Mr. Davidson: Certainly the quoted price for a stock on an exchange is normally the best evidence of the value of that stock, but not the only evidence. Secondly, we are prepared to accept a good evaluation by a competent evaluator of real estate.

Senator Cook: Was it mentioned that a ruling could be obtained before the transaction?

Mr. Davidson: Yes, senator; that can always be done.

Mr. Cumyn: Let me give an example in which it would be totally impossible to put a value on a company. Let us say that a company is rolling out under this provision. It is an old factory, very profitable, making very good products. How do you value it? You do not know its best and highest use or by virtue of what it is producing that it has any value. It is impossible to put anything close to a value on it that would be 100 per cent sure to go.

Senator Connolly: Would that not also be true of a case of a property being expropriated? I do not wish to take sides, but there is always the question as to whether the value put on it is the value of the raw land, the raw buildings and the raw equipment, or whether it is taken at its value when producing at its maximum. It seems to me that that is a perennial type of problem, but some reasonable figure is ultimately determined. It must be done on an expropriation, so why should it not be done in these cases which are almost tantamount to expropriation?

Mr. Cumyn: Expropriations are notorious for creating litigation.

Senator Cook: What is your answer?

Mr. Cumyn: My answer would be, senator, that rather than applying to all roll-overs, this "reasonably" rule should only apply to roll-overs in which it is thought that the gift is being made not just to any other taxpayer, which might be a sister corporation, but for the benefit of the related individual, an individual related to the taxpayer. Then, for instance, in the case of a large, publicly listed company making a roll-over of this type there could not possibly be any suggestion that a gift was being made, so the provision would not apply. On the other hand there could be the case of an individual transferring something to a company owned by his son.

Senator Cook: As a matter of common sense, what taxpayer in his right mind is going to make a gift to any other taxpayer who is not related to him? As a matter of ordinary, reasonable interpretation?

Mr. Cumyn: Two wholly owned subsidiaries of a publicly owned corporation would not care one way or the other, would they?

Senator Cook: The words are "is reasonably regarded as a gift"; it is not reasonable when two people are not related in any way, shape or form to consider that one of them intends to make a gift one way or the other.

Mr. Cumyn: I would ask Mr. Thompson if the law could be interpreted in that manner.

Senator Cook: The court could interpret it in that manner, even if he does not.

Mr. Thompson: The manner in which it would be interpreted would be parly for response by Mr. Davidson. However, ignoring taxation altogether, it seems to me that if more than one party is imvolved in putting assets into a company, those two parties are certainly going to see that their respective interests are retained. They will attempt to strike the best estimate they can of the value of the asset. It will make it difficult, but as businessmen they will certainly attempt to strike their own estimate.

Mr. Cumyn: Yes, but if they are sister corporations they will not be too preoccupied by that. Normally they would not be.

The Chairman: I believe we touched only lightly on the amalgamation aspect and the changes in the bill.

Mr. Thompson: Yes, there are quite a few changes, many of which are extremely technical. At the shareholders' level there is a more complete roll-over now, as I mentioned earlier. Within the amalgamating corporations there is a more complete flow-through of the tax characteristics of the predecessor companies into the new company.

Mr. Cumyn: I would like to refer to three of these characteristics: The purpose of section 87, which is being amended by clause 51, at page 120 of the bill, is to preserve the tax characteristics of two companies which come into amalgamation. One frequent problem is whether interest which is being deducted by a predecessor corporation can continue to be deducted by a successor corporation.

Senator Connolly: What do you mean by that: "interest which is being deducted by a predecessor corporation"?

Mr. Cumyn: Let us say that a predecessor corporation has borrowed money. Under the act there are some instances in which the interest costs may be deducted. If it is, for instance, borrowing money for the purpose of acquiring an income-producing property its interest will be deducted. Now we suddenly have a breaking, an amalgamation, a new company. The successor corporation, the amalgamated corporation if you wish, inherits the debts of the predecessor corporation, but it does not necessarily inherit the purpose for which the money had been borrowed. This is a perennial problem and I would ask Mr. Thompson whether the intention of this and other euphemistic provisions, such as clause 51(1)(c) at the bottom of page 120 and (7) at the bottom of page 128, would provide such a flow-through which is not, as far as I know, otherwise specifically provided in the act?

Senator Connolly: In your example the successor corporation is not presumed to be using this business property for the purposes of making income?

Mr. Cumyn: It has not borrowed the money.

Senator Connolly: It has not borrowed the money, but its predecessor had.

Mr. Cumyn: Yes.

Senator Connolly: However, in any event, it is not using the property for productive purposes.

Mr. Cumyn: No, because it would be in fact taking over the business and all assets.

Senator Connolly: It seems to me on a common sense interpretation that if it continued, even though it was transferred from one corporation to another, it would continue in the same role and the use to which the property would be put would be the same as it was put to by the previous company and the rules would continue to apply, would they not?

Mr. Cumyn: On a common sense basis, yes. The provisions regarding amalgamation are so detailed and so long that one no longer relies on common sense but refers to the text of the act, which provides nothing specific with respect to this reasonably common problem.

Senator Cook: There is nothing changed with respect to amalgamation under corporation law, is there?

Mr. Cumyn: No, but under the Income Tax Act it is deemed to be a new corporation. Section 87 provides that none of the fiscal characteristics of any of the predecessor corporations are considered to have been inherited by the successor corporation.

Senator Flynn: Another point is that if the first company were to discontinue using the asset for its original purpose it can no longer claim the deduction of the interest cost from its income.

Mr. Cumyn: That is right.

Senator Flynn: I mean, if the amalgamated company does not continue then it would be in the same position as the first one.

Senator Cook: In other words, if the amalgamated company acquired a certain factory and then shut it down.

Senator Connolly: Let us not take the opinion from this side of the table. I think you are right, but I do not know it and neither do you.

Mr. Thompson: What was your second reference, Mr. Cumyn?

Mr. Cumyn: On the top of page 129 it says that where there has been an amalgamation of two or more corporations after May 6, 1974, and the debt of the predecessor corporation became the debt of the successor corporation, then under the provisions of the act they will apply as if the new corporation had incurred originally the debt or other obligation at the time it was incurred by the predecessor corporation, which does not necessarily say for the same purpose but comes very close.

Mr. Thompson: I think the intention of that particular amendment was to make it clear that there was a rollover on the debt.

Mr. Cumyn: In other words, the income tax application rule evaluation.

Mr. Thompson: Right. There would be no deemed capital gain or loss on the value of the debt at the time of amalgamation.

Mr. Cumyn: Then, what about the other?

Mr. Thompson: On the point you raised, I am not sure offhand what the consideration was in doing these amendments, but possibly there is a way to apply them under the existing law.

Mr. Davidson: Paragraph 20(1)(c) says that you can deduct interest paid on borrowed money used for certain purposes. It does not say who the borrower must be although obviously a new amalgamated company would be the one who pays the interest and therefore would have a claim provided that the moneys borrowed were used by the amalgamated company in a business capacity.

Mr. Cumyn: The difficulty we have in practice is that the money was never really used by the amalgamated company because it never had the money; it has simply inherited the debt.

Senator Connolly: But it has the assets.

Mr. Davidson: Yes, it has the assets acquired with the borrowed money or it has, let us say, the rolled-over borrowed money in inventory at the time, so it really is using it even if it did not borrow it.

Mr. Cumyn: So the department is administering this act in this way?

Mr. Davidson: As far as I know. I do not know of any problem that we have had in respect of this. Obviously you say there are many problems, so we must have had some. But it certainly has not been raised as a problem on the tax policy side.

Mr. Cumyn: To my knowledge there were three rulings that were given on the issue and one went one way and two went the other way.

Mr. Davidson: I hope the two went in favour of the taxpayer.

Mr. Cumyn: There are two other areas concerning amalgamations where one wonders if there should be a flow-through, and that is where you have resource properties as described in section 59 of the act and goodwill or other things as described in section 14. I would ask Mr. Thompson if the relevant percentage rules which effectively give to the taxpayer credit for the accrued value of these assets prior to the 1972 flow-through under the amalgamations?

Mr. Thompson: I do not believe that they do. These were special transitional rules for taxpayers who were in a certain position at the end of 1971. In a number of special circumstances the transitional rules like that do flow through. Resource properties and goodwill give rise to particular considerations because they are a bit harder to track, in other words to identify the income from the particular asset, and it is quite possible in the course of a statutory amalgamation that there is really a substantial change in the ownership of different parties involved. It is one area where it just was not felt appropriate to flow through that transitional rule. Certainly in general the intent under statutory law is to provide flow-through provisions but here and there a certain kind of practical judgment is called for where a line is drawn.

Mr. Hierlihy: Further to that, many of these amendments were quite welcome, but we certainly would like to have seen amendments in the area of designated surplus. My question is whether these have been considered and discounted for reasons that you have just expressed, or whether it is still a problem that you are looking at and whether perhaps we can look for some relief in this area because there can be serious problems created on amalgamation.

Mr. Thompson: There are quite a number of problems in the designated surplus area, and in the course of the past year the decision was made that for now those particular amendments would be kept to one side and left for the next time round. The general subject of designated surplus is still actively under study so that the fact that there were not any amendments in this respect concerning amalgamations does not mean that there never would be.

The Chairman: You mean they are on the drawing board?

Mr. Thompson: No, I am not sure where they are—but they are in process.

Senator Connolly: I put in a plea, Mr. Chairman, that when the rules are available that they be made as simple as possible. It is a little too much to hope for, I know, but I still ask.

Mr. Hierlihy: I would hope that the amendments might be retroactive also in this area. I know that this committee did recommend back in 1971 that the designated surplus provisions be excluded from the act.

Mr. Cumyn: I have one further question to ask. In the area of the 1971 capital surplus there were difficulties in subsection 89 (5) of the act which is clause 53. There is a provision in there which appears to have a degree of retroactivity. If a capital property is disposed of in a non-arm's length transaction, this new rule would prevent the creation of a 1971 capital surplus, and the difficulty is that prior to having had any warning that this new rule would be imposed, taxpayers did in fact proceed with transactions of this sort thinking they had created a 1971 capital surplus and they have now been eliminated retroactively. Would you care to comment on that?

Mr. Thompson: This rule was introduced at this time because we had considerable evidence that non-arm's length sales of shares of considerable value were being made just for the purpose of creating a 1971 CSOH which could be used to pay out dividends free of the ordinary tax. These sales would be cases where there was really no change in the ultimate ownership, perhaps just the sale of

shares of one subsidiary to another subsidiary, and it was quite clear that an amendment had to be made to eliminate the benefit of such transactions prospectively.

Mr. Cumyn: Do you feel the amendment has merely that result, or does it also in fact eliminate the chance of the taxpayer ever realizing 1971 capital surplus?

Mr. Thompson: This is a further aspect of it that was struggled with at great length, because there is no intention or desire to remove the ultimate possibility of realizing CSOH on an arm's length transaction as well. The practical difficulty is that there has to be some viable way of tracking the CSOH that can be operated without undue complexity. In some situations, too, the sales would be to non-resident corporations, or to individuals for whom CSOH has no meaning. Also, some of these sales would have been under section 85, and there are rules in this bill that enable this CSOH to be preserved.

Mr. Cumyn: Can one expect a practice in future that, if you think the statute as it currently exists is being abused, as you would put it, you would feel free to retroactively amend it in this punitive manner?

Mr. Thompson: Well, Mr. Chairman, those are your adviser's words. The question of retroactivity and the effect of the timing of changes is always difficult. It is not possible to generalize very well. In this case the government's view was that the benefit that would result from a transaction that has taken place in the past was really a benefit that the taxpayer was not reasonably entitled to, and that to take away the benefit of it prospectively was an appropriate way to approach it. It affects only corporate distributions that are made in the future, so in that sense it is only prospective.

Mr. Cumyn: May I ask one further question, Mr. Chairman? Let us say somebody who is an innocent person, who just happened to make a non-arm's length transaction and realized 1971 CSOH, were to suddenly realize his predicament under this very complex provision; he made his transaction prior to your budget in May when the public was given notice of this change. Do you think he could go to the department and say, "I would like to undo this transaction. I will just sell the assets back. I will do whatever is necessary to completely go back to square one." Do you think the administration would be prepared to let him go back to square one as far as the tax consequences are concerned? In other words, to be in a position where, if he realized his assets subsequently in an arm's length transaction, he could trigger the creation of a 1971 capital surplus?

Mr. Thompson: I think it would be very difficult in tax administration to do that.

The Chairman: Short of an amendment.

Mr. Thompson: Right. There is always relief in limited circumstances of inappropriate results under the Financial Administration Act. However, I think it would be quite difficult for the administration to do that.

The Chairman: This would appear to be an appropriate time to adjourn. I think we have gone over this particular subject. We will resume at 2.30 this afternoon in Room 356-S.

The committee adjourned until 2.30 p.m.

The committee resumed at 2.30 p.m.

The Chairman: Honourable senators, as we agreed this morning, we will proceed this afternoon first with the mineral resources taxation and natural resources industry. Mr. Thompson will deal with the mechanics of this and he will answer questions, right up to the point, if we get to it, of the direct policy decision, which is something for the minister. We will try—and I expect we will be able to do it—to have the minister here sometime tomorrow morning—because, by the way we moved this morning, we made very rapid progress.

Senator Flynn: It was good.

The Chairman: This afternoon we should certainly be able to deal with all the aspects except the one the minister will have to deal with on mineral resources taxation. We should also be able to deal with Foreign Accrual Property Income, FAPI, even if we sit only until 4.30.

Mr. Thompson: Honourable senators, I assume that you would like me to review the general nature of the tax incentives as they have been in the past and as they have been changed in this bill.

The Chairman: You can assume that the committee is reasonably well informed on the history and the development in this area, particularly in the light of Senator Manning's speech last night and Senator Hays' remarks yesterday afternoon. We have a pretty good bird's eye view of the situation and, progressively, of the developments. So you are not talking to an audience which needs to be educated on the background. However, you steer your own course within the limits you have put upon yourself.

Mr. Thompson: Let me outline the main features of the incentive provisions as they have existed in the income tax legislation in the past, say before 1972, then the main changes in the 1972 reform, and then the main changes as they emerged in the budget of November 18, 1974.

Prior to 1972 there were three main incentives, by types: fast write-offs, a depletion allowance, and a three-year exemption for the income of new mines. The fast write-offs applied to exploration and development expenditures in searching for petroleum or in searching for minerals. The depletion allowance was an automatic deduction from production income of one third of the profits, ostensibly in recognition of the depletion of that type of resource.

In the course of the tax reform debate which resulted in legislation effective in 1972, these incentives were modified. It is true that the exploration and development write-off was continued, but there was a change in the depletion allowances. The three-year exemption of new mines was replaced by an immediate write-off of all the capital costs of a new mine. In other words, the capital costs of a new mine could be claimed to the extent of income from that mine, so that the investor would be sure of getting all his money back before he had to pay any tax. In the depletion allowance, the automatic allowance was replaced by an earned allowance so that in the future the depletion allowance could be claimed only to the extent that the company had actually done exploration and development. Every three dollars of exploration and development earned a dollar of depletion allowance.

By way of phasing it in, this change to earned depletion was to take place gradually over a period of five years, so that up until the end of 1976 the automatic depletion was

to have continued, and then the earned depletion could be claimed after that against the production profits. There was another feature that was supposed to come in in 1977 in relation to mining taxation. In recognition of the special position of the provinces on mineral resources, the federal government proposed, and enacted in 1972, that the federal tax would be abated by 15 extra points, starting in 1977, but that mining taxes, or income royalties, would be disallowed, starting in 1977. So that was the general picture of the mineral and petroleum incentives as they became effective in 1972 and up until last year's developments.

With the change in world prices in petroleum particularly, and also in some minerals, and with the consequent action of the provinces, with which you are familiar, significant changes were introduced in the budget of May 6, 1974, and slightly modified later, in the budget of November 18, 1974. These could be divided into two general categories. On the incentive side, the incentives were slightly cut back again. The other main development was the general disallowance of all provincial mining royalties or levies accompanied by an extra federal tax abatement in respect to those resources.

On the incentive side, the immediate write-off of exploration expenditures continued, but the development expenditures could be amortized only at the rate of 30 per cent on the diminishing balance basis. The earned depletion, which was scheduled to come in in 1977, was to commence immediately after May 6, 1974.

In relation to the royalties and other mineral levies, as you know, these are no longer deductible from income, under the provisions of Bill C-49. On the other hand, in recognition of the special position of the provinces, there is an extra federal tax abatement. In the case of mining, that abatement is 15 per cent immediately. In the case of petroleum, it starts at 10 per cent, moves to 12 per cent this year and then 15 per cent next year and thereafter.

The Chairman: At which time the corporate tax would be 25 per cent. Is that right?

Mr. Thompson: Yes, that is right. The net federal rate would end up at 25 per cent for both industries.

The Chairman: Yes.

Mr. Thompson: That covers the main features—perhaps too quickly, but it may be sufficient to open the points for questions now, Mr. Chairman.

The Chairman: Before you start to ask questions, honourable senators, I should mention that we caused to be distributed the various memoranda which we had and which were prepared as a result of meetings we had with some of the industry through their membership in the chamber of commerce.

Mr. Cumyn: Mr. Chairman, could Mr. Thompson explain the revenue effect to the government of these proposals? What additional tax revenue is it expected that they will raise for the federal government?

Mr. Thompson: Some estimates were provided with the budget material which I can refer to. I believe that the resource proposals in the May 6 budget of last year would have increased federal revenues by about $400 million. In the budget of November 18, 1974, there were modifications which would have reduced that by about $100 million, so presumably the net revenue effect for 1974 would have been in the order of $300 million.

The Chairman: Yes. I think I had a calculation of a figure of $335 million, being the net result of what the 1974 budget provided, less the incentives, or abatements, or whatever you call them, on the difference in tax rate for 1975, which would reduce that figure, and that is about in line with what you said. You said $474 million less about $175 million. That would get you to the area of $300 million, $335 million.

Mr. Thompson: That is right. I think your figure probably includes the mining sector.

The Chairman: Yes, it does.

Senator Connolly: Would that mean, Mr. Chairman, that based on these figures that we have on the document which has been circulated, if the federal government's rate on its share of the revenue was 25.4 per cent, it would be approximately $300 million more in the first taxation year? Is that about what Mr. Thompson is saying? Given the rate at 25 per cent, the result would be about another $300 million in the first taxation year.

Senator Cook: The figure of $300 million applies to mining, too, does it not?

The Chairman: Does your figure include mining as well, Mr. Thompson?

Mr. Thompson: With mining it is a little over $300 million, and more like the $335 million that the chairman mentioned.

Senator Connolly: This would be from petroleum and gas?

Mr. Thompson: Yes.

Senator Connolly: That would mean, I take it, Mr. Chairman, that the provincial share, which is 64.5 per cent, after the Alberta offsets, would be, in the first year—what? How much more?

Senator Cook: Two and a half times.

Senator Molson: Yes. Two and a half times.

Senator Connolly: Two and a half times, roughly, the federal take. Instead of $300 million, it would be $750 million.

Senator Flynn: That is one way of putting it.

Mr. Thompson: In the first year the provincial share is possibly more in relation to the federal share, since the federal income tax in the first year or two after the change is reduced because of a carry-over of exploration and development, and under depletion from the past. So you cannot really take a ratio, a general ratio, and apply it to 1974.

Senator Connolly: Substantially more, in any event, that the federal increase?

Mr. Thompson: Yes. It would be at least the ratio shown here.

Senator Flynn: Are you referring to this document? I think we should identify it.

Senator Connolly: I cannot identify it other than by the fact that it was circulated here this afternoon, and it is described as "Division of the income from an existing

domestic barrel of oil in Alberta based on Canadian Petroleum Association figures."

Senator Flynn: I would like to know where it comes from.

Senator Connolly: I cannot help you, senator, on that.

Senator Flynn: I would like the Chairman to try to find out for us where it comes from, because I understand that it is not from the department.

The Chairman: No. What has been distributed is the statement which was explained and filed with the committee by Mr. Martin and Mr. Cochrane, on their second appearance as members of the Chamber of Commerce, and they illustrated it with a projector. This was prepared at my request, because they had appeared in December, first, before Alberta made the reductions which they did. I therefore asked them to give us realistic figures reflecting the Alberta reduction. That is why you have got four columns there.

The first column is in connection with the basic price as it was earlier in the year 1974; the second column reflects the increased price; the third column is the November 18 budget and the effect before the Alberta offsets, and the last column is the November 18 budget after the Alberta offsets. That means, as I quoted the other day, the net revenue at those different times and under those different conditions. You will therefore see what the net revenue would appear to be. I also quoted the industry retention, and that is where the effect of the offsets granted by Alberta is shown. Before the offsets the net retention was 13 cents a barrel. After the offsets the net retention would be 47 cents a barrel.

Senator Flynn: Before we question the witness on that, I would like to know whether he acknowledges that these are generally fair figures.

Mr. Thompson: Well, Mr. Chairman, the figures for revenue costs, and drilling and exploration costs, and the federal and provincial shares based on those, are in a reasonable range. I think the main thing to consider is the basis on which the calculations are made, and the significance of the results.

Senator Flynn: Have you some doubts about the share of net revenue figures?

Mr. Thompson: No. Based on the figures for the operating costs and the federal and provincial amounts based on those, they are in a reasonable range, we think, from a quick review at lunch time.

Senator Flynn: They can be used as the basis of our discussion.

Mr. Thompson: That is right. The main thing for you to consider is the significance and the nature of the calculation.

Senator Connolly: Senator Hays yesterday put some very significant figures on the record, and he used the price of a barrel of oil sold in the export market. That, of course, increased the percentage of the federal share way over the 25 per cent, but as I understand it that export tax, which is applied as a result of federal legislation so far as the federal, the provincial and the industry interests are concerned, is really an in and out matter, and these figures, basically, are the figures that really apply, even in respect of oil exported.

The Chairman: I would think the figures possibly exclude the realization on export, because if you recall, when we were looking at the estimates this item was shown as a transfer payment.

Senator Connolly: That is right.

I think we made that point when we had these people here before, that it was in fact a transfer payment, so in any event Senator Hays' figures yesterday would have to be modified to that extent.

The Chairman: To exclude the export tax.

Senator Flynn: Or these figures would have to be modified to take into account the export tax.

Senator Connolly: As the chairman says, since it is really a transfer payment it does not really affect the ultimate result of this.

Senator Hays: But it represents about 814,000 barrels a day.

The Chairman: Senator Hays, it is not a question of volume.

Senator Connolly: It is a question of interpretation of the figures.

Senator Cook: Dealing with these figures here, is it fair to say that the combined rate of taxation, both federal and provincial, comes to about 90 per cent?

Senator Connolly: It has to be.

Senator Molson: Tax, royalties and all the rest.

Senator Cook: What is the effective rate on ordinary manufacturing companies?

Senator Beaubien: Forty per cent.

Mr. Thompson: It would be in the order of 40 per cent. Of course, there is a special feature in here, that the provincial share includes a royalty for resources.

Senator Cook: A tax by any name is still a tax, and it still comes to 90 per cent.

Mr. Thompson: Part of the issue at stake is the significance of the remaining 10 per cent.

Senator Hays: But if it happened in Saskatchewan it would be 100 per cent taxation or 101 per cent or 102 per cent.

Senator Connolly: Could I ask the witness what the average corporate rate is?

Senator Flynn: In the share retained by industry.

Senator Connolly: What is the corporate rate of taxation in Canada?

Mr. Thompson: On the average it runs to about 40 per cent, taking into account the smaller companies.

Senator Connolly: The point I am interested in making is that the federal rate of 25 per cent on the petroleum and natural gas industry is a considerable degree lower than the normal corporate rate in the country. I take it that that

rate is applied as a matter of policy because it is a wasting resource, that it is an industry that has to be encouraged, and that lower rates of taxation are indicated for that purpose. Is that the general philosophy behind this rate of 25 per cent?

Senator Flynn: You are here to explain the bill.

Mr. Thompson: You will recall from the budget speech that quite a number of factors went into the government's thinking in arriving at resource proposals. One of the important features of this is the relative balance between federal and provincial revenues in the resource field.

The Chairman: Certainly, to the extent that the corporate tax rate is lower, it makes more revenue available to the province for taxation.

Senator Connolly: Either to the province or the industry.

The Chairman: Or the industry, yes.

Senator Flynn: What about the export tax? Where does it go? What does it represent?

Mr. Thompson: At the time of last year's budget in May, the export tax and the amounts that were paid to subsidize the oil imports in eastern Canada just about offset each other. In other words, they were roughly in balance, so the proceeds of the export tax were able to provide the subsidy.

Senator Flynn: Is that still the situation?

Mr. Thompson: As things have changed, the export tax actually is becoming less than adequate for that purpose. In other words, it no longer quite covers the required subsidy.

Senator Hays: There would be some reduction in the export of Canadian oil, and that is part of the reason—we are now importing more than we are exporting. I would like to give these figures to the witnesses, to see what they have to say about them. These figures I used last night were figures I got from the Secretary-Treasurer of our company, Home Oil, and as they relate to our company they are not exactly accurate, but they are certainly very close and in the ballpark.

On a barrel of oil that goes to Chicago, we receive $12.65. Sixty-five cents is used for transportation and the federal government takes $5.50. Federal income tax is $1.64 and the Alberta royalty is $2.34. Then provincial income tax is 39 cents and our operational costs are 65 cents. This leaves us with $1.48 a barrel.

Senator Beaubien: And you got $12.65?

Senator Hays: The Chicago consumer pays $12.65 a barrel.

Mr. Thompson: When you say "operating costs" you mean lifting costs?

Senator Hays: Yes.

Mr. Thompson: And the $1.48 is before exploration and drilling expenditures?

Senator Hays: That is right.

Mr. Thompson: Those figures are really in line with the CPA figures, I believe, before the Alberta offsets.

Senator Hays: On new oil, we were getting in the neighbourhood of $2 on Canadian new oil and for American new oil it was $12.70, I believe, and when you take off the expenses it worked out to a net of about $9.75 per barrel in the United States.

Senator Cook: How much did you say the industry retained?

Senator Hays: It retains $9.75.

Senator Connolly: And how much do you retain?

Senator Hays: One dollar and forty-eight cents in Canada.

Senator Cook: You retain only $1.48 and these figures don't show income tax?

Senator Hays: I started with $12.65. Then there was 65 cents for transportation, $5.50 for the federal government, federal income tax at $1.64, Alberta royalties at $2.34, provincial income tax at 39 cents and operational costs at 65 cents, leaving a balance of $1.48.

Senator Flynn: They do not compare. There is a substantial difference.

Senator Connolly: But in the $5.50 item there is included the export tax?

Senator Hays: That is the export tax. It was used to offset the high price of oil in eastern Canada.

Senator Buckwold: If I may go on to what Mr. Thompson has said, I think that drilling and exploration at $1.35 are not included in the figures given by Senator Hays.

Senator Connolly: Nor are income taxes, I gather.

Senator Hays: Yes, the income taxes are there.

Senator Buckwold: But that $1.35 is not in the figures given by Senator Hays.

Senator Flynn: Does the witness agree with the share of net revenue distribution as shown here—not exactly, but on the whole?

Mr. Thompson: Let me comment on that, Mr. Chairman, because there is a difference in approach in these calculations to the approach taken in the information presented with the budget. The budget figures refer to the relative share in terms of the production income before exploration and development. In other words, what is the sharing of the revenue flowing from the petroleum and minerals that are being taken? If you would like to note some figures beside the schedule that you have, in the budget of May 6, 1974, the federal percentage on that basis was approximately 23 per cent.

Senator Flynn: Is that under the existing tax system?

Mr. Thompson: No, this was after the May 6 budget. The provincial share was 53 per cent and the industry share was 24 per cent.

Senator Beaubien: Is that a share of the value a barrel?

Mr. Thompson: Yes, of the value of the lifted barrel.

Senator Molson: At the $6.50 price, Mr. Thompson?

Mr. Thompson: This is in relation to the $6; $6.50, minus 50 cents for lifting.

Senator Flynn: That should be compared to the figures in the third column, I suppose. That is the closest.

Mr. Thompson: That is right. So, at May 6 it was 23 per cent, 53 per cent and 24 per cent in relation to the $6 net lifting price. In the November 18 budget the federal government modified its proposals; and its shares in those terms dropped to 18 per cent, the provincial share remained about the same at 53 per cent, and the industry share was then 29 per cent. It is difficult to be precise, but the further percentages that you need are after the adjustments made by the Province of Alberta in its royalties, incentive programs and tax cuts. The changes in Alberta would be in the order of approximately 5 percentage points, so the provincial share would then drop to approximately 48 per cent, but the industry share would increase to approximately 34 per cent. Those are very round percentages, but will give you some feeling for the balance. So, after the November 18 budget, as in Bill C-49, and after the Alberta changes in its oil fiscal measures, the federal share would be in the order of 18 per cent, the provincial share would be approximately 48 per cent and industry would have 34 per cent.

Senator Beaubien: That would work out that in relation to a barrel of oil worth $6 the company would keep $2.04, 34 per cent of $6.

Mr. Thompson: Yes.

Senator Beaubien: If that were sold abroad and obtained the $12.65 per barrel, how would that work out?

Mr. Thompson: It depends how you view the export tax, senator. If you view it as a transfer payment, it does not change anything.

Senator Hays: Mr. Thompson, do you have the American equivalent as to how they tax the oil industry vis-à-vis Canada? That is available?

Mr. Thompson: I do not have it readily at hand. We have done some work with it, but it is difficult to generalize, because they have different pricing arrangements and so on, which make it hard to compare.

Senator Cook: You referred to the export tax as a transfer payment. That is a transfer between the federal and provincial governments and is all taken from the company, but remains a tax to them.

Mr. Cumyn: Your percentages, Mr. Thompson, are of the gross revenue, less lifting costs. Those of the Canadian Petroleum Association which we have here are percentages of the gross revenue, less lifting costs and also less drilling and exploration costs. Would you agree that if you were to take the $1.35, if that is a proper figure, into consideration in your figures, the federal take would come close to 25 per cent, which is the figure used by the Canadian Petroleum Association?

Mr. Thompson: I believe that would be so, Mr. Cumyn. However, as I said before, the point upon which senators should reflect is the nature of the two calculations. Perhaps I should make this further comment, which I had intended to offer. The industry retention in the CPA figures is what they retain in cash terms. It is not the profit of the business.

Senator Connolly: It is cash flow.

Mr. Thompson: It is cash flow.

Senator Connolly: Out of that must come overheads, exploration and everything else that they might have to do.

Mr. Thompson: Yes; well, all the exploration, in other words, all the costs of turning out new reserves for the next 10 or 20 years, have been recovered already before that industry retention is determined.

Senator Hays: Yes, if they hit oil and do not go broke. The oil to which I referred was found in 1957, 1958, 1961 and 1962 and we were not allowed to sell until now, when apparently it is not worth very much. For instance, last year we spent $35 million on exploration, which this year will be reduced to approximately $12 million. In my opinion the whole thrust of this concerns the fact that the Americans have much more incentive than we to go ahead and drill. They are also free under present law to go where they wish. I believe this is what concerns the oil industry, plus the fact that, as Senator Manning pointed out, the rules changed.

Senator Desruisseaux: Is that also why the rigging companies are leaving?

Senator Hays: Well, when you consider $9.75 and $2.

Mr. Thompson: The point I was coming to is that most businesses are not measured in terms of cash flow. Investments may be made in new plant, new reserves and new inventory. There are accounting methods for spreading those costs over a number of years in an endeavour to match them up against income. Although it is very difficult to forecast, especially in petroleum and mining, in which you must go into future years and endeavour to estimate success, et cetera, the government's estimates indicate that such an industry cash retention would still leave the industry with a reasonable rate of return.

Senator Connolly: That is the government's position.

Mr. Thompson: Yes, based on very extensive forecasts, and the data and assumptions underlying these forecasts have been discussed at the technical level with representatives of the industry.

Senator Connolly: Mr. Chairman, may I ask Senator Hays a question? I take it, senator, that when you say the incentives are not as good in Canada as they are in the United States, you are saying that this is because of the federal take—that you think the federal take is too high?

Senator Flynn: That is a very pointed question.

Senator Hays: In the province of Alberta, for instance, they are taxed on money they do not receive. In Saskatchewan, if you have a barrel of oil, the royalties are so high that you do not receive anything back. It seems to me, with regard to the American oil industry, that they are drilling structures that we could not afford to drill, because they are getting more money for them. We have all kinds of structures that we could drill, but which were abandoned because production was not high enough. We had the wellheads screwed down, and that sort of thing, and we were permitted only to produce so much. At $8 oil, you can produce the oil, just as in the case of a mine, where there is not as much oil, and the sands are not as big, and that sort of thing. That is what the United States are doing, and in so doing, they have discovered a couple of fairly large fields, particularly in the Gulf of Mexico and off the coast of Florida. I think Canada is in the same situation. It

seems to me that our policy is wrong. I do not think we can compete with the United States in the exploration for oil.

The Chairman: Senator Hays, these figures would become much more attractive if we had much more oil production, even at present prices.

Senator Hays: Yes.

Senator Flynn: It seems to me that we have to try to reconcile some of the figures we have in this CPA table with those given by Mr. Thompson. I would like, first, to try to compare the share of the industry, as indicated here, with the figures given by Mr. Thompson. It is mentioned in this table that the industry's share, after Alberta offsets, is only 10.1 per cent, whereas Mr. Thompson mentioned a figure of 34 per cent, which is quite different. I would like Mr. Thompson to try to reconcile that.

Senator Connolly: In addition to that, senator, I think the whole three figures—

Senator Flynn: I want, first, to find out, from the point of view of the industry, whether the share of the profit is sufficient incentive. If it is only 10 per cent, we can understand the argument; but if it is 34, if it has gone up from 27 to 34, it would be hard to accept the opinion of Senator Hays or of the industry.

Mr. Thompson: The main difference is, if you are looking at the last column, that the 34 per cent is a percentage of the $6 amount.

Senator Beaubien: But that is not the world price.

Mr. Thompson: The 10 per cent is a percentage of the $4.65 figure. It is a different type of calculation.

Senator Flynn: Your 34 is based on what?

Mr. Thompson: It is based on the $6 amount.

Senator Flynn: In other words, you take off the drilling and exploration costs?

Mr. Thompson: It is looking at the share of the value of the oil lifted out of the ground, and leaving to one side, for that purpose, the cost of turning up the new oil.

Senator Flynn: If you took away the $1.35, you would have to revise all the other figures.

Mr. Thompson: Yes. It is a different calculation, but the basic statistics are the same.

Senator Molson: Mr. Chairman, we are talking $6.50 and $6. We are taking the 50 cents and adding it to the industry. We are cutting the price from $6.50 to $6. We are removing the lifting costs and changing the whole ratio, and coming up with this other set of figures. But in all these figures, from the point of view of comparison, we were talking about the rates of income tax for corporations, and then we mentioned the 40 per cent rate for the manufacturing and processing industry. Actually, the general rate is 46 per cent. The manufacturing and processing industry is 40 per cent. We are talking here about the federal take of 25 per cent. We are mixing apples and oranges. This is actually the federal share of the net revenue by these various devices. We are talking about the provincial share here which comes out in royalty. But in comparing those with an ordinary manufacturing or processing company, the 40 per cent, say, federal income tax rate does not take into account at all, in comparing figures, anything for the provinces.

There are some industries where these figures would not look terribly out of line, if we took into account all the ways in which various governments take a slice all the way through. We are talking about the share of net revenue, and we have these various figures which we started with: $12.65, $6.50, and $6. You could get a multitutde of figures out of this, but we are not really comparing apples with apples all the way through.

Senator Flynn: It is important to compare it with the situation before the government intervened. If these figures have any meaning, we see that previously the federal share was 13 per cent and is now 25 per cent, or 18 per cent if you accept the figure of Mr. Thompson; whereas the provincial share would be a little higher or a little lower, depending on whether or not we accept Mr. Thompson's explanation. The main thrust of the problem is whether the federal government is coming into this and taking the lion's share just kfor the sake of bargaining—as was suggested by the chairman in the Senate yesterday.

The Chairman: That is what you say.

Senator Connolly: We should ask the witness whether he would talk for a moment about the federal government's share in the first column on the Canadian Petroleum Association figures of 13 per cent, and what are the items that made it rise to 25.4 per cent; and then the provincial share of 59 per cent rising to 64 per cent. Most of us felt that the provincial share rose a great deal more than that since the increase in oil prices. We are really tilting at windmills here if we do not know what those differences mean, and whether in fact the 59 per cent is the level from which you start to determine the provincial position. If we knew something about the development of the royalty increase, it would help. Did it start by taking 59 per cent, and is it now taking 64 per cent, of the value of a barrel of oil?

Senator Beaubien: Mr. Chairman, we have to look at the fact that the oil is worth $12.65 anywhere except in Canada. The fact that we get $6.50 for it is all due to government intervention. In comparing whether to have a rig in Canada or in the United States, we do not look at these silly little percentages, which really do not mean anything. The world price is $12.65, and you do not get $12.65 because the government is taking it away to subsidize the oil it brings in from the Portland pipeline. What we are really looking at is this. If you are going to have a rig, if that is what we are interested in, if we want to develop oil in Canada and you have a rig, where are you going to go? Are you going to go where you get $6.50 less all these other charges, or are you going to go where you get $12.65?

The Chairman: The simple question appears to me to be that the export tax on the figures Senator Hays gave us amounts to about $5.65, something like that.

Senator Hays: $5.50.

The Chairman: That tax was put on, and that money is used to compensate for the cost of oil that goes to the eastern provinces and to part of Quebec. Either we should say that this should not be done, that the province that produces the oil should be entitled to reap the harvest, or the function of the national government is to lighten the burden of this cost of oil for all the people of Canada. They

have chosen this way of doing it, and that is a matter of government policy.

Senator Flynn: It would be outside of this bill. After all, we have to take for granted that the price is more or less uniform in Canada. Under this price, what is the distribution? The problem under this bill is what the federal government takes, what the provincial governments take, and what is left to the industry.

Senator Cook: There is one point, following what the chairman said. There is a $5.50 export tax. The oil industry says, "Sure, equalize the price of oil in Eastern Canada as against Western Canada, but do it out of general revenue, do not do it out of the industry."

Senator Flynn: If you look at the problem overall I agree with you, but if you look at it under this bill the only problem is royalties. It is not the export tax. We will have to discuss the export tax in another context.

Senator Connolly: Export tax is in another context altogether.

Senator Flynn: If we want to know what we should do about this bill, we have to take it for granted that it is more or less an equal price all across Canada.

Senator Hays: The federal government takes $1.64 roughly, the Province of Alberta gets $2.43, and Saskatchewan gets about $3.

Senator Cook: Off the paid price.

Senator Hays: Through income tax and royalties.

Senator Cook: Off the paid price.

Senator Connolly: Let us find out about the royalties and go right to what Senator Flynn suggests. What is the royalty rate? What was the average royalty rate that applied in the western provinces before the oil prices increased?

Senator Cook: Put it this way. What was the royalty when the royalties were deductible from the federal income tax?

The Chairman: We have that figure. At December 31, 1973, it was 22.8 per cent, and that was deductible.

Senator Cook: Alberta shot it up to 65 per cent.

The Chairman: You must not confuse the 65 per cent rate in Alberta. That 65 per cent was 65 per cent of the incremental value. That was beyond the difference in price between, as I understand it, the original price and the $6.50, so we have to make that calculation.

Mr. Thompson: In overall average terms the average was something like 40 per cent after the Alberta addition of the 65 per cent incremental royalty. In other words, instead of being an average overall rate of 22 per cent, it was increased to about 40 per cent effectively.

Senator Flynn: 22 per cent of what? Let us be precise.

Mr. Thompson: Of the gross value of the oil; that is the $6.50.

Senator Flynn: It was based on the well production?

Mr. Thompson: The wellhead price, the $6.50 amount in this table.

Senator Flynn: Is the 65 per cent the other figure?

Mr. Thompson: The chairman says it is based on the excess of the price, $6.50, over a lower amount.

Senator Flynn: It is not the same basis?

Mr. Thompson: No.

Senator Flynn: One is on production and the other is on the price.

Mr. Thompson: They are both on the price, but the incremental royalty is just on a certain portion of the price.

Senator Flynn: But if they had made no change it would have been on the production only?

The Chairman: That is right.

Mr. Thompson: I am not sure what you mean by "production only".

Senator Flynn: I thought the 22 per cent was calculated on the amount of oil taken from the well.

Mr. Thompson: Right.

Senator Flynn: Whereas the 65 per cent is on the value.

Mr. Thompson: No. The 65 per cent is based on what is taken from the well.

Senator Flynn: The same thing?

Mr. Thompson: But it is based only on part of the price.

Senator Flynn: It is based on the two, then?

Mr. Thompson: It is 22 per cent on the first, say, $3.80 and 65 per cent on the balance.

Senator Flynn: But it is exclusively on the increase in price.

Mr. Thompson: Right, the incremental royalty.

Senator Connolly: In the light of those answers, would you say that the provincial take, which is now at 64.5 per cent—65 per cent for practical purposes—

The Chairman: That is not the gross rate. The 65 per cent is on the portion of the price between $3.80 and $6.50.

Senator Connolly: If you work it out, at the end it is quite a coincidence that you work out to a figure for the provincial take of 64.5 per cent on these figures.

The Chairman: That is right.

Senator Connolly: Does that come from a base of 22.8 per cent? Was it originally 22.8 per cent and is it now 64.5 per cent? If so, how long did it take to get from 22 per cent to 65 per cent?

Mr. Thompson: It is only a mere coincidence that the figures are close. The 64.5 per cent here is on a different base. It is on the income after all expenses, including exploration and development so that is only a coincidence.

Senator Connolly: Where have the royalties gone, from where to where? Is it 22.8 per cent to 40 per cent?

Mr. Thompson: To about 40 per cent, but then the Alberta adjustments in their royalty arrangements cut

that average percentage back to possibly 36 per cent, if my memory serves me right.

Senator Connolly: Where has the federal government's take gone, in that same period?

Senator Flynn: That has doubled.

Mr. Thompson: In terms of our budget calculations, the percentages I gave you, before the May 6 budget, the federal government's percentage of the production revenue net of lifting cost—in other words, the $6 amount—was 8.5 per cent compared to 47 per cent provincial and 45 per cent industry.

Senator Flynn: And now?

Mr. Thompson: Now it is more like 18 per cent federal, 48 per cent provincial and 34 per cent industry.

Senator Flynn: Only the federal government has gained out of this.

Senator Connolly: It could not have, on those figures.

Senator Flynn: For goodness' sake, you didn't hear. It is 8.5 per cent federal, 47 per cent provincial and 45 per cent industry. The federal goes up to 18 per cent from 8.5 per cent, the provincial goes up 1 per cent, from 47 per cent to 48 per cent, and industry goes down to 34 per cent.

Senator Connolly: From where?

Senator Flynn: From 45 per cent.

The Chairman: So the one who is really caught in the middle is industry.

Senator Flynn: If you want, but the federal is much better off than the provinces.

Mr. Thompson: If I may comment again on the industry share, the essential question is whether the industry share leaves them with an adequate return to carry on business, and the federal calculations indicate that there is sufficient there to give the industry an adequate rate of return. There is a further comment that might be made, too, and that is that these are only percentages, which can be a bit misleading, because I believe that the amount of money available for exploration in 1975, for example, out of the industry cash flow is something like double what it was in 1973.

Senator Flynn: I do not disagree with that, but there is a cash flow of the federal government and for the federal and provincial governments. They are not worse off, in any event.

Senator Cook: When the royalty was, say, 22 per cent—whenever that was, it was deductible for federal income tax. When it was doubled, whenever that was, you disallowed the whole amount for federal income tax. Why was the original 22 per cent not continued to be allowed?

Mr. Thompson: Possibly you would like the minister to speak to that?

Senator Cook: I would like somebody to speak to it.

Senator Flynn: You do not have to solve all the mysteries.

Senator Molson: That would have been much too simple.

Mr. Thompson: Well, no, it would not have been simple at all.

Senator Hays: Mr. Chairman, the statement which Mr. Thompson made with respect to availability of money interested me. He said there was more availability of money because there was more demand for oil. That does not necessarily say there is more availability under the present policy to drill in Canada for the exploration of oil.

The Chairman: There is a non-controllable factor there. In the United States, oil demands a higher price.

Senator Hays: That is right.

Senator Flynn: The fiscal conditions in the United States may be so much better than they are here that everyone will try to find oil there rather than here. So it depends on us to a large extent.

The Chairman: If you are considering that it is between $6.50 and $10.00 or $12.00, the drillers are obviously going to go where the money is. It seems to me I answered Senator Cook's question as to why the federal disallowance should have included only the amount of royalty in excess of what the royalty was at December 31, 1973. I think I gave an answer to that last night. I do not know how many people accepted it. I said that it was part of political bargaining.

Senator Flynn: That is what I was trying to translate earlier: bargaining from strong position.

The Chairman: Yes.

Senator Buckwold: May I take a slightly different tack, Mr. Chairman? I do not claim in any way to be an expert in the oil business. Perhaps these gentlemen can help me. The industry retention under the existing tax system on the Canadian Petroleum Association documents which we have, would indicate that when oil was $3.80 and after charging off $1.35 for drilling and exploration costs, the retention was 53 cents a barrel, if these figures are correct. We are now looking at a retention of 47 cents. So what we are talking about is 6 cents a barrel. Am I so far correct in my assumptions? If we are only looking at 6 cents a barrel, is this as calamitous to the industry as we would be led to believe? That is the point I am making.

Senator Flynn: I do not think the witness would like to reply to that, but I could tell you that if the conditions in the United States are much better, then it will be calamitous.

Senator Beaubien: And the conditions are much better in the United States.

Senator Flynn: That is the point. It is not what you have that counts. It is what you can have.

Senator Buckwold: I am talking about the health of the industry here. At this moment I am not talking about the exploration or the encouragement to find new fields, but the current health of the industry.

Senator Cook: But you are selling oil at $6.50 a barrel and it is probably costing you $12.00 or $15.00 to replace that oil. That is what it amounts to. If you are selling your present stocks at pegged prices, it is going to cost you much more to replace that oil, barrel for barrel.

Senator Flynn: If you are willing to exhaust your proven reserves, I suppose it is not too difficult.

Senator Beaubien: And that is what we are doing.

Senator Hays: To replace 100,000 barrels today it is about $11 a barrel.

The Chairman: I wonder if Mr. Thompson feels he can discuss the point Senator Buckwold raised with respect to the CPA figures, which show that when oil was $3.80 a barrel, after the various deductions the industry retention was 53 cents a barrel, whereas if you look at the situation today, taking into account all the changes, including the change in Alberta and the concessions that they have made and the present situation tax-wise, the industry retention is 47 cents. Now, Senator Buckwold's question was about all this noise that is coming forth and the complaints of the industry that they are now getting 47 cents whereas, when oil was $3.80, they received 53 cents on each barrel. If so, is that enough that there should be this rowing about it? Have I interpreted your question correctly?

Senator Buckwold: Yes, that is right.

Mr. Thompson: I do not know whether I need to add very much, because that observation appears to tie in with the general view in the federal calculations, that the industry should still be able to get a reasonable rate of return.

Senator Flynn: It also ties in with the competition. If you earn only 47 cents here and, with the new conditions, you can earn twice as much elsewhere, it will have an effect. That is the point. It is a problem of policy. I noticed this morning that Mr. Thompson was very careful not to embark on any questions of policy, and I doubt that he would go further than he has now.

The Chairman: You do not expect it, so you are not disappointed.

Senator Flynn: I am not disappointed, but I was wondering if he would respond more to Senator Buckwold than he did to me this morning.

The Chairman: I notice that he used the words, "It would appear."

The only other thing we have to rationalize in this connection is that if the deductibility of royalties federally continued to the extent of what the percentage was at December 31, 1973, we have figures which were submitted by the people who appeared before us which would show that that would add another 39 cents to the 47 cents of retention by the companies, so that they would have 86 cents per barrel retainable.

Senator Flynn: What would be the loss for the federal government and the loss for the provincial governments?

The Chairman: I asked the question, if you remember, when these men were before us the second time. I wanted to know how much the company retention would be, or would increase if they were permitted to deduct 22.8 per cent for royalty payments to the provinces. This was the figure. We were told that the company retention would increase by 39 cents per barrel. That would give the company 86 cents per barrel. Now the question is, and we do not seem to have answers on it, is 86 cents per barrel an adequate retention by the companies to carry on exploration and development?

I think it is essential, if we are going to have any kind of prosperity in Canada, that the oil and gas industry must be able to progress. They must be able to explore. Perhaps their judgment in going as far north as they do, where the cost is so much greater, is not good. Senator Manning hinted at that last night. He said there were areas in the settled portions of Alberta where there could be oil recoveries, and substantial recoveries, at much lower cost; but we do not have any evidence on that. All we have is those figures, and we have Mr. Thompson's statement that on the departmental calculations they had concluded that on the basis of the budget, dealing with royalties, the companies would still be left with an adequate—I do not know whether he actually used the word "adequate"—or, in any event, left with enough money to carry on explorations.

That may arise through the larger income brought about by higher prices. Or course, then, if we simply did away with the $5.50 export tax, that would provide more money for the vendors of the oil, but then it would mean that the export tax would have to be changed to a subsidy if you were going to maintain a level of oil prices across Canada, so that is why I said that a basic consideration is whether we approve of that principle, that the federal government owes it to the people all across Canada—

Senator Cook: The federal government would get back half the export tax in income tax anyhow. The companies would make that $5 more profit, and would have to pay that much more in income tax.

The Chairman: Quite true. So government revenues would go up and company revenues would go up, and everybody would be happier, except that then you would have to provide a subsidy which would come out of the extra income that the government got, and that would come out of the taxes the people would pay.

Senator Flynn: When you speak of the 86 cents, Mr. Chairman, I think it has a meaning only in relation to the possibilities elsewhere. I mean, it may be enough, but the problem is whether there are competitive elements destroying this figure or making it worthwhile.

The Chairman: When you say "competitive elements", there is the question, for example, of where the driller will work.

Senator Flynn: They will not work there if they can work under better conditions elsewhere.

The Chairman: That is right. That kind of money has no personality.

Senator Cook: Could I switch for a moment to mining, Mr. Chairman? I have a document here which the committee members can have if they wish. Like Senator Hays, I am declaring my interests. I am a small shareholder in a company called Brenda Mines, a copper molybdenum mine, in British Columbia. I will not read all of this, but I will read this part here. By the way, it cost $60 million to bring this mine into production. It was financed by Noranda.

> Brenda is currently projecting that it will pay more in taxes and royalties than pre-tax earnings . . .
>
> In total, taxes would then be $2.2 million versus pre-tax earnings of $2.1 million.

It would operate next year at a loss of 2 cents a share. What incentive is there for anyone to open up a copper mine?

Senator Molson: Patriotism.

Senator Flynn: That is the point I raised last night. What about the mining industry? What do these royalties do to them? I am thinking of copper, gold, silver.

The Chairman: The mining position, as I stated, was that the corporate tax rate is 25 per cent. They get a 25 per cent depletion, and for exploration and development they get 100 per cent write-off of the expenses. For development they get 30 per cent, but the difficulty I pointed out was that in order to get any value out of those figures of depletion, and development and exploration expenses, they first of all have to earn the money, and therefore, preceding that, they have to find the money. Now, if their own operations do not produce it, they have to go into the money market, and the question is, with the operations in the United States in the state they are, is the money market going to be attracted by what is going on here, especially when you have contention between the provincial and federal authorities? It just makes it an unattractive field. These are all the incidental problems.

Senator Flynn: That is a big point; but my point was, is the mining industry affected in the same way—I mean, fiscally—as are the petroleum and oil industries? In other words, they are not allowed any more to deduct royalties, so that technically they could find themselves, because they do not enjoy the same boom as do the oil industries, having a financial loss on their books, and still having to pay corporate tax, because they will not be allowed to deduct royalties.

Mr. Thompson: Senator, that is possible, depending on the nature of the provincial levies.

Senator Flynn: Yes; but let us take the levies as they are presently. There must be some mining companies who earned only a small profit, and I believe that if you have to deduct the royalties from that you come out with a loss. Yet you would have to pay some tax.

Mr. Cumyn: We checked that, Senator Flynn, with one or two mining companies, and it is essentially the province of British Columbia that poses the problem. In the east the levy of royalties is pretty low, and I think, with the increased federal abatement, the eastern mining companies are not anticipating any problems. In British Columbia, however, it is disastrous, as Senator Cook pointed out.

Senator Flynn: Technically, it would be the same as if a mining company would earn, let us say, only $25,000 net profit, and they would, in their expenses, show $35,000 in royalties, and they would come out with a loss of $10,000. Yet they would have to pay some income tax.

Mr. Cumyn: Yes.

The Chairman: That arises because of the royalty treatment in British Columbia.

Senator Flynn: I am not speaking of British Columbia, I am speaking, technically, of anywhere else but there, where they would not increase the royalties for mining operations.

The Chairman: Mr. Cumyn has just given an answer to that.

Senator Flynn: He has given a practical answer, but the theoretical answer that he has given is that it would be possible for a company to pay tax even having had a loss—a new loss.

Senator Cook: The point, Mr. Chairman, is that it is only B.C. that is doing it now, but let these governments rationalize this situation and next year there will be other provinces doing it.

The Chairman: Senator Cook, we have enough problems to deal with with what we have on our platter now.

Senator Flynn: It is in this bill, just the same. What I was surprised at is this: I do not know why this bill would apply to the mining industry. I understand, because the Chairman has explained it, that the federal government wants to be able to bargain. That is why it imposed these restrictions, and refused to deduct royalties as far as the petroleum industry is concerned; but there is no similar reason, as far as the mining industry is concerned, except possibly the case in British Columbia, with which I am not familiar.

The Chairman: Senator Flynn, your language, if you would just hold a little bit—

Senator Flynn: I am always willing to do that.

The Chairman: I did not explain the political bargaining. I made a suggestion.

Senator Flynn: It was only incidental, Mr. Chairman. I would like to get an answer to my question.

Senator Cook: It lurks in the background.

Mr. Thompson: Mr. Chairman, there were some similar factors occurring in the mining industry. It is much harder to generalize there, because there are so many different minerals and so many different price characteristics; but in British Columbia, for example, there was a new royalty regime brought in following the changes, I guess, principally in the copper market.

Senator Flynn: The price of copper, also.

Senator Beaubien: It went down 50 per cent in three months.

Mr. Thompson: British Columbia, for example, brought in a royalty which they called a super royalty but it is an incremental royalty of 50 per cent on a certain increase in the price. In Saskatchewan early in 1973 they brought in a potash reserve tax which was calculated in such a way as to be a very high level tax. Similar developments were happening in the mineral field.

Senator Flynn: But not comparable.

Mr. Thompson: Different in degree and not as universal throughout the industry.

Senator Buckwold: This is an opportunity for me to raise the plight of the potash industry in Saskatchewan.

The Chairman: Senator Heath?

Senator Heath: Mr. Chairman, following on Senator Flynn's remarks, I wonder if it would be helpful if we could have in graph form some sort of comparison of the corporate tax rate on resource industries since income tax reform and comparing them with the proposed legislation we are studying now, and the corporate tax rate as compared with the manufacturing industry and have it set out in a way that we could see these things easily. For example, you could take the whole resource industry or you could split it off into mining, petroleum, forestry, et cetera or in whatever manner you liked. I think it would be very helpful for us to see that. I would also like to see the effect of provincial royalties in the metal mining industry as opposed to petroleum and taking into account the non-

deductible costs as well as provincial royalties. British Columbia certainly has a most difficult problem in metal mining right now, and on the national scene the mining industry is in a different boat from the petroleum industry. I think we should find something like that helpful. One of the problems as I see it is that we have not considered the fact that we export about 70 per cent of our mining products, and we are very much in the position of being involved in the world market which is a very volatile thing whereas petroleum and gas are really not export commodities. In sum total we import as much as we export. It comes out equal, but that is not the case with the products of the mining industry.

The Chairman: We have had no submissions from the mining industry. But we certainly had submissions from the petroleum industry. I am surprised they have not been putting a lot of pressure on you, Senator Heath, in British Columbia.

Senator Heath: I am just a weak, lone woman!

Senator Buckwold: Mr. Chairman, I want to put on the record the condition of the potash industry in Saskatchewan. I want to point out to honourable senators and the committee the plight of that industry which is not being caused by oppressive federal taxation. I have some documentation here which indicates that this industry which is really in a ruinous state finds itself in that position because of the avarice of a provincial government that, it seems to me, is determined practically to put them out of business. Yet the blame is often put on the federal government as to the extent of the impact of the so-called royalty deductions. For your information, of pre-tax profits of the potash industry in Saskatchewan, which, as I say, has an investment of over $1 billion, 25 per cent goes to the federal taxes, 62.6 per cent for provincial taxes and the industry profit—pre-income tax—is 12.4 per cent which leaves 2.80 per cent return on investment which is a rate, as I have said, which is ruinous for the industry. I just draw to the attention of honourable senators because, as I say, that very important industry to our province is in deep trouble and not because of the federal royalty charges but rather because of provincial government policy.

Senator Flynn: Is there anything we can do for you?

The Chairman: Honourable senators, we have had quite a discussion back and forth on this question. May I summarize the position we have arrived at and then we have to decide where we are going from there. We have got to the stage, so far as oil and gas is concerned and the question of non-deductibility of royalties for federal purposes, where we have some figures now which would appear to indicate that when oil was $3.80 a barrel the company take or retention was 53 cents, whereas today with all that has happened in the meantime, the company now retains 47 cents. If that truly depicts the problem, then we have to look as well at the other areas to see why all the additional burden through non-deductibility of federal royalties and the impact of all those other things is as little as it appears to be from those figures. It may be lack of volume, although I do not think it is that, or it may be the effect of the $5.50 export tax. Whether it is or not, we do not know. However, we have crystalized the area of the problems as we see it, and what I would suggest to you would be that the appropriate approach would be to stage a policy and that what we should do on that is to invite the minister to come and deal with those questions.

Senator Flynn: I agree with you, Mr. Chairman, but your question must be put in relation to the doubling of the price. It is only six cents less, but when have you ever seen anybody losing six cents when the price of his products has doubled?

Senator Beaubien: It has more than doubled, Mr. Chairman. It has gone from $3.80 to $12.65.

Senator Flynn: That is on the world market, but I am speaking of here.

Senator Connolly: The question is then whether we are going to discuss the question of the oil export price.

Senator Flynn: I agree that the minister should come.

Senator Cook: When we dealt with the tax reform bill over and over and over again we said that we could not operate in a vacuum, and when we were dealing with resources and taxes we had to be competitive. We must realize that money could go anywhere. It could go to Australia, the United States, South America, Asia or Africa or anywhere.

The Chairman: There is no question, Senator Cook, that if the money is needed, and I have no doubt no matter what the retained earnings of the companies may be, that it is not enough to give you continuously an aggressive exploration policy.

Senator Beaubien: Mr. Chairman, part and parcel of that is that the government has set the price at $6.50.

Senator Flynn: Let them take less and you might find a solution.

Senator Beaubien: But the price is $12.65, and it is being held at $6.50.

The Chairman: Is that not also part of our discussion with the minister?

Senator Beaubien: I agree, Mr. Chairman.

The Chairman: One question is in relation to the $6.50 price. I can see some answers to it, but what I would have to say at this time is not important. We are interested in the policy and an explanation of it. There may be good reasons why the $6.50 price should be established. There are in my opinion excellent reasons for the export tax. The funds must be raised somehow once it is accepted that people throughout the country must be treated in more or less an even way. The question is whether the money should be raised by an export tax or by paying subsidies and increasing other taxes.

We have thrown this back and forth all afternoon and have given it a very good shake. Therefore, I think we are at the stage at which the minister could attend and attempt to solve the problem of why these items were introduced and what consideration was given to the fixing of a price. There is also the question of the disallowance completely of royalties.

Senator Flynn: Our only concern in connection with this bill is whether we approve the reduction of royalties. We cannot set the price at $12.60 or abolish the export tax. We must deal with this bill.

The Chairman: Yes, but behind our thinking in considering this bill is whether the full non-deductibility is proper in all the circumstances.

Senator Flynn: Yes.

The Chairman: That is the question and the background information is along the lines of our discussion. Having done that, unless Mr. Thompson has something more to contribute to this—

Mr. Thompson: No, sir.

The Chairman: Mr. Cumyn, have you something to add?

Mr. Cumyn: I would like to know whether the add-back of these royalties is intended to be treated as taxable production profits from oil and gas wells in Canada for the purposes of clause 80 of the bill?

Mr. Thompson: I take it that is for purposes of the extra tax abatement and the special rates on resource profits?

Mr. Cumyn: That is so.

Mr. Thompson: Perhaps Mr. Davidson could confirm that the add-back would form part of the income from that resource?

Mr. Davidson: I do not think we have given it any thought yet. However, I assume if that is the policy we will strive to give it that interpretation.

Mr. Thompson: That is certainly the intention and we have assumed that the technical rules in the act concerning income from a source would mean that the royalties added back into income would form part of the income from production of wells and mineral resources.

Mr. Cumyn: May I ask one further question, Mr. Chairman? I think it is useful to obtain clarification of these points which might give rise to interpretative problems. By including special provisions in Bill C-49 concerning section 59, disposition of resource property, the proceeds of the disposition of these assets are effectively treated as income.

Is it intended that they will not be taxed also as capital gains, despite the fact that no exclusion is specifically made in section 39 of the Income Tax Act?

Mr. Thompson: Even if a cross-referencing exclusion is missing, certainly there is no intention to tax them at more than ordinary income rates.

Senator Connolly: They would be taxed as income on the basis of the amount received and not as a capital gain; is that it?

Mr. Thompson: That is right; that is the way it has been and it may be that in the course of the distinction now between exploration and development and the consequential technical changes, that we need another cross-reference in the capital gains section. I believe that was Mr. Cumyn's inquiry.

Senator Flynn: Mr. Chairman, with regard to the mining industry, in provinces where royalties have not been increased and I gathered from your remarks that it is all provinces except British Columbia and, probably, Saskatchewan, the enforcement of this act will mean increased taxation on the entire mining industry.

Mr. Thompson: Senator, I think for many minerals the royalties that have existed in the past have been non-existent, or very low. Therefore, for many of them it will not have much impact at all.

Senator Flynn: I am not speaking of non-existent royalties, but of those which exist.

Mr. Thompson: But in surveying the whole scene prior to 1973, mining royalties were not all significant. There were royalties of different degrees here and there.

Senator Flynn: They pay a royalty for mining, there is no doubt. The government receives a certain amount.

Mr. Thompson: Yes, there is some.

Senator Flynn: So there will be a corresponding increase in taxation in principle; that is the point.

Mr. Thompson: There is no doubt about that at all.

The Chairman: We have developed this point and it is about a quarter after 4. I had thought there was another point we might cover today, FAPI. However, in all fairness, in view of the fact that it would take about an hour and this has been heavy concentration, I would ask for the direction of the committee: Do you wish to resume at 9.30 in the morning?

I was hoping that by sitting tomorrow morning, during which time I could arrange for the minister to attend, and sitting during the afternoon we might finish this stage of review and be through with these witnesses. Then we could sit down and discuss how to proceed.

If it is possible and it seems to me that it is possible, because when we finish FAPI and hear the minister the other items could be recited like a litany and would require no explanation—

Senator Flynn: We could even dispense with the reciting.

The Chairman: Well, then we would miss your voice, Senator Flynn.

Senator Beaubien: Mr. Chairman, we might get through by tomorrow afternoon, then.

The Chairman: It is possible that we could finish and be to the stage—

Senator Molson: Why do we not sit another hour and get that much ahead?

The Chairman: It is whatever the committee wishes to do.

Senator Flynn: If the witnesses are in good shape and willing we could proceed.

Senator Connolly: Let us look at it at a quarter to 5.

Senator Flynn: It is very technical, but not too controversial.

The Chairman: No, it is not. Then we will stay for a while. Order, please. The committee has indicated its desire to continue. May we have the attention of honourable senators while Mr. Short takes us through the question of FAPI. This was a very important subject with us when we looked at the White Paper and at Bill C-259. Therefore we do have a little working knowledge on the subject. With that, would you please start on this question, Mr. Short? I am sure you do not need any questions to become warmed up on the subject. You are a self starter.

Mr. Short: Honourable senators, I would like to leave room for questions. Perhaps I could present some back-

ground. As honourable senators know, in the 1971 tax reform legislation a new concept was introduced which was called FAPI. FAPI is part of the alphabet soup which has grown up in the tax system. The initials FAPI stand for Foreign Accrual Property Income. That is the income of a foreign affiliate of a Canadian taxpayer which will be imputed to him and taxed in his hands, whether or not that income is distributed. This was introduced as a new concept, and the law in the area was complex—which honourable senators will recognize as being a masterpiece of understatement.

The provisions were not designed to take effect immediately because of their complexity, and because it was the government's wish that those whose interests were affected would have an opportunity to comment on them and assess their impact, so that the necessary changes might be made in order to make the provisions effective and workable.

The then Minister of Finance—at that time, Mr. Benson—said he recognized that there were a number of difficulties with the new law and that he wanted to study them, and review the representations before they would take effect.

A number of representations were received, and in Bill C-49, now before you, are the fruits of that study of the provisions which will take effect next year.

There were a number of criticisms levelled against the FAPI provisions. Perhaps the basic criticism was that the rules as originally proposed would interfere with bona fide international business operations and thereby adversely affect the competitive position of Canadian based multinational companies.

This criticism very often took the line that FAPI should protect against the avoidance of Canadian tax; but, in fact, it went further and assumed an international policeman role, if you will, in protecting also against the avoidance of other countries' taxes.

I could give you an example: the income of a financial intermediary established abroad to lend funds from one foreign company to another foreign company within a multinational group would be taxable to the Canadian parent company, even though no avoidance of Canadian tax was involved.

I think Bill C-49 was responsive to that criticism, in that it refined the expression "foreign accrual property income" to restrict it to passive investment-type income, and to income which had been diverted from Canada. Other income, that is, income that arises in connection with a bona fide international business operation, is excluded from FAPI and therefore from the application of these new rules.

That, I think, was the basic criticism. There were a significant number of technical criticisms of the FAPI rules. I could catalogue most of them for you.

The first is that the FAPI rules would apply when the Canadian shareholder did not, in fact, control the foreign company and therefore had no say in its distribution policy.

The attribution rules—the rules by which the foreign accrual property income was attributed to the various shareholders—were criticized on the basis that in some cases, where you had different classes of shares, the rules could result in the attribution of more than 100 per cent of the income of the foreign affiliate.

The FAPI rules were criticized because there was failure to recognize that the foreign accrual property income may in certain circumstances exceed the income of the foreign affiliate because it might have had operating or other losses.

A further criticism was that the mechanism for providing relief for foreign taxes—not when the FAPI was earned by the foreign affiliate but when the earnings were distributed back to the Canadian shareholder—was defective.

There was criticism also of the fact that the application of the rules to those foreign affiliates that were trusts were, to take the kindest criticism, uncertain.

There was also a criticism that the rules were insufferably complex.

I think those were the major technical criticisms, and, taken together, they amounted to fairly serious condemnation of the FAPI provisions. In the new rules, introduced in Bill C-49, I think that all of those criticisms have, to a large extent, been accommodated.

Senator Desruisseaux: Mr. Chairman, may I interrupt to obtain some enlightenment? Mr. Short, you mentioned criticism from certain people. From whom? From where did the criticism come—from what source?

Mr. Short: A number of the criticisms came from your committee at the time of the 1971 hearings on Bill C-259. We had a number of representations from Canadian-based companies with international operations; from professional associations—the Canadian Bar Association, the Canadian Institute of Chartered Accountants—and indeed, from a number of professional persons across the country; as well as from individuals whose interests were affected by these provisions.

Indeed, we encouraged as many representations as possible. We wanted to sharpen the rules and make sure that they hit where it was intended and should not hit where it would seem inappropriate. These representations were extremely helpful, I should say essential, to us in sharpening the provisions in this way.

Rather than get into the details of the changes, I should make the observation that we have accommodated, to the extent we have been able to—and that is to a considerable extent—all of these particular criticisms that I have noted, with one exception, which is complexity. The rules remain complex. However, the correction of some of these criticisms and the sharpening of the rules made the complexity inevitable. We are dealing in an area of international operations where the people who are involved are quite capable of dealing with complex laws. The concepts in the FAPI provisions are now very much clearer; the lines are very much sharper. Therefore, I believe that the complexity will not prove an intolerable burden. The complexity will not involve 99 per cent of the people who are taxpayers. They have an impact on a very, very small proportion of people, those people who set up foreign trusts and affiliates—for their purposes.

Senator Flynn: Well put.

The Chairman: You mean for lower taxes.

Senator Cook: Would you say they are a very sophisticated group of taxpayers?

Mr. Short: I would say so. With that by way of background I am open to questions.

Senator Hays: Could you give us an example of how the rules would affect, say, Massey-Ferguson?

Mr. Short: How the new rules, the new FAPI provisions, will affect them?

Senator Hays: Yes.

The Chairman: They appeared before our committee.

Mr. Short: Massey-Ferguson is one of the companies that made very extensive representations. They were most helpful in telling us how the rules we had originally proposed would affect them, and in making suggestions to us as to how their situation might be accommodated without at the same time abandoning the whole idea of FAPI, which I think they accept. On the basis of the representations that they made to us, and the discussions that I have had with officers of that company, I conclude that they do not expect to be affected by the FAPI provisions. I might rephrase that and say that these FAPI provisions will not, in their revised form, interfere with Massey-Ferguson's international operations in any uncomfortable way.

The Chairman: Mr. Cumyn, have you some questions?

Mr. Cumyn: I have one, which arises from the text of the bill at page 163. Effectively, with the exception of capital assets being used in an active business, the FAPI of a foreign affiliate will include its capital gains and it will be able to deduct its capital losses. There is a rather primitive, if I may say so—although the rest of the legislation seems to be particularly sophisticated—transitional measure here to the effect that a company will be able to deduct, in effect, from its FAPI losses to the extent that they may not be considered to have accrued prior to the 1976 taxation year.

It seems to me that where a company has in fact a position where if something cost it $1 million, a loss brought the value down at 1976 to $600,000, and then it re-sold it once more for $1 million, it will not have had a real gain in any sense of the term, yet the result of this disregarding of the losses accrued prior to the introduction of the system will result in its being taxed on a gain of $400,000 in my example. I was wondering if Mr. Short could comment on why something such as the tax-free zone rule was not utilized in this situation.

Mr. Short: I believe your problem arises, Mr. Cumyn, out of a misreading of this provision.

The Chairman: I hope it does.

Mr. Short: The provision says that in calculating the foreign accrual property income you take into account only that portion of the gain or loss that accrued after 1975. In your example there is no gain or loss on the disposal, and therefore there is nothing to enter into foreign accrual property income.

Mr. Cumyn: Let us change the example slightly. What happens if it cost $1 million, its value has, at the beginning of 1976, descended to $600,000, and then it is sold at, say, $400,000. There it has a real loss of $600,000. Here you would nonetheless disregard the bulk of the loss.

Mr. Short: The $400,000 would not enter into the calculation of foreign accrual property income, and that result is totally consistent with the result that would otherwise obtain if at the end of 1975 the taxpayer sold then repurchased the asset for $600,000. What we have attempted to do on the capital gains side, is to start afresh as of the beginning of 1976.

Senator Connolly: Why do you disregard the $400,000?

Mr. Short: The reason we decided to do that was, first, it seemed reasonable, and, second, if we did not do that we would have in fact put companies in the position of having to reorganize, to sell all their assets, before January 1, 1976, in order to shelter their subsequent gains from FAPI. That would have put them in an extremely difficult position.

The Chairman: Mr. Short, if I come into January of 1976, when these provisions are operative, and I am still holding the property for which I have paid a million dollars, and I sell it in 1976 or in 1977 and create a loss in relation to my cost price which was ante-1976, what is my position?

Mr. Short: I am not sure I understand the example. You say you paid a million dollars for the property?

The Chairman: I have an asset which cost me pre-1976 $1 million. Sometime in 1976, when FAPI is working, I sell that asset.

Mr. Short: At a loss?

The Chairman: At a loss.

Mr. Short: We take into account that portion of the loss which accrued after the end of 1975.

The Chairman: Which means that I would have had to have an appraisal at January 1st, 1976, or December 31st, 1975, in order to establish the fair market value at that time.

Mr. Short: It would be necessary to establish that value.

The Chairman: If instead of a loss I had a gain in relation to my original cost, would I still go through the same process of arriving at a fair market value as at January 1st, 1976?

Mr. Short: Yes.

Senator Beaubien: Mr. Short, would that not mean that everyone who had an asset abroad would be working terribly hard to get that asset assessed very high at the end, if he wanted to sell, or very low, if he wanted to take a loss? If you own a property, how can you say what it will be worth on the 31st of December, 1975?

The Chairman: You are having to do that nowadays, senator.

Mr. Short: This is but a small part of the very problem which was faced when the tax on capital gains was introduced in 1972. I think it affects very few people. For those who had set up foreign affiliates in years gone by in the expectation of reaping a significant tax advantage, it may well be that, to the extent that these rules remove that advantage, the reason for the foreign vehicles no longer exists and, therefore, they will be wound up.

Senator Buckwold: The investments would be repatriated.

Mr. Short: To the extent that foreign affiliates are not wound up, these rules would come into play. But they do not penalize in any way the person who does not wrap up his foreign affiliate. But there is a valuation which is

necessary at such time as the investments acquired by an affiliate before 1976 are disposed of.

Senator Cook: That applies to everybody.

Mr. Short: Yes, it does.

The Chairman: Was there some reason why you did not make use of the tax free zone?

Mr. Short: It would have compounded the complexity, senator. I am not sure that we have not achieved substantially a tax free zone within the rule which Mr. Cumyn referred to.

Mr. Cumyn: Reading it the way you explain it now, Mr. Short, I now see that, in effect, it seems to come within the principle of the tax free zone.

Mr. Short: In a very simple way.

Mr. Cumyn: In a very simple way.

Mr. Short: That was our intention. We were guided by the principle: where possible, simplify. You can see that we were not always successful, but I think you have managed to point to one of the areas in which we were successful in this respect.

Mr. Cumyn: If I may switch to a second point, Mr. Chairman, the only other real area I have to comment on is that of rollovers. The various rollover provisions which have now been inserted here always apply only in respect of shares that are shares in a foreign affiliate, as I understand it. I was wondering what the difficulties were that impelled Finance not to give more extensive rollovers, and whether they might be prepared to consider this in the future.

Mr. Short: Yes, we will be prepared to consider this in the future. The rule to which you referred, which takes into account gains and losses only after 1975, has effectively provided a total and complete rollover for the years 1972 through 1975 inclusive.

Now, in the international area there is a need for rollovers, but those roll-overs should be consistent, to the extent possible, with the roll-overs in the domestic area that Mr. Thompson referred to earlier. We attempted, in the international area, to do what had been done in the domestic area; but you will appreciate that we did not have a full opportunity to give the domestic provisions the amount of study that was necessary. We have already received a number of representations pointing out areas of difficulty, and we want to study those fairly carefully. It is extremely unlikely that in this area of the law there will not be changes in the future, as particular instances of difficulty come to our attention.

Senator Laird: Mr. Short, in connection with this FAPI, set up in the bill, and having in mind that there is brought into charge in Canada this attributed income from offshore operations, what measure is used in fixing that income? In other words, is it by our rules, or is it by the tax rules of the country in which the income arose?

Mr. Short: There are several types of income that a foreign affiliate might have. The most common type will be the income from carrying on an active business. The rules for determining this imcome are to be provided in the income tax regulations, and a description of those rules was provided in an information release of the Department of Finance in 1971, in the month of August. For the purposes of calculating foreign accrual property income, you are really looking at income from property, as such.

Senator Connolly: Real estate?

Mr. Short: For the most part interest and dividends, though it could include real estate rental income, yes. However, the difficulties of investment income measurement are not nearly the difficulties that you have in determining business profits, where you have a host of expenses and deductions and allowances of various sorts.

Senator Laird: That is what I am thinking of.

Mr. Short: The calculation of foreign accrual property income will ordinarily follow the rules in our statute.

The Chairman: If the nature of the income is rental, will you regard that income as being from a passive source, rather than an active business source?

Mr. Short: I find it difficult to answer that other than to say that it is a facts and circumstances situation. You may be in the hotel business, which is a very active business—

The Chairman: Yes.

Mr. Short: —on the other hand you may simply have an investment—

The Chairman: In an apartment, for example.

Mr. Short: —in an apartment building, in which you have no management whatsoever, but where your principal activity is banking the rent that you receive. These are the extremes. The one is quite clearly an active business, and the other is quite clearly investment income. You do get problems in the grey area between those extremes.

The Chairman: You might operate a dining room in the apartment building, for example, or you might operate transportation services. That would give the character of active business to it, would it not?

Mr. Short: Ordinarily it would, yes. I would be perhaps somewhat surprised if this particular problem should prove to be a troublesome one in practice. People who run hotels are in a very active business. On the other hand, people who own a condominium which they rent from time to time, are not ordinarily in an active business. Those are really the sorts of things that are likely to be in play. I question that there will be a broad, grey area into which there will fall very many practical problems.

Senator Laird: Could I take you a step further, though? Let us take the case of the origin of the attributed income being in the United States. If a problem arose as between the two jurisdictions, would it be possible to take advantage of the provisions of Article XVI of the Canada-U. S. Tax Convention, with any hope of relief?

Mr. Short: Oh, I think the answer to that is quite clearly "yes". Article XVI provides what is referred to as the competent authority, or mutual agreement procedure, by which Revenue Canada and the Internal Revenue Service may get together wherever there is a case of real double taxation to determine ways in which it might be resolved. Quite clearly it is of broad application. It could certainly be used to resolve a problem of double taxation as between Canada and the United States should that arise out of FAPI.

The Chairman: Of course, in some countries you would not have treaties, so that procedure would not be available.

Mr. Short: That is right, Mr. Chairman: I am not sure that you are not seeing in these provisions a potential for double taxation that does not really exist.

The Chairman: Frankly, that is what I am seeing, and I am very happy to hear you say that it does not exist.

Mr. Short: The basic concept behind FAPI is to ensure that the tax that is paid on this income is equal to the tax that would have been paid had it been received by the taxpayer himself rather than by a foreign affiliate. When I say that the income has borne that amount of tax, I mean that amount of tax in total, either abroad or in Canada. To the extent that income that falls into the category of foreign accrual property income has borne a tax abroad, there is a direct relief against the Canadian tax. I believe that the relief provisions should work fairly effectively. I have not seen an example where they do not function quite reasonably.

Mr. Cumyn: Mr. Short, reverting to the question of real estate which would be held by a controlled foreign affiliate, regulation 1102(3) of the act presently prevents non-resident persons from depreciating property situated outside of Canada. That would effectively block the foreign affiliate from depreciating property outside of Canada. Would this be changed?

Mr. Short: Yes.

Senator Connolly: He would be able to depreciate it?

The Chairman: Oh, indeed.

Mr. Cumyn: At Canadian rates, presumably.

Mr. Short: Yes.

The Chairman: I would say it would not be at rates higher than Canadian rates.

Mr. Short: Conceptually the way we have dealt with this in the area of calculating business earnings is to take whatever rate the foreign country's tax system allows. If there were a fast write-off, then we would allow the foreign country's rate to govern. The total amount of the deduction which you could get for depreciation of an asset over time would be governed by the Canadian rules, but the timing of it would be governed by the foreign country's rules. By that I mean that not more than 100 per cent of the cost of real estate would be deducted as depreciation but whatever rate of depreciation the other country allows would be the rate that we would accept.

Senator Molson: Would these be the conditions regardless of the treaty status of the countries involved?

Mr. Short: Yes.

The Chairman: What would be the position of recapture in those circumstances?

Mr. Short: If the real estate was not real estate used in an active business, then the net rental income derived from it would be foreign accrual property income. Any depreciation on that property would also fall into foreign accrual property income, and any gain over and above—the amount of proceeds in excess of the original cost—would be taxable. This taxable capital gain would also enter into foreign accrual property income.

Senator Laird: Would that be by virtue of our regulations?

Mr. Short: Yes. We look to our tax law for determining the nature of the income and to the other country's tax law for the timing of its inclusion or deduction as the case may be.

Mr. Cumyn: Mr. Short, the regulations which will add so much flesh to the bones of these FAPI provisions are yet to be made public. Can we assume that they will become public shortly after Bill C-49 becomes law?

Mr. Short: Yes. I have a greater interest, perhaps, than anybody in this country in getting those rules published as quickly as possible, and I can assure you that it is my intention to press to have them released with no more delay than is absolutely necessary.

Senator Cook: The tax comes into effect when?

Mr. Short: 1976.

The Chairman: Any further question? Mr. Cumyn tells me he has one more question.

Mr. Cumyn: Mr. Short, is it envisaged by the department that difficulties of some of the larger groups in getting all of the information in from their various foreign companies around the world on time could delay the normal production of their income tax returns in which FAPI must be reported, and has any thought been given to permitting them to file separately at a later date in respect of their FAPI?

The Chairman: I think we made that point in our interim report in 1971.

Mr. Short: When these provisions take effect we will undoubtedly discover administrative problems we have not imagined up to now, but I would not anticipate the amount of difficulty that seems implicit in your question. I say that for two reasons; one is that I do not think that many of the bona fide multinational companies will find themselves concerned with the FAPI provisions, and secondly, while I admit there will be reporting requirements, these will be no more onerous than similar reporting requirements in the United States and some other countries. Indeed the Canadian shareholders will have most of the information available to them in any event simply because of the reports they obtain from their overseas subsidiaries and affiliates.

Senator Cook: Have you any idea as to what this tax is likely to yield?

Mr. Short: Nothing. If FAPI works effectively, people will not establish trusts and corporations as tax avoidance vehicles in some of the tax haven countries, and therefore we could look to no revenue. I am not sure that they will be that effective, and therefore I think it is possible that we will derive some revenue. But I am afraid, senator, that I could not at this stage give you an estimate as to how much that might be. Whatever revenue is produced is evidence that the provisions are less than wholly effective in their objective.

The Chairman: I am sure there will be some shifting of operations from countries which have been tax havens and that may produce tax revenue for Canada.

Mr. Short: Yes, but it would be impossible to make an estimate as to how much that would be.

Senator Connolly: If multinational corporations which are active corporations are not to be affected, I take it that most of the impact of this will fall on individuals who establish foreign trusts or companies for the purpose of tax avoidance in tax havens. Is that so?

The Chairman: Tax havens will certainly be affected by the FAPI provisions.

Senator Connolly: Am I right in what I say?

Mr. Short: I would say that it is substantially correct.

Senator Molson: This will be no deterrent to foreign affiliates and subsidiaries that serve a useful purpose other than simply tax avoidance?

Mr. Short: That is right.

The Chairman: If there are no further questions, shall we adjourn until tomorrow morning at 9.30 a.m.? Is it agreed?

Hon. Senators: Agreed.

The Chairman: I want to thank you very much, Mr. Short, for being so explicit and expeditious.

The committee adjourned.

Ottawa, Thursday, March 13, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-49, to amend the statute law relating to income tax, met this day at 9.30 a.m. to give further consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, I can tell you this morning that the report I have from the minister is that he will be here at or about 10 o'clock. I told him that, to convenience him, as soon as he came we would stop what we were doing and give him an opportunity. In the meantime we propose going on with Mr. Thompson. Mr. Cumyn has five or six points that we had discussed with him and he wants to get his answers on that. Then we have a few questions we want to discuss with Mr. Short. After that we will start into partnerships with Dr. Allan, I believe, if there is still time before the minister comes.

Senator Connolly: Mr. Chairman, do you intend to sit this afternoon?

The Chairman: Yes. I could tell you what I am hoping to do. I hope that we might finish the evidence part of it by 12.30 today; there is not that much more left. Then we have this afternoon to sit and talk about the kind of report we are going to make. If we can agree on that, we should be able to put the report in and get it out of the way, if the Senate sits this evening, which I do not know. That is the plan, and plans at this stage are subject to change.

Mr. Hierlihy: Mr. Chairman, perhaps I might lead off. Mr. Thompson, clause 6(4) introduces new subsection 13(7.1). It is on page 11. It incorporates the wording included in the old paragraph 13(7) (e) referring to grants or assistance receivable and refers to the amount the taxpayer has received or is entitled to receive. There is some question as to whether this entitlement to receive the amount is an entitlement to receive the amount in the year or an entitlement to receive the amount which will not be received until subsequent years. Perhaps Mr. Davidson might be called on to comment on this provision as well.

Mr. Thompson: Mr. Chairman, this relates to the adjustment of a capital cost of depreciable property wherever the taxpayer receives a grant from the government. The question being raised relates to the time at which the amount of this grant would reduce the capital cost of the depreciable property. The operative words are:

> Where the taxpayer has received or is entitled to receive assistance from a government

This particular wording is the same wording that was in the act before it would be amended by this bill.

The changes which are being made in Bill C-49 relate really to the type of assistance which is taken into account. The wording in the present act was causing a bit of difficulty in interpretation and the purpose really of this particular amendment is to describe in more detail the type of government assistance which would reduce capital cost.

The point which is being raised by Mr. Hierlihy relates to the wording in the present act concerning the timing at which the capital cost would be adjusted. We have not been aware of difficulties being raised in this respect but perhaps Mr. Davidson could clarify the view of the administration and if there are further questions we will discuss it further.

Senator Connolly: Mr. Chairman, what is the specific question?

Mr. Hierlihy: The question is when the assistance should be offset against the capital cost of the property. I am thinking of a situation where a person has, say, constructed a new plant and he may be entitled to receive a grant in respect of this new plant.

Senator Connolly: From DREE or something like that?

Mr. Hierlihy: That is right. He undertakes construction knowing that he is going to get assistance. The question is, does that assistance offset his construction cost immediately, or when the amount is received. The point is that under some programs the assistance may be paid over a period of time, a few years, and the question is whether it will be offset as received or in the year in which the taxpayer has received a specific amount, or right after that when the full grant is approved. I might note that the last time I looked at the interpretation book, it referred to "entitled to receive in that year" which, to me, would imply a specific amount that he is entitled to receive in that year.

The Chairman: That would mean he would be operating on an instalment plan?

Mr. Hierlihy: Yes. It is the clarification of this that I am referring to.

Mr. Davidson: Honourable senators, as far as Revenue Canada (Taxation) is concerned, normally the rule would be that he would be entitled to receive in that year. I think the law is written this way so that if a man has fulfilled all the conditions precedent and it is just a delay in payment which may be because of a postal strike or something like that, it would be taken into account when he becomes entitled. I think that is really all it means.

The Chairman: As to when he may be entitled to receive this, it depends on the arrangements with the authority that is making the grant or the payment. The terms of payment of the grant may be on an instalment basis and when the work progresses so far he is entitled to receive a payment.

Mr. Davidson: Exactly, Mr. Chairman, and he is not entitled to receive the rest until he has done something further.

The Chairman: That is right, so he is going to have to bring it into the cost of the project for depreciation purposes in instalments as he becomes entitled to or receives the payment.

Mr. Davidson: Exactly.

Mr. Hierlihy: I have a further question on this provision, Mr. Chairman. There was a decision of the Federal Court of Appeal very recently, *The Queen v. G.T.E. Sylvania*, in which the Quebec reduction of tax resulting essentially from a fast write-off was attacked, if I may use that expression, by the department, the reduction of tax being deemed to be a reduction of the capital cost of certain assets to the taxpayer. It was fought in the courts and the taxpayer won, the court holding that where Quebec saw fit to reduce its corporate tax this could not be construed as being provincial assistance and the depreciable capital cost of the property acquired by the taxpayer could not be reduced under this provision. The very same provision has

been amended by the introduction of the words "deduction from tax" which would effectively wipe out the effect of the Federal Court decision. I am wondering if Mr. Thompson would comment on the policy where he feels this does not impinge on the provincial statute or provincial taxing.

Mr. Thompson: I cannot explain all the reasoning behind the government policy, since I am not a policy spokesman. I would comment, though, that this court case to which you refer is evidence of the ambiguity of the present provision in the law. Furthermore, if the present act really does have the effect which the court has decided, it does run counter to the established policy of the federal government. This question has come up from time to time, whether the provincial tax credits or other subsidies should reduce the capital cost of depreciable property. The federal government has consistently in the last few years stated the position that all forms of such grants should reduce the capital cost for depreciation purposes. In other words, the value of the government assistance would reduce the cost which the taxpayer could claim for tax purposes.

The Chairman: We have this question coming up in connection with shipping subsidies. In that respect it is not permitted to include the subsidy as capital cost for purposes of write-offs. It would have to be deducted, really leaving the net.

Senator Connolly: That seems fair.

Senator Flynn: Are you referring to the owners of a ship?

The Chairman: I beg your pardon?

Senator Flynn: You are not referring to a shipbuilding company, but to a ship owner?

The Chairman: That is right, the owner.

Senator Flynn: If they pay less, I suppose that the cost for depreciation purposes is the price paid to the shipbuilder.

The Chairman: That is right.

Senator Flynn: Then in that case the subsidy of the federal government has already been taken into account. It enables the shipbuilder to offer a lower price.

Senator Connolly: If the contract is written in the manner you suggest.

Senator Flynn: The subsidy has already been deducted from the price paid by the shipowner.

The Chairman: That is right.

Senator Flynn: So I do not believe that problem would arise.

Mr. Cumyn: In this case, if I may point this out, senator, it is a reduction of provincial tax.

Senator Flynn: Yes, I agree with that and we are attempting to ascertain whether the problem is similar with respect to the shipbuilding subsidy, but in my opinion it is not.

Senator Connolly: Are you suggesting that a reduction of the provincial tax should not affect it?

Mr. Cumyn: Yes, I am.

Senator Connolly: Because it would not be in the nature of a capital grant, or a grant that affects the capital value of the property.

Mr. Cumyn: Yes, I think also it takes away the province's leeway to have a fiscal policy of its own. They are saying that if a certain type of investment is made during a certain period they will effectively reduce the tax burden. They will not subsidize the acquisition of the building, but will, in one way or another, reduce the provincial tax burden.

Senator Connolly: You may have a point there.

Mr. Cumyn: The federal government says no, they do not think the province should have a fiscal policy and they intend, at least to a considerable extent, to nullify the effect of that policy by reducing the capital cost of these assets.

Mr. Thompson: Mr. Chairman, part of the difficulty is drawing a distinction between the treatment of different types of assistance. If, for example, Quebec had chosen to give outright grants, rather than a reduction in tax, there would have been no doubt under the tax law that it would have reduced the cost and they would have had to take into account that tax effect in establishing the amount of the grant.

Senator Buckwold: What would be the situation in the case of a municipality which gave free municipal or local taxes? Would that also reduce the capital cost allowance, or would it just be that expense?

Mr. Thompson: In effect, that is correct; they would not have the expense and, in effect, to that extent it would be taxed immediately.

Senator Buckwold: But you would not use that in addition to the fact that it would not reduce the expense to reduce the capital value?

Mr. Thompson: No, it would come into income by reducing the expense otherwise deductible and that would be the end of that. However, that is another illustration of the need for consistency in the tax rules between different forms of assistance.

Senator Molson: What is the difference between a municipal tax and a provincial tax in this context?

Senator Beaubien: A municipal tax is not an income tax.

Mr. Thompson: The intention is to try to treat them all equally.

Senator Flynn: A municipal tax is usually a tax for services, not related to any specific asset.

The Chairman: The point under discussion, as I understand it, does not refer to municipal taxation; that is an expense.

Senator Flynn: That is right.

Mr. Thompson: Relief from municipal tax is an illustration of another type of government assistance which affects the taxable income.

Senator Cook: It does not cause any difference, because it just cuts the cost.

Mr. Thompson: In effect, it is taxed.

Senator Molson: Relief from provincial taxation also reduces cost.

Senator Cook: Not cost.

Senator Molson: Yes, it does.

Senator Connolly: When relief from municipal taxation is obtained a deduction is lost. Is that added back?

Mr. Thompson: No, it just does not appear.

Senator Connolly: It just does not appear on the books at all for income tax purposes?

Mr. Thompson: That is correct when, in effect, the income and taxable income has been increased.

Senator Connolly: Then you go to the question of relief from provincial income tax. How does that affect the capital value for depreciation purposes? It is a current expense.

Mr. Thompson: The value of the tax reduction in the year would be deducted from the capital cost of the depreciable asset.

Senator Cook: How do you arrive at it?

Senator Connolly: I wonder why, though?

Senator Molson: Over what period? I find this a difficult conception.

Mr. Thompson: In a technical sense there can be some problems in identifying the exact amount in the year, but I assume that the Department of National Revenue has worked out a method of doing this in the case of the Quebec law.

Senator Connolly: I can understand that in connection with a capital grant. That would not be available for depreciation, but in the case of relief from a portion of provincial income tax it is a current account due by the company. How does it affect the capital value of the property?

The Chairman: That is the position taken in the bill, that it does not, therefore it cannot be reduced from the capital cost.

Senator Flynn: It is directly related.

Senator Connolly: The bill brings it in; it says it does.

Mr. Cumyn: The bill provides that there is a real cost but now it will be reduced by the amount of the forgiveness of the provincial tax. Normally, income tax, whether provincial or otherwise, is not a deduction. Profit is something which comes afterwards. It is the sharing of the profits, if you like, with the public.

Senator Flynn: Yes, but the tax in this case, as I understand it, would be only that portion which is related to the specific item.

Mr. Cumyn: That is right.

Senator Flynn: It is not a general tax, such as a municipal tax. It is that portion of the reduction created by the reduction granted by the provincial government.

Mr. Thompson: But it is all value to the taxpayer. If I could refer to the municipal tax reduction again, municipal tax is normally a tax for services rendered and the municipality is still rendering the services. If you adopt the other side of the argument, you would be proposing that if the municipality lowered or repealed its municipal taxes because a plant is established in a certain area, that would have to be excluded, or it must be pretended that the municipal expense is still being paid, even though it is not.

Senator Flynn: Yet the tax would not apply necessarily to the new building, which is new equipment. It could apply to the whole property, to the land and so forth. If you could relate that part of the municipal tax which is attached to the new plant, then possibly you would have ground to apply the same rule.

Mr. Thompson: Yes, but that just affects the timing of it.

Senator Flynn: I do not know what the situation is in the other provinces, but in Quebec practically all exemptions have now gove overboard.

Mr. Cumyn: This problem arises in Ontario also, senator.

Senator Flynn: I would imagine so, but I am saying that in Quebec the exemptions have practically disappeared.

Senator Cook: Am I to understand that it comes about because the province gives an accelerated depreciation?

Mr. Thompson: In this case, the Quebec investment allowance is an extra deduction from income based on a certain percentage of the cost of the depreciables.

Mr. Cumyn: It is not really a capital cost allowance. It is a deduction from tax. In other words, if you spend $1 million, so much percentage of that, apart from depreciation, will reduce it.

Senator Connolly: Who opened this can of worms?

The Chairman: Shall we move on to the next question?

Mr. Herlihy: Clause 7(2) and (3), on page 19. It would appear that this amendment was intended to apply to those situations where land is held as inventory. This was the understanding I had. The problem is in the use of the word "development," in that it extends beyond that situation. It would also appear to apply to the situation where land is acquired and there is an intention to construct a building within a couple of years. In that latter situation, any interest and taxes which are disallowed effectively are lost. If the land is inventory, there is a provision that the cost of inventory is increased by these interest and tax charges disallowed; whereas if the land is held for future development, by way of an apartment building, and so on, it would seem that we would lose these charges.

I was going to suggest that if it is intended only for that situation where land is held as inventory, it might be clarified where development might be expanded on. If it is intended to apply to the situation where land is acquired with the intention of constructing a building, perhaps the disallowed interest and taxes could be accumulated and either allowed as an offset against subsequent revenue or perhaps included in the capital cost of the building and thereby be eligible for depreciation.

The Chairman: We should perhaps ask Mr. Davidson how he would interpret "development?"

Mr. Davidson: I think it could include the land held for future development as well as the ordinary inventory sense of the word "land inventory".

The Chairman: You say that if land is acquired and nothing is done with it except that it is held for future development, in that case it would not be inventory. Is that right?

Mr. Davidson: I think it would be included in these rules here.

The Chairman: But you would not be entitled to deduct interest and taxes as part of the carrying charges against other income?

Mr. Davidson: That is right.

The Chairman: If you had any income from that land, you could make your deduction against that.

Mr. Davidson: Yes, Mr. Chairman.

Senator Hays: You could capitalize it when you build.

Mr. Davidson: Yes, that is right.

Mr. Herlihy: Yes. So it could be carried forward and added to the cost of the building.

Mr. Davidson: Of the land. It is the cost of carrying the land that we are talking about. It is carried forward to the cost of that land.

Mr. Cumyn: Which is useless, because it means you cannot depreciate it.

Mr. Davidson: It is useful if you sell for profit.

The Chairman: That is right.

Senator Hays: But it cannot be capitalized with the building.

Mr. Davidson: No; it is capitalized as part of the cost of the land.

Mr. Hierlihy: My question is, why is there relief where the land is held as an inventory item, because effectively we will get a write-off when the land is sold; whereas if the land is held for the purpose of constructing an apartment building, there is no provision for relief except if that land is sold some time in the future as part of the capital transaction?

Mr. Thompson: One of the general intentions of the amendment is really to regard the interest or carrying charges as part of the cost of the asset. If it is land that is held for development and retention, as a rental property, the interest and taxes are really regarded as part of the cost of the land—in other words, in the same way as the original cost of the land. I would think this would come close to an ordinary economic or financial reporting view of the cost.

Senator Connolly: It is a common sense way of doing it.

The Chairman: What is the next point?

Mr. Cumyn: We come now, Mr. Chairman, to the capital gains area, clause 20, which amends paragraph 48, on page 35. It covers the rather difficult rules applicable where we have persons coming into and leaving from Canada. The deemed realization of capital gains has been a real bone of contention in this field in the past. One of the difficulties which these provisions do not deal with, and which is similar to the one I mentioned yesterday, is that where someone enters Canada who has accrued losses on his capital property, he will not be able, as I understand it, to take these into consideration in computing his losses or gains when he subsequently realizes an asset. I am wondering if Mr. Thompson could comment on this lack in what seems to be a fair and equitable rule.

Senator Connolly: Is this an application of the FAPI rules?

Mr. Cumyn: No. The capital gains rule says that if someone emigrates to Canada, Canada will not tax him on his gains or losses prior to his coming to the country. He will be deemed to have acquired all his capital property, with some exceptions, at the time he enters the country. The specific problem which I see here is where a man enters the country holding assets which are worth only $50,000 and which cost him $100,000. He is established here, he becomes a citizen, and he sells one of those assets. Let us say the total sale is $75,000, but in reality his own loss is $25,000.

Senator Laird: It is the date of fixing the cost base that is bothering you?

Senator Flynn: So far as Canada is concerned, he comes in with his wealth, baggage and luggage, and he is valued at that time. I do not see that we should worry about the losses suffered anywhere else.

Mr. Cumyn: It is a principle of taxation that you are taxed on your ability to pay. If you do not really make a gain you should not be taxed on a notional one.

Senator Cook: What about where he comes in and his property has increased in value over his cost?

Mr. Cumyn: That may be some other taxpayer; it may not be the same taxpayer.

Senator Cook: I quite agree, but how do you deal with that one?

Mr. Cumyn: Then the accrued gain would be disregarded, and I think that is fair.

Senator Beaubien: Should not the tax-free zone apply? His cost is 100, he comes in at 50, then the zone between 100 and 50 is non-taxable. Would that not apply?

Mr. Cumyn: That is what I would suggest.

Senator Beaubien: It does not in this case?

The Chairman: No.

Senator Connolly: The real objection arises from the fact that he is revalued on income.

Mr. Cumyn: Yes.

Senator Connolly: Surely we are all subject to something like that.

Senator Beaubien: No, we have the tax-free zone.

Senator Flynn: We have the 1971 values anyway.

Senator Connolly: The 1971 D-Day values screw us up.

Mr. Cumyn: There we do, as Senator Beaubien says, have the tax-free zone. If you have accrued losses prior to December 31, 1971, they will not be disregarded in computing your tax liability today when you dispose of those assets. If you emigrated to Canada on January 1, 1975, your position is quite different.

The Chairman: Maybe it is so different that you should be able to bring your losses with you.

Mr. Cumyn: Perhaps Mr. Thompson could comment on this. Maybe he sees some justification on this that I do not.

Mr. Short: I will comment on it. It seems to me that we are dealing with a provision that is not in this bill at all. This rule has not been altered in any way by the bill, so the question is really, "Why didn't you do something?" There are a number of ways in which the problem of measuring the gain for somebody who comes to Canada, or somebody who leaves Canada, might be dealt with. Countries seem to adopt a variety of rules. For example, the United States would tax a person who went to the United States on the whole gain, regardless of the portion of it that accrued before he entered the United States. This has been a very vexing problem for Canadians who held property and were unable to dispose of it before entering the United States; they were taxable on the full gain, even though no part of it, or a very small part of it, may have accrued after he established United States residence.

That rule did not appeal to us at all and we adopted a basic approach that we look at the person's situation for the period of time during which he was in Canada. This rule has several advantages. One of the important advantages is administrative simplicity. It is extremely difficult to go back and determine the original cost of property of somebody who was not in Canada at the time he originally acquired it. It would add considerable complexity to the law to add a tax-free zone in this area.

I think this time might be appropriate for me to say that I hope you will accept that explanation.

Senator Flynn: You are preparing the ground for the minister.

The Chairman: Since the minister is now here, we will postpone further consideration on these questions.

Mr. Turner, I think you have been briefed on the problems we were discussing yesterday afternoon and on which we have deferred further consideration to hear from you.

The Honourable John Napier Turner, Minister of Finance: Mr. Thompson has conveyed some of the concerns and questions of the committee to me. I do not know whether you want me to deal with the questions that I had relayed to me and then give you some responses. Is that the way to handle it?

The Chairman: Yes.

Hon. Mr. Turner: Just by way of background, the purpose of the resource taxation measures in the May 6 budget, and later the November 18 budget, was to restore to the federal government, the federal Parliament, and the people of Canada a fair share of resources revenues. Because of unilateral action on the part of some provinces the Canadian people's share of those revenues had become intolerably low. I am talking about unilateral action by the Province of Alberta on petroleum and gas; of Saskatchewan in respect of petroleum and now in respect of potash and other mining minerals; of Manitoba, which was contemplating a mining tax; of the Ontario mining tax; and then of course of British Columbia in mining, oil and natural gas.

The old standard royalty arrangement, which was a flat payment against a unit of production or volume—so much a ton, so much a barrel, so much an ounce—had been converted by the provinves into disguised taxation, because those royalties became escalated payments against movements of price and movements of profit. All sorts of techniques were being used, aside from the royalty mechanism. There were joint venture agreements, which took a share of profits, and marketing agencies whereby the royalty or the economic rent of the province was taken in the form of the difference between the price paid to the producer and the price sold to the consumer.

For these reasons we had to move to disallow those royalties as an expense for federal tax purposes. There is no constitutional issue there. For federal tax purposes we can decide which expenses are deductible and which are not deductible.

In any event, the questions were put to me were these. First of all, in calculating the share of revenues why was not the export tax considered as a federal share of that revenue in working out the percentages rather than a transfer payment from one part of the country to the other, or from producer to consumer? There are a number of reasons for that. During the last election campaign I listed them in a speech to the Calgary Chamber of Commerce. That speech was not one of the biggest hits of all time!

Senator Flynn: You mean, as far as the result was concerned.

Hon. Mr. Turner: I would like to summarize now what I said then. First of all, the export tax was the mechanism used to facilitate the domestic price arrangements made by the Prime Minister and the premiers. All ten premiers and the Prime Minister of Canada agreed on a uniform price across Canada of $6.50 a barrel, with transportation worked out. In order to achieve that we used the mechanism of the export tax, which took the difference between $6.50 and the export price to the United States, and we transferred that in effect to consumers east of the Ottawa Valley line. Initially the account was in balance. In fact, for 1974—I do not want to be held quite to these figures—we took in roughly $1.5 billion and paid out $1.4 billion. It is what the accountants call a pass-through. As a matter of fact, when you look at the extra equalization payments that the federal government has to pay to the provinces because of the increased revenues, to Saskatchewan and Alberta particularly, the increased equalization amounts to about $200 million or $250 million for 1974. If you take the entire oil account subsidy, plus equalization, less the export tax that we take in, we are about $150 million in the red on oil in 1974. Because exports will be phased out over a period of years to the United States, because of our reserve position, the revenues from any export tax will dwindle and the subsidy remains the same, unless the domestic price of oil goes up.

The last reason why we did not consider the export tax an an element in the revenue-sharing for our own calculations is that the export tax will gradually disappear. We will be moving towards the international price. Obviously the prime element in the bargaining between the Prime Minister and the premiers at the forthcoming First Ministers' Conference on April 9 and 10 is what the price will be, how much it will move up from $6.50 a barrel. I do not even want to speculate. Obviously, as the price moves up there is less export tax, because the differential between the domestic and international price changes and also because exports are facing down anyway and because there is less subsidy which we will have to pay on the other side. So the export tax will be a diminishing concept. Moreover, from

the balance of payments point of view, as exports start to phase out we will have to move domestic price up anyway because then the subsidy will not have any revenue carrying it. The arguments that the premiers and the Prime Minister of Canada will have to have in front of them will be as to how they set that price, how far it goes up, and they are easy to summarize.

In favour of moving the price up is the fact that the export tax starts to phase out and improves our relationship with Alberta, Saskatchewan and British Columbia. Our balance of payments position improves. It is a built in conservation measure, the more the price reflects the international price. It is an added inducement for bringing in new resources.

Against putting the price up, although as I say the price will move up, is the fact that you do not have inflationary effects. That is why of course Mr. McKeough, the Provincial Treasurer of Ontario, was speaking about Ontario's position. They are concerned about having their price move up. For every dollar per barrel the price of oil moves up, it is reflected by about half a point on the consumer price index. For every dollar a barrel of oil it takes $1,500,000,000 out of the economy in terms of the diminishing purchasing power. So it has a macro-economic effect. Those are the arguments that will be before the Prime Minister and the provincial premiers.

That is basically why I do not consider an export tax as part of the revenue picture for the federal government. We are looking at a mature tax system over the next decade, and those percentages were geared on what we were to get under the corporate tax, what the provinces would get out of their royalty and so on as property tax. And were not considered to be part of that ten-year calculation, for the reasons I have given you.

The second question, as I understand it, Mr. Chairman, related to the industry share of the production revenue. How can the industry prosper for such a small share—or so the argument went. The Canadian Petroleum Association tabled figures and indicated that they believe that there is a tax and royalty burden of about 90 per cent. I would like to summarize my responses to that, if I may, sir.

The Chairman: Yes.

Hon. Mr. Turner: First of all, the Canadian Petroleum Association table is in terms of cash flow. It assumes that the cost of new reserves and of all exploration and development expenditures, is going to come out of current cash flow, current revenue. That is all very well. I do not know any other industry in the country which can finance the expansion completely out of working capital or cash flow—without going to the market, either for debt or for equity. The essential issue which we looked at was the profitability of the petroleum industry, the rate of return on a full life cycle basis over a period of years. Our projections indicated an adequate rate of return after giving effect to the federal budget of November 18, 1974 and the subsequent modification by the provinces, particularly Alberta.

Our officials discussed, and I discussed with ministers in Alberta, what they thought was a fair percentage of the production revenue, for the industry. We agreed that it was somewhere between 30 and 35 per cent. The November 18 budget and the subsequent moves by Alberta puts the industry in that range. After Alberta had made some positive moves after my budget, I asked the leading members of the international companies, the leading executives of international companies, to come in and see me and Mr. Donald Macdonald, the Minister of Energy, Mines and Resources.

I did not expect them to come in with grateful smiles; we all know it is a bargaining game and that they are going to try to shake the tree a little more. I told them to go home with our figures and work out the figures again with Alberta and see whether they just could not adjust their prospects. We think there is sufficient incentive now for exploration and development and we will be seeing the chief executives of those companies as they work those figures through their own computers and come back to us. Even in terms of cash flow, the funds available to industry for exploration and development are now very substantially increased. In 1975, this year, the funds available are almost $3 billion and that will cover twice the level of exploration and development in constant dollars, which took place in 1973. And if financed further by debt, they will have even more funds. I say debt, because the equity markets are still not fertile enough to contemplate that type of financing.

The next question was, the federal share of production revenue. The question, as I understand it, was: Why is the federal share of production revenue increased relatively more than the provincial share? I looked at the Canadian Petroleum Associations table and it showed that for $6.50 price, which we now have, the federal share of production revenue, after exploration and development, has risen from 11 per cent to 25.4 per cent, compared to an increase for the provinces from 63.9 per cent to 64.5 per cent. That is an old game, too; it depends on when you start moving these percentages.

Let me try to summarize my reaction to that. The CPA table has been prepared on a different basis than the federal estimates. It is difficult to comment on those differences briefly. Let me put the changing relationships between the federal and provincial shares in terms of the federal estimates, the figures we gave to Alberta and to the industry. Prior to 1972, before the provinces became ambitious and imaginative, in the way of taking money out of the mineral industries,—prior to 1972, due to the federal tax incentives—depletion, depreciation, immediate write-offs for exploration and development—the federal share, as a ratio of the provincial share, was in the order of 1 to 10. In the period from 1947 to 1972, the 25-year period from the war, the federal government took $400 million out of the oil industry, the provinces took $5 billion. I suppose we would have lived with that, because we expected, now that the industry by 1972 was turning the corner and becoming a mature industry, that the incentives had run out and we would start getting our share of those revenues.

The people of Canada had deliberately encouraged the oil industry to get into production, by allowing that cash flow to build up because of the depletion and depreciation allowances. We said, now the people of Canada will get their fair share. If provincial royalty arrangements had remained unchanged in 1972, the federal government might have looked forward to a relative share of about 1 to 2¼ as our depletion allowances and depreciation allowances ran out, say 15 per cent compared to 34 per cent—15 per cent federal to 34 per cent provincial, of production revenue, and the industry getting the balance, about 51 per cent.

What happened? The changes in provincial royalties would have left the ratio at 1 federal to 6 provincial which is indicated even in the CPA table. This forced the federal government, as I say, to try to obtain a fair share of

petroleum revenue for all Canadians and to protect the eroding federal tax payments. If the provinces were to play this game with forestry, instead of a flat stumpage they would take an escalated stumpage. If Ontario were to play the game of manufacturing we could end up with a residual tax base that really would not have the fertility to redistribute among regions and conduct the fiscal policy needed for stabilization purposes.

In terms of production revenue, if we had done nothing after a unilateral provincial action post-1972, the federal share for 1974-79 would have dropped to 8½ per cent compared to 47 per cent to the provinces. I do not think that is satisfactory. The present estimates, after the November 18 federal budget, in which we pulled back on the exploration expenses and increased the provincial abatement, are 18 per cent federal and 46 per cent provincial. In other words, 1 to 2½, which is roughly what we would have expected if the provinces had not done anything in 1972.

Senator Connolly: What were the first figures?

Hon. Mr. Turner: 18 per cent federal and 46 per cent provincial.

Senator Connolly: Those figures are after the Alberta action?

Hon. Mr. Turner: After the Alberta response. The other question I have been asked a great deal throughout the country and particularly in Alberta is: What if normal royalties—whatever a "normal" royalty is—were still allowed? The figure of 22 per cent is used, because that was the Alberta figure pre-1973. With the increase in provincial royalties which has now taken place it would still leave the federal government with an inadequate share, say 13 per cent in relation to the provincial share of 47 per cent. We would have moved down from 18 to 13 and they would go up from 46 to 47 if we were to allow a 22 per cent royalty.

Our trouble is that if we were dealing with royalties we might be able to contemplate it. If we were dealing only with royalties. However, the royalties come as disguised tax and the provinces, with skilled advice, are using the techniques I have described to you. They are using marketing agencies, petroleum corporations, joint venture agreements and taking part of the produce in kind rather than in money.

I have asked my guys here how to draft a statute that could level out at 22 per cent on all these various techniques and they tell me that it is technically impossible to achieve. So I said to the provinces: "Let's break clean; the royalty is no longer a royalty, it is a disguised tax. I am not challenging your right to tax; I am going to give you half the road. We will increase the abatement so that if we tax at 50 per cent, the provinces will take 25 per cent of the 50 per cent and we will take 25 per cent of the 50 per cent. The companies will know where we stand and they will know where you stand. Take that 25 per cent with any type of gimmick, technique or scheme you wish."

The final question, Mr. Chairman, was with respect to American competition: Will oil exploration not go to the United States because they are giving, so the argument goes, a better deal to our oil producers to do exploration and development than we are?

First of all, pricing and tax arrangements in the United States are continually changing and if you have been following the congressional debates on depletion allowance, with an overwhelmingly democratic Congress, we rather wonder how long that will last.

The second response, of course, is that exploration in Alberta is now eligible for very substantial incentives, particularly provincial.

Senator Connolly: Is that a further withdrawal?

Hon. Mr. Turner: No, senator; through you, Mr. Chairman: their incentives in Alberta are geared to exploration in Alberta. If a company explores and develops in Alberta their incentives are very strong now. So, taking it with the federal tax, they have a lot of leeway there.

Senator Connolly: It will reduce the provincial take, though?

Hon. Mr. Turner: The provincial take; well, they have about $900 million now in a little capital account and they will be building it up by about $1.5 million a year for a while.

Senator Hays: They are going to have elections every year now.

Hon. Mr. Turner: Most of the action, Mr. Chairman, will be offshore and in the frontier zones, which are under oil and gas land regulations. We have jurisdiction, not only over the federal tax, but over the federal royalty, or the federal take. We will have to ensure that the combined rent plus tax is such that it gives sufficient incentive to the company to open up our North and bring in the reserves we need. That is within our control. So, obviously if we are not meeting world competition in terms of those incentives, we will have to think again about it, but we have the ability to do it.

I hope I have not taken too long, Mr. Chairman.

Senator Hays: Mr. Minister, I always enjoy listening to your speeches. Taxation always seems to me like church: everything to sell and nothing to buy, sort of thing.

First, how are you treating the Northwest Territories oil to which you just referred, saying that is our oil? Of course, we have production, but we do not have too many deliveries.

Hon. Mr. Turner: I believe the companies are concerned that we publish our rates and regulations pretty quickly up there. Judd Buchanan, the Minister of Indian Affairs and Northern Development, Donald Macdonald, the Minister of Energy, Mines and Resources, and myself are seeing what we can do to accelerate that process. Once that is firm and once we can give an undertaking that those are the ground rules and there is some certainty to it, in my opinion the mineral industries—you know, they have a legitimate complaint in that they have not known what the ground rules would be and the mining industry publishes those advertisements in which they say they have been squeezed in the sandwich. However, these arguments over money have been with us ever since Confederation. I thought the crisis labelled the "Constitutional crisis" was overblown. Your question, though, was what we intend to do about the North?

Senator Hays: Yes; what are the taxing policies in so far as the North is concerned? You have not decided yet?

Hon. Mr. Turner: Well, obviously we will have to disallow our own royalties, but in setting our disallowable

royalties, we will have to combine the tax and the royalty at a rate which will produce an incentive.

Senator Hays: So, I suppose at that time a producer would really know what your real taxation feeling was?

Hon. Mr. Turner: The producer when he sees the federal tax rate, which he now sees, and when he sees the royalty or rental, will be able to calculate with certainty what his cash flow is, because we are negotiating within the government to set that rate.

Senator Hays: How do you propose to treat new oil and old oil vis-à-vis the United States?

Hon. Mr. Turner: I really cannot be specific about that at the moment, senator. All I can say is that—

Senator Connolly: But there it is all new oil.

Hon. Mr. Turner: It is primarily new oil, yes, except for Norman Wells.

Senator Hays: But for new oil in the United States today the producer receives a gross of $12 and new oil in Alberta is $2 or $3.

Mr. Thompson: I believe the price on the new oil is somewhat over $10, but I do not know if it is as high as $12. The old oil is in the area of $5.

Senator Hays: It was $12 last week.

Mr. Thompson: I see that it is $5.25 on existing oil.

Hon. Mr. Turner: They are not as good on existing oil, but are better on new oil.

Senator Hays: I beg your pardon?

Hon. Mr. Turner: The average price of new oil and old oil in the United States is approximately $7.75. Existing oil is $5.25 and new oil is over $10.

The present royalty and tax arrangements in the United States may be more favourable, although in Canada there are lower royalty rates on new oil and drilling incentives, particularly now with the combination of the Alberta and federal incentives.

Senator Hays: But in practice we are still losing rigs, are we not, to the United States, down to the gulf? We talk about $3 billion for exploration. Is that the figure?

Hon. Mr. Turner: Yes.

Senator Hays: What percentage of that $3 billion will be used in Canada?

Hon. Mr. Turner: The rigs will follow not only the tax arrangements, but also the action. You come from Alberta, senator. Tell me what action there will be in exploration in Alberta for new oil?

Senator Hays: The reason why I think there should be a difference between new and old oil is because of those fields which were abandoned, where production was not felt to be economic. There are many in those areas—for instance, in Saskatchewan—which were drilled by small operators because the larger companies did not feel that the fields would be economic—where you have got a few barrels of oil out of shallow drilling. We have a lot of fields in Alberta which have been abandoned. If they were on the edge of the stock share, we might be sitting on a tremendous amount of oil which will not be discovered.

Hon. Mr. Turner: That is a legitimate comment.

The Chairman: Are there any further questions?

Hon. Mr. Turner: Mr. Chairman, I cannot resist saying this: Senator Hays mentioned that he likes listening to my speeches. I like listening to his speeches. I remember, one time I had the unique privilege of introducing Senator Hays, when he was Minister of Agriculture, to Mr. Kramer, who was Minister of Natural Resources in Saskatchewan. It was the only time I have ever had the opportunity of introducing two auctioneers!

Senator Connolly: The other night, Mr. Chairman, Senator Manning made the point about practices which had developed within the provinces. He spoke about the royalty and the additional taxes that were imposed on the incremental price of oil. I cannot paraphrase him adequately, but perhaps something will emerge from this question. It seemed to be a real problem with him, a constitutional one. He affirmed the right of the federal government to deal with oil royalties as they were traditionally owned; but, unless I am doing him an injustice, he said that so far as the higher taxes, based upon incremental prices, were concerned, their disallowance was not within the competence of the federal government. Perhaps some of the members of the committee will correct my statement of what he said. If it is right, perhaps we could have a comment from the minister.

Senator Flynn: He said that tactically the move of the provinces was not very sound, because they were changing the method of calculating the royalty.

The Chairman: Even if you accept all that, there is nothing constitutional about the right of the federal authority to adjust their revenue so that notwithstanding what a province might do they could gain certain revenues federally. There is no constitutional issue in that.

Hon. Mr. Turner: I would just like to make a brief comment, Mr. Chairman, although I am no longer Attorney General. I would echo what you have said, that the federal Parliament has universal access, unlimited access, to all sources of taxation. We do not contest the right of property in those resources lying with the provinces, and the argument the provinces use is "All right, the property right is reflected by the economic rent, called the royalty." Our answer to that is "Yes, so long as economic rent remains economic rent—a flat fee for the use of the property or for the taking out of the resource. But when that so-called rent becomes a disguised tax on profit as it moves up and down, or on prices as it moves up and down, it is no longer a property right."

Let us take municipal taxes. No doubt the municipalities, through the provinces, have the right to tax property, and they put a business assessment on every business in the city of Ottawa. Suppose those municipal taxes were authorized by a province to be geared not against the assessment of the value of the property but against the profit of the business? At the moment, municipal taxes are a deductible item. They are a business expense for federal tax purposes. I can see the province of Ontario, for instance, creaming us by allowing municipalities to tax against profit or income. Then, of course, anyone in my position would have to revise the deductibility aspects of it; and yet there is nothing more fundamental in property than municipal property tax.

So we are not questioning the property right. We are questioning the impost against the property, and whether it is really an economic rent any longer—whether it was within the discretion of the federal Parliament to allow it as a deductible item, or whether it is a disguised tax. We have never allowed a disguised tax to be a deductible item.

Senator Flynn: Mr. Chairman, the minister said that prior to the decision made by Alberta, B.C. and Saskatchewan, he had been thinking of doing something about the federal share of the revenue of the resources, because he felt there was an imbalance there. I was wondering what he had in mind doing if the provinces had done nothing.

Hon. Mr. Turner: That is not what I said, with respect. I said that our share for the first 25 years was about one in 10—$400 million against $5 billion—because of the federal depletion allowances and the federal appreciation allowances, and the exploration expenses. But we have reached the stage where the industry has turned the corner and become a mature industry. The people of Canada can then expect its share of tax. Had we done nothing, and had the provinces done nothing, our share would have come up from one to 10 to one to 2¼. That is to say, 15 per cent compared with 34 per cent. We would have been happy with that.

Senator Flynn: You would have done nothing?

Hon. Mr. Turner: At that stage I think we would have been tempted to do nothing. Now you are going to say, "We are now up to 18." They are up to 46.

Senator Flynn: You thought there would have been an increase in the percentage of the federal share?

Hon. Mr. Turner: I would have thought that, as between the ratio between the federal and provincial governments, we would have been happy with one to 2¼. We have now got it back to one to 2½. It might have been that both the provinces and the federal government might each have wanted to take a higher percentage because of the so-called windfall of international oil prices, but I doubt very much whether we would have moved to disallow royalties if the royalty had remained a royalty.

Senator Hays: Are you saying, Senator, that constitutionally you can disallow royalties?

Senator Flynn: Yes. I would like to ask the minister, why, then, if you were satisfied with the trend, did you disallow all the royalties and not only the excess royalties?

Hon. Mr. Turner: Because even if you took an allowable portion of 22 per cent, the excess had become so large—100 per cent royalty, for instance, in Saskatchewan or an average of 65 per cent in Alberta at that time—that even at 22 per cent our share would have been inadequate. The second reason is that we are dealing with a variety of creatures, and not just the royalty. We are dealing with arrangements—as I have said, joint venture arrangements, sharing produce-in-kind arrangements, marketing board arrangements—and there is no way we could draft a statute that would even it out at 22 per cent, even if we tried, because the flexibility of provincial taxing vehicles is now so wide that the only way we could deal with it is to disallow them all, increase the provincial abatement, and say "Okay, do your own thing, and the country will know what we are doing and the people of the province will know."

Senator Flynn: You are penalizing the provinces which have done nothing. You say that you would have been satisfied with the status quo. In fact, the status quo was maintained in six or seven provinces.

Hon. Mr. Turner: We are not penalizing the provinces that have done nothing. In this sense, in return for the disallowance of the royalty, we have increased the abatement.

Senator Connolly: You have taken it out of one pocket and put it in another.

Senator Flynn: I am thinking mainly of the industry.

Senator Connolly: Is the abatement equivalent to the disallowance?

Hon. Mr. Turner: It depends on the rate of the royalty. In the Atlantic provinces the abatement is worth more than the royalty. The provinces have done better.

Senator Flynn: In fact, you have been penalizing not the provincial governments but the industry as a whole.

Senator Hays: That is right.

Senator Flynn: I mean, the fight is on the back of the industry.

Hon. Mr. Turner: Could I put it this way? I have a duty on behalf of the people of Canada to ensure that as between the provinces and the federal government, between the people of a region and the people of the country as a whole, the people as a whole get a fair share. There is some responsibility on the provincial governments to analyze how much they are taking. As I say, the current shares are now 18 to 46.

Senator Cook: Following on that point, if I may, I fully appreciate what you say, but what recourse, if any, has a taxpayer who may find because of the combined taxation that he is paying 102 cents on a dollar? Is it closed?

Hon. Mr. Turner: Take a mineral taxpayer in Saskatchewan. If that royalty does not recede he may well decide that he is not going to operate any further in that province. That is the only leverage the company has.

Senator Connolly: Take the one in British Columbia which has been mentioned.

Senator Cook: That is all? Is the door closed? Is there not some leverage? Can the two governments not get together?

Hon. Mr. Turner: We threw $200 million or $300 million more on the table for petroleum interests in 1975 as a result of the holdback from May 6 to November 18. Alberta threw $300 million or $400 million on the table. Alberta made a positive response. We have not had any significant response from Saskatchewan. We have not had any significant response from British Columbia, except on natural gas, and there was a bit of arm twisting there.

Senator Flynn: You mentioned that the provinces have taken unilateral action.

Hon. Mr. Turner: Right.

Senator Flynn: You have done the same. Tit for tat.

Hon. Mr. Turner: There is no convention, of course, that you have to consult on budgetary measures. We have had a

thorough discussion of it; the Canadian people had a good look at that budget.

Senator Flynn: I am not too sure about that. That is a mere assumption.

Hon. Mr. Turner: There is always a first time. Usually in a budget you get to open on Broadway. This time we opened in New Haven and were able to re-write it!

Senator Flynn: What about the possibilities at the next federal-provincial conference? If you found an understanding that was different from what is included in this bill, how would you correct it?

Hon. Mr. Turner: I do not know what the rules of the Senate are, Mr. Chairman, but in the other place we find it very difficult to reply to hypothetical questions.

The Chairman: That is right. We do too.

Senator Flynn: But technically speaking?

Hon. Mr. Turner: There is nothing more hypothetical than what the Prime Minister and the ten premiers will agree upon.

Senator Flynn: I agree. I was merely thinking of it technically speaking. Legally speaking how could you change this?

The Chairman: By statute.

Senator Flynn: Bring in an amendment.

Hon. Mr. Turner: You know, what I bring before Parliament is not written in stone.

Senator Buckwold: You get stoned for it.

Hon. Mr. Turner: I often get stoned for it, as Senator Buckwold says. I am very conscious that we leave enough of the industry to get these reserves into play. This is in the interests of the country. I think attitudes have changed a good deal in the last 18 months from concern about windfall profits on the one hand and how to get those reserves out on the other. It is crucial for the self-sufficiency of this country, and for the ability I believe Canada has over the next quarter of a century to really move.

What is available for bargaining on April 9 and 10 between the Prime Minister and the first ministers? First it is price. Any movement in price is of great benefit to the producing provinces. Then there is bargaining on access to markets, what guarantees. Then, if exports are phasing out to the United States, what are the shut-in requirements as far as the provinces are concerned. There is a good deal of manoeuvrability here. Finally, I would say that there is room on the part of some provinces to draw in their horns a bit.

Senator Hays: When you say "shut-out", the federal government has the power to stop exports.

Hon. Mr. Turner: Yes, I think that is right, but obviously in setting our rates of exports to the United States there are two types of people we should consult with. First there is our customer, especially one who has rights that have been built up in the northern United States refineries. The Secretary of the Treasury of the United States who was here yesterday had something to say about it, and obviously is going to keep in touch.

Senator Hays: They would not be there otherwise.

Hon. Mr. Turner: That is right, if it were not for dependence on our oil. We owe it to them and to ourselves to stay in touch and consult on how we do it. Secondly, we have to consult the producing provinces, because if there is a phasing down there is going to be a percentage shut-in of oil, and that affects not only provincial revenues but the position of the companies concerned.

Senator Flynn: And the federal.

Hon. Mr. Turner: Yes.

Senator Connolly: We have had another committee of this chamber talking about Canada-United States relations and the problem of the dependence of refineries and consumers in the northern States is a very important one. Does that affect your thinking, too, when you are talking about your fiscal arrangements?

Hon. Mr. Turner: Yes, because one talks in terms of revenue as that is affected by lower exports; one thinks in terms of balance of payments; you think also, as I said, of the ability of the export tax to finance your subsidies in the eastern provinces.

Senator Connolly: These are domestic considerations.

Hon. Mr. Turner: Yes, and they are uppermost in our minds in our relationship with the United States. It may well be that in order to protect the northern states refineries in the United States we are going to have to come to some agreement with the United States on how to get that Alaska oil down the coast and in some place where it will not be an environmental hazard.

Senator Connolly: In-flow and out-flow.

Hon. Mr. Turner: It is possible to get to those northern states refineries either by pipelines or by pipeline plus ocean transport. If it comes in ocean transport on the West coast, people in the State of Washington and in the Province of British Columbia have environmental concerns. To protect those northern states refineries, it may be open to us to see what we can to do solve the environmental problems of the Unites States, hos to get that oil and where to get it back into the continent.

Senator Connolly: Does that do anything about the refineries in the middle west, about which there has been a good deal of public concern?

Hon. Mr. Turner: That is right. By getting that oil into the coast you can readjust your continental distribution.

Senator Hays: Do you not think one of the most important things in any negotiations there may be on April 9 and 10 would be how to handle the petroleum industry in the Northwest Territories? There is a great lack of confidence. You mentioned that they had 25 years to drill for this oil. But they bought this oil in the ground; they gambled; they went to the auction sales and paid for it, as you very well know. I can show you rooms that are papered with oil stocks for which these fellows did not get anything; they all went broke.

Hon. Mr. Turner: That is how I used to get my fees in the early days of practising law!

Senator Hays: A few made it but most didn't, most failed. Some of this money came out of the United States, because in the initial stages eastern Canadians lost all their money. That is why there is lack of confidence. I think we have to be pretty careful that we do drill enough.

There is a great lack of confidence, as you well know, in the oil industry today. It is a matter of getting these dollars, and then people down the road knowing what is going to happen to their dollars.

Hon. Mr. Turner: I think the comment is well taken.

Senator Desruisseaux: Mr. Chairman, there was a piece in the news this morning about the oil people raising their exploration money.

Hon. Mr. Turner: Texas Gulf?

Senator Desruisseaux: Yes, Texas Gulf, to $300 million. They had projected to $200 million or something like that, but they said that through the confidence being restored—

Hon. Mr. Turner: As a result of the Ontario government revising its mining tax. That is what the report said, and that is where the problem was.

Senator Molson: Mr. Chairman, there was an allusion to philosophy in taxation yesterday—I think the word was withdrawn very quickly. I would like to ask the Minister of Finance if he has any deep concern, at this period of disagreement between provincial authorities and the federal government, for the scars in this case which are going to be left with us, that they will have any serious effect or threat. We know that the scars are certainly there and we are fumbling to see how the industry is surviving, and so on. I would like to have the minister's view on what may happen as a result of this engagement or jousting over some considerable number of months.

Hon. Mr. Turner: Mr. Chairman, in response to Senator Molson, there is only one person entitled to philosophical comment, and that is the minister—I am saying that, out of my team, I mean. Sometimes committees, both in the Senate and the House of Commons try to sandbag my boys into a policy and they are very skillful in trying to stay away from it.

Senator Molson: There was nothing like that.

Senator Flynn: They have been very successful.

Hon. Mr. Turner: I do not know about the scars. There were a few bruises. Certainly, my own relationship, for instance, with the Provincial Treasurer of Alberta, Mr. Gordon Miniely, has remained open and friendly. I take it they were good all the time. You might have read Mr. Miniely's recent statement as to how the federal government is facilitating administration of the new taxes.

Senator Hays: Are you trying to pick up the last Liberal vote?

Hon. Mr. Turner: Yes, I am sure his motive was showing, but he said some pretty nice things.

Senator Flynn: I do not think he needs it.

Hon. Mr. Turner: He said some nice things. The provincial election is something beyond my ken, senator.

In dealing with Alberta I was convinced that the premier and Mr. Don Getty, his Minister of Federal and Intergovernmental Affairs, and Mr. Gordon Miniely and those in management, were very concerned about the situation. I did not deal with the premier as frequently as I would like. There is so often a tendency of a rook for a rook, a bishop for a bishop, a pawn for a pawn, in this game. I felt they were as concerned about the health of the industry as I was. At least, you have the same basis on which to negotiate. With some of the other western provinces I am not quite sure that they share the role of the private enterprise in the spectrum. That makes it difficult.

Senator Heath: I would like to ask the minister how we can do something about this situation. Taking our petroleum industry, as far as it relates to resources, this morning, or taking our mining industry—and British Columbia is part of Canada, too!—we are taxed at a rate of between 60 per cent and 100 per cent. Forestry is taxed at a rate of 55 per cent. I know that we have got this serious problem, with the philosophical outlook between the provincial governments in Canada. I cannot see that this bill we are dealing with now is going to mitigate that situation, in the case of industry and the aims of the Canadian people, in Ottawa and elsewhere.

Hon. Mr. Turner: What this bill does for the mining industry in British Columbia is restore the immediate expensing on a one year basis of exploration.

Senator Heath: That is it.

Hon. Mr. Turner: That is what the bill does. The real problem now is mining and mineral taxation in British Columbia. That is out of my hands. That is in the hands of the people of British Columbia and the government that they elect. The recent British Columbia budget, brought down by the premier, who also doubles as Minister of Finance, as did his predecessor, proposes to refund provincial tax on the share of the federal tax the provinces get as a result of the disallowance of these royalties. If the provinces get 10 per cent, or 13 per cent in British Columbia of the federal tax, the federal tax goes up somewhat as a result of the disallowance of this provincial royalty. Alberta has already given it back to the petroleum industry. British Columbia proposes to give it back to the mining companies. I would hope that the premier is reconsidering the royalty picture in British Columbia.

Senator Heath: I would hope so, too.

Hon. Mr. Turner: In a press conference that we shared—and I hope that is not too ambitious a term on my part—he indicated that he thought the price was determining and that the tax was really peripheral. I tried to indicate my attitude, and it turned out to be a public debate, that the tax was crucial in the competitive ability of the mining industry in British Columbia around the world. Take copper. Copper is now 60 to 65 per cent of the mineral production of British Columbia. The ore bodies in British Columbia are at about 0.2½ to about 0.4 per cent.

Senator Beaubien: For copper?

Hon. Mr. Turner: For the copper. Where is the competition for British Columbia? Let us start and get down to New Mexico and Arizona; the percentage of ore there is about—

Senator Heath: 0.15?

Hon Mr. Turner: No, it is 0.6, 0.7, 0.8, and so on, about twice, twice that of the best ore in British Columbia. If you go down to Chile and Peru, it is 2½ per cent; if you go down to Zambia it is 4 to 5 per cent—ten times as rich as the ore in British Columbia. We are dealing on world markets here and of course since British Columbia imposed that mineral tax the price of copper went from, what was it, senator?

Senator Beaubien: It went from 96 to 45 cents.

Hon. Mr. Turner: Yes, but it was about $1.30 at one time, when they put that tax on.

Senator Beaubien: It is down again.

Hon. Mr. Turner: Yes. Really, on behalf of Parliament, I have to propose taxes that will apply evenly across the country. What the provinces do within their jurisdiction, to make some industries less competitive than others, is something only the people in the province can deal with.

Senator Flynn: Have you any suggestion how they could do it?

The Chairman: Honourable senators, on your behalf I would thank the minister very much for coming here this morning. Thank you, Mr. Minister.

Hon. Mr. Turner: Thank you, honourable senators.

The Chairman: We will go on now with the rest of our business.

Mr. Cumyn: Mr. Chairman, we were going through a number of technical points. The next would be clause 22, on page 37 of the bill. In our study of the bill, we found a substantial difference between the English and French texts. I would like to point it out. I would like to ask how the department proposes to indicate the new position. The text refers to convertible property as it applies to shares. In the English text it says "the terms of which conferred upon the holder the right to make the exchange and no consideration was received by the taxpayer"—whereas the French text says:

> dont les conditions d'émission donnaient à leur détenteur le droit d'effectuer l'échange—

In other words, it deals with the original rights to exchange as opposed to the original rights obtained in the shares. In other words, referring to the original rights of issue, as opposed to the rights of cashing the shares, there is a difference and we wonder which version the department would apply.

Mr. Davidson: Generally speaking, we would use the English version. It is up to the taxpayer if he wishes to use the French.

Senator Connolly: Or if his lawyer wishes to use the French.

Mr. Cumyn: In my opinion, in this case the English is more beneficial to the taxpayer than the French.

Senator Flynn: That is the point.

The Chairman: Senator Flynn, I am sure you would agree that if the English version is more beneficial to the taxpayer we should support the English wording. It would be up to the officials to resolve the problem.

Senator Flynn: You might take a note, however, that we should possibly make an amendment the next time.

Mr. Thompson: It is a clear mistake in the wording.

Mr. Cumyn: The next question concerns clause 25(4), at page 47 and continuing to page 48, where we see the term: "any beneficiary under such a plan." It would seem to me that we are looking at any such trust governed by a plan and a beneficiary thereunder, which is referred to in clause 54(c)(5). It would seem that a literal interpretation as the section now reads could create problems.

Dr. Allan: What is the problem again, please?

Mr. Hierlihy: We have the phrase "any beneficiary under such a plan" standing on its own. We are looking at superficial losses and it would seem to me that there we are contemplating a transfer by any trust governed by a plan to a beneficiary thereunder. This is referred to in clause 54(c)(5). It seems to me that a literal interpretation of the superficial loss provision itself could cause a problem. For example, if I disposed of a property that was acquired by my friend Mr. Cumyn and he is the beneficiary under a registered plan, a literal interpretation would mean a superficial loss, which is obviously not intended.

Mr. Davidson: As far as Revenue Canada (Taxation) is concerned, we would not take that stand.

Mr. Hierlihy: I am sure you would not, but I hope that at some point in time it could be amended to make it more clear.

Dr. Allan: We will certainly consider it.

Mr. Hierlihy: The next point relates to clause 26(1), at page 48. This is a welcome provision, in that it extends the rules for qualification as a principal residence. It refers to "the term of his employment by that employer" and I wonder if it might be administered so that it would also apply to his term of employment with a related company. Shall we say, for example, if a person is moved offshore in the course of his employment to work with a subsidiary, or sister corporation, the wording now seems rather restrictive.

Mr. Thompson: I think, Mr. Chairman, within the intent of the amendment that the point is well taken. The idea of the amendment is to permit an individual to keep his principal residence exemption continuing in a situation in which he may be posted elsewhere for a lengthy period because of his employment.

The point raised is that he may actually, however, be working for a subsidiary or sister corporation of his employer. I think the point is well taken and should be considered in the future.

The Chairman: I assume that administratively care will be taken to carry out that intent.

Senator Flynn: You could certainly define it.

Mr. Davidson: I am not sure, Mr. Chairman, whether under the law we could in fact do that. However, it is quite easy for the taxpayer to get around that by having the subsidiary hire him before leaving Canada. That would certainly be acceptable.

Mr. Hierlihy: We should be very careful with this provision then, because we could have to count on kind treatment from the department.

Mr. Davidson: You should be careful.

Mr. Hierlihy: The next one is clause 33(1), at page 57, dealing with child care expenses and providing that a male, or man may be entitled to claim them. This is extending the circumstances under which he may claim those expenses. I wonder if perhaps it remains a little restrictive and there must be separation pursuant to a written agreement? It obviously would not contemplate the situation in

which the wife walked out the door. Would it not be sufficient if it could simply be established that there was a separation?

Dr. Allan: Mr. Chairman, the primary concern in this amendment was the virtual impossibility in many circumstances to establish the separation. The measure had to be administratively clear, and as it stands it is, although we realize that in certain circumstances the problem you indicate may arise.

Mr. Hierlihy: There are significant differences between the cases of the wife and the husband, of course, and in these days of women's lib. it seems that this might be extended a little.

The Chairman: I think that should be marked for future consideration.

Dr. Allan: Yes.

Mr. Hierlihy: We have a series of clauses, all dealing with the same situation, tax free transfers of depreciable property. This would cover clauses 38, 48, 51 and 52. Where depreciable property is transferred under a tax-free rollover it is generally provided that the capital cost of the property to the transferee shall be deemed to be that of the transferor for the purposes of depreciation provisions.

I believe it is also intended that this would apply for purposes of the capital gains provisions. I wonder if we might have clarification of that. It is my understanding that this is the intention.

Mr. Thompson: Perhaps, Mr. Chairman, we could just take a look at one or two of the particular provisions in order to refresh our mind.

Mr. Hierlihy: Perhaps if we could consider clause 38(7), at page 94, and in particular clause 39(2), at the bottom of page 95, it says:

> —the amount that was the capital cost to the trust of that property exceeds the amount determined under paragraph (b) to be the cost to the child of that property,

Mr. Thompson: Mr. Chairman, I believe the point is well taken. It sounds like the appropriate policy.

The Chairman: Mr. Davidson, where you have a situation such as we have here, where a cross reference would be necessary of helpful—let us assume it is not made right away—and a problem comes up, how would you deal with it?

Mr. Davidson: We have on occasions, Mr. Chairman, received assurances from the department that this is the policy and that an amendment will be made at the next opportunity. We have taken the stand that in the meantime we should administer it in accordance with that policy.

The Chairman: We have reached that stage here. As Mr. Thompson said, the point is well taken. If I bring a problem of this kind to you tomorrow, Mr. Davidson—and I will quote from the transcript of today's evidence—you will proceed accordingly?

Mr. Davidson: I would rather you wait until Royal Assent is given.

The Chairman: I interpret that to mean, in the circumstances I have related, that when Royal Assent is given, that is the way you would proceed.

Mr. Davidson: Yes, Mr. Chairman.

Senator Connolly: How do you do the cross reference? Suppose we were to put in an amendment. Do we put the cross reference right into this section?

Mr. Thompson: That is a question for the Department of Justice. That would appear to be the convenient way of doing it.

The Chairman: What is the next point?

Mr. Cumyn: Mr. Chairman, I think we should make the point that it is not merely clause 38 which has this problem. It applies also to clauses 48, 51 and 52. Without taking up any more time, I think we can assume that the same reasoning applies.

Mr. Hierlihy: The next question concerns clause 52—

The Chairman: Mr. Thompson agreed that a cross-reference would be advisable or necessary, or words to that effect. That statement applies to these several sections which have been enumerated.

Mr. Thompson: That is probably so, but I would not want to commit myself without looking at them. We could look at all of them, certainly.

The Chairman: Perhaps you could look at them and give us your views.

Mr. Thompson: May I have the page references?

Mr. Hierlihy: Clause 52 is one that is listed. It is on page 129.

The Chairman: Is that subclause 7, on page 129?

Mr. Cumyn: The act contains, in section 85(5), not that it has been amended by Bill C-49, the very same problem. The act likewise contains, in paragraph 88(1)(f), not that it has been amended by Bill C-49, the very same problem. The latter two are not problems within the amendments of Bill C-49. They are problems which exist in the act as it is now.

The Chairman: You have called our attention to it. Let us move on.

Mr. Hierlihy: The next one is clause 52, on page 129, dealing with the winding up of a wholly owned Canadian corporation. Under paragraph 88(1)(e) of the act, a subsidiary is deemed to have paid a taxable dividend equal to the amount that would have been its designated surplus. It is being suggested that there should be a further limitation to the amount of the deemed dividend so that it will not exceed the fair value of the assets of the subsidiary less its capital limit. The problem is that the designated surplus, as now defined, can, in fact, be greater than the net amount. Part of the difficulty seems to hinge around the definition of post 1971 undistributed surplus. It is my understanding that it is intended that this can be a negative amount, but that perhaps it is not being interpreted in that manner. If this is part of the problem, perhaps there could be a specific provision introduced whereby it is clear that the post 1971 surplus can be a negative amount. In addition, I would suggest that this further limitation on the amount of the deemed dividend might be considered.

Mr. Thompson: What will be the consequences if that situation arose, as you see it?

Mr. Hierlihy: There is a deemed dividend equal to the amount that would be the designated surplus. There is the potential for a deemed dividend in excess of the assets which actually flow up.

Mr. Thompson: There could be a kind of phantom designated surplus.

Mr. Hierlihy: That is right.

Mr. Thompson: I think, Mr. Chairman, as I mentioned before, this is probably part of the designated surplus set of problems which we really set to one side for this round of changes. We can certainly keep a note of that point.

The Chairman: It requires study as to what are the ramifications. What is the next point?

Mr. Hierlihy: That takes us into the area of partnerships.

The Chairman: We can deal with that subject and you can raise the issues there. I do not know whether all honourable senators appreciated the questions which Mr. Cumyn and Mr. Hierlihy were asking, but these involved a submission which we made to the department several weeks ago on points which we thought required clarification. They may not really meet the intent of what the legislation was intended to deal with. We left copies of this material with them, and I think we distributed yesterday a memorandum containing all those. We have been getting answers on those questions. We can now move into what I think is the main remaining area which we were proposing to discuss, unless honourable senators wish to raise some other point. That was the partnership provisions. We may have some questions in the memorandum which deal with that, but they can come out in the course of the discussion. Dr. Allan, are you going to deal with this partnership question?

Dr. Allan: Mr. Chairman, with your permission, I should like to ask Mrs. Vaucrosson to deal with this point. She is one of the persons who have been working in this particular area.

The Chairman: Mrs. Vaucrosson, I shall ask you my favourite question. Why do we have these provisions? To what extent, if at all, do they differ from what is in the act at the present time; and, to the extent that they differ, what is the reason for making the difference? The first question on that is: Is what you have done relieving?

Mrs. Aura Vaucrosson, Personal Commodity and Estate Tax Division, Tax Policy Branch, Department of Finance: Yes, it is.

Dr. Allan: It is certainly clarifying.

The Chairman: It does not necessarily follow that because it is clarifying it is relieving.

Dr. Allan: I think it can be described as both clarifying and relieving.

The Chairman: With that kindly atmosphere created will you tell us all about it?

Mrs. Vaucrosson: In general, what we have tried to do is this. We have been receiving a number of complaints and a number of representations that what we did in the act left quite a lot of uncertainty about what is to happen and what is not to happen with regard to partnership taxation. In some areas it was held that we have created an entity called partnership for tax purposes which is different from how it actually operates in real life, that we have not followed through with enough means by which they could reconcile the two things. That is the main thrust of our amendments, to provide a means by which the real life situation would be reconciled with the Act. The biggest of these was something that existed in the act under section 98(1.1), the continuing partnership interest. If a partner left a partnership he was deemed still to have a continuing interest in the partnership.

Senator Connolly: For tax purposes.

Mrs. Vaucrosson: For tax purposes.

Senator Flynn: As long as he was going to withdraw something.

Mrs. Vaucrosson: As long as he still had some form of investment or connection with it. This was just one concept, the continued partnership interest. Practitioners complained that there were so many different relationships with a retired partner that they were left with uncertainty, and in some cases no means by which they could identify a particular situation in the act, as to what would happen. For instance, if a partner who left a partnership for a term, perhaps to serve on a royal commission for five years. They did not know what his tax position was under the act, whether he had ceased to be a partner and had become something else, or whether he had just taken a leave of absence and would continue to be carrying on business, if he was receiving income from it. There was nothing in the act to answer this.

We have answered this by introducing two new concepts which distinguish between a continued interest in respect of income from a partnership and a continued interest in respect of just his capital investment left in the partnership. This was the biggest amendment in the act.

The Chairman: I take it the basic approach to the question of partnership is now being given different titles. The continuing interest is now the residual interest.

Mrs. Vaucrosson: In respect of the capital aspect. What we have tried to do to facilitate practitioners is to set up two separate concepts, one which continues his capital interest only and has nothing to do with the other income arrangements, and another that deals only with income, because for tax purposes it is very important to have the two things distinguished. This was giving real problems, what was income and what was capital interest.

The Chairman: The designations you now have are much more appropriate and much more descriptive.

Mrs. Vaucrosson: Yes, we think so.

Senator Connolly: What pages of the bill are we talking about?

The Chairman: It runs from page 171 to page 180. The aspect it deals with is entirely the position of, I assume, a retiring partner, and also the position of receivables. Are those the two aspects?

Mrs. Vaucrosson: For a retiring partner who continues to have income out of the partnership, we have given a designation that would apply to this income. The other one is the retiring partner who relinquishes all his rights to income and has only a residual investment left in, which the partnership has to pay out.

The Chairman: The two aspects of these provisions deal with the position of a retiring partner in two positions that he may have. First, he may have a continuing right to receive income, even though he has retired. He may also have a capital stake in the partnership which is called a residual interest. The treatment of the residual interest can be dealt with at any time, depending on the term of his agreement with the other partners.

Mrs. Vaucrosson: But it is crystallized as a capital asset.

Senator Connolly: For example, if he died it would be an asset in his estate.

Mrs. Vaucrosson: Yes.

Senator Connolly: Or it might be something that he could sell.

Mrs. Vaucrosson: It is a capital asset by definition.

The Chairman: There is a provision in these clauses that were a man dies, if he still has an accumulation of receivables that are attributable to him, to lessen the burden of income the payments of tax can be spread over a period of six annual instalments. That is on the receivable side.

Senator Connolly: That is only on death.

The Chairman: That is right.

Mr. Cumyn: In drafting these provisions, did you feel the same person would normally have both kinds of interests, a continuing interest and a capital interest?

Mrs. Vaucrosson: Not particularly.

Mr. Cumyn: Was it your feeling that if he had one he would not have the other.

Mrs. Vaucrosson: No. This would most likely be the general situation, but he could have both.

Mr. Cumyn: Let us take a simple example. Let us say a partner retires from a partnership; he is entitled to receive back in respect of his share, if you wish, of the furniture, fixtures, good will and so forth, of the partnership a certain amount over two years. He is likewise going to receive his share of income or a certain percentage of what he would otherwise have of his share of the partnership income, again in those two following years. Perhaps you could say how each of these four types of payment, year one, year two, capital in year one and year two income, would be dealt with under the act?

Mrs. Vaucrosson: He actually has rights of two natures. He has an income right, which would be under section 96.1 on page 172. This is his right to receive income of the partnership. In respect of this right, anything he receives would have to be income, just as if he were carrying on business through the partnership. He has to include these amounts as income. His rights in respect of income of the partnership is dealt with separately as income only.

Senator Flynn: During the year he received it?

Mrs. Vaucrosson: Yes.

Senator Flynn: Suppose he spread it over five or six years?

Mrs. Vaucrosson: Whatever the terms of the partnership agreement were.

Mr. Cumyn: What happens if he sells this right?

Mrs. Vaucrosson: It is also treated as income, and the amount of the proceeds come into income.

Mr. Cumyn: If the proceeds come in in three years, is he going to be taxed right away or over those three years?

Mrs. Vaucrosson: The same provisions that apply to the income of the partnership would apply to him.

The Chairman: So far as the income is concerned, I would think the agreement with the remaining partners would provide for annual payments. If there are annual payments the income he accounts for is the annual payment that he would get.

Mrs. Vaucrosson: By source, according to the dictates of the partnership.

Senator Connolly: What you are saying, in effect, is that the income that is allocated to him after a partnership agreement in a given year, even if he is retired, is paid to him and is taxable in that year.

The Chairman: Yes.

Senator Connolly: There is no change in the law there, is there?

The Chairman: No.

Mr. Cumyn: And then if he disposes of his right to that income and he receives the proceeds over two or three years, the indication was I think that he would likewise be taxed over the three years.

Mrs. Vaucrosson: Yes, as he receives it.

Senator Connolly: As he receives it.

Mr. Cumyn: It is at that top of page 173 and I do not quite get that impression. I am looking at clause 60(2), referring to section 96. There is provision for a new subsection (1.2). It is at the top of page 173. That (1.2)(a) is the question.

Mrs. Vaucrosson: The proceeds of disposition in the year.

Mr. Cumyn: If it is proceeds of disposition payable over three years, does this mean that the entire amount must be brought into income in the first year?

Mrs. Vaucrosson: It is treated the same way as any other. It has to be. If it is income of the partnership, it is treated the same as any other business income as defined in the rules.

Mr. Cumyn: If he sold his interest in the partnership to someone who has replaced him and he is being paid over one year, I cannot tell when I read paragraph (a) here whether his entire proceeds are included in his income for the year or whether they are spread over the years as he receives them.

The Chairman: Would it not depend on the terms of the agreement of sale?

Mrs. Vaucrosson: If he sold it in full, then the entire proceeds would have to come in just the same as in the case of any other complete transaction.

Senator Cook: Complete transaction.

Mrs. Vaucrosson: Even if he is not paid in full.

Mr. Cumyn: That does not seem fair, to me.

The Chairman: It is quite easy to draw the agreement and arrange it.

Mrs. Vaucrosson: He could sell it in portions if he wanted to. If he sold it in full, the transaction is complete. He has a sale offer for an item and has received proceeds for such item. If it is income that he has received and he has to include it in his income as such, it falls within that.

Mr. Cumyn: That is what I am coming to. Is this going to be treated in that way?

Mrs. Vaucrosson: The problem is that he has had this right of carrying on business.

Mr. Cumyn: But if he disposes of his right, what happens to the proceeds of the disposition?

Mrs. Vaucrosson: If he makes a full disposal then the income should come in, because he is no longer in business.

Senator Flynn: I think it is simple. If under the partnership agreement he is supposed to receive over five years and he receives it over each of these years, it is taxable over each of these years. If he sells that and is paid over three years he would have to pay over three years the portion he received every year.

Senator Connolly: He could continue over six years?

The Chairman: One year.

Senator Flynn: If I sell something that I am going to receive payment for over six years but payable to me over three years—

The Chairman: Senator Flynn, the point we are really getting at is this. If I am entitled under my agreement with the partnership, when I retire, to receive annual payments over six years, then if in the first year or the second year I sell that, the whole agreement, and it is commuted value at that time, that becomes the proceeds of disposition. The question then is, having sold the whole agreement at a commuted value, is that income in the year in which I did it? It would certainly appear from this section we are talking about, at page 173, that it would be, that commuted value being the proceeds of disposition.

Senator Flynn: The whole amount would be taxable in this year, even if my agreement is to be paid over three years?

The Chairman: That is right.

Mrs. Vaucrosson: But that would be a part of the agreement between you and the person to whom it had been sold, because it is a right you have sold, the right to income over six years. If it is sold in the second year, it is a right to the person who has bought it, and he steps into your shoes to get that right; he is going to have the right.

Senator Flynn: He will have to pay the income tax, then?

Mrs. Vaucrosson: Yes, he will have the same right.

Senator Flynn: Yes. Of course, in that case, I quite understand it.

The Chairman: There is some advantage to the man who buys, he gets it at a commuted value.

Mr. Cumyn: Normally in this sort of situation the act provides a reserve to the vendor, even if the purchaser would be entitled to treat his cost as being incurred by the way.

Senator Flynn: You cannot have it both ways.

The Chairman: You mean that the purchaser would want to take it in the hands of the purchaser, that the annual payments he would be entitled to receive by virtue of that assignment would be income to him?

Mr. Davidson: Mr. Chairman, if I may break in at this point, the normal arrangement would be to get the one payment. In other words, you want to get out of your future payments, for a lump sum. So, in the normal case, it is quite correct to tax in the one year. I think it is perhaps hypothetical that someone is going to get six years payments over three years. There is also the question that on death there is a deemed disposition, of course, and he does not get anything, he does not enter into any arrangement. Supposing he gives it to his son, for instance, again we would not want to delay the payments if the son is going to pay over 20 years for something he gets in six. So I think that on the whole it is quite appropriate to tax the man once and for all when he disposes of his right to future income.

The Chairman: We were not arguing that. If you commute the value of what you hold today, if you only get the full value over a period of six years, the value today is something less, so he gets that and that is the proceeds of disposition. Under this bill it will be taxable in his hands at the time he receives it.

Senator Flynn: That is right.

Mr. Davidson: At the time he signs the agreement, Mr. Chairman.

Senator Flynn: There was a point, if the sale price is payable over three years, you do not seem to be too sure that that could not spread itself over three years.

Mr. Davidson: I am quite certain you will have to take it in in the year in which you assign it in full.

Senator Connolly: Not the year in which you receive the income?

Mr. Davidson: No.

Senator Connolly: What about the case in which you make a disposition, as the chairman has said, and the partnership goes bankrupt and there is no income?

Mr. Davidson: This is where I sold, say, to Mrs. Vaucrosson my right to receive that and Mrs. Vaucrosson is paying me for that right. She may suffer because she cannot claim from a bankrupt partnership, but as far as I am concerned I have got my money and I am out of the game.

Senator Connolly: Can you not carry on with Senator Flynn's proposition? Suppose the term of the sale—let us say you value and you fix it as of 1975 and you say I will take one-third in 1975, one-third in 1976 and one-third in 1977, and you stipulate that.

Senator Cook: But you are not getting income then in the sale price. It is no longer income once you sell it. It is part of the purchase price.

Senator Connolly: In that case, would you still tax it in 1975?

Mr. Davidson: Yes. The agreement could be different. I could sell one-third of my right this year and next year sell another one-third.

Senator Connolly: It semms a clumsy way to do it.

The Chairman: I cannot imagine anyone who had a lawyer working for him would permit his client to sign the kind of agreement where he might contract for a commuted sum to buy that right to receive income, without getting adequate guarantees. So I am not looking at it from the point of view of the man who buys the commuted value. It is the question of that once and for all, if you take a lump sum, the commuted value becomes income in your hands in that year, under this bill.

Senator Cook: If you are taking it by instalments, you might get interest on the instalments.

Senator Flynn: Or even from the purchaser if the purchaser is the former partner or the other partners.

The Chairman: If you drew the agreement and commuted the value in relation to your right, what you have acquired would be a right to receive that payment in each year, and you put a commuted value on the first year, a certain amount on the second year, and a little more on the third year.

Senator Connolly: Is that so?

The Chairman: I would think so.

Senator Connolly: I would think so, too, but I thought you said no.

The Chairman: If I have an agreement under which I receive income in each year, and then I sell that right, but I do not sell it for a commuted value represented by a lump sum, I sell a right to receive in each year, for a lump sum amount. Then my proceeds of disposition would be only that lump sum in each year.

Mrs. Vaucrosson: And you are selling part of your right in each year, rather than the full right.

Senator Cook: But under that arrangement the purchaser would not hesitate. If he sells outright, it must be income in that year.

The Chairman: Well, these are the risks. Have we exhausted the possibilities of that phase?

We now come to another phase, the disposition of the treatment of receivables.

Mrs. Vaucrosson: We do not propose any amendments in connection with the treatment of receivables.

The Chairman: If the treatment of receivables is not dealt with in the bill, I would say that the method now recognized is very satisfactory.

Mrs. Vaucrosson: Yes.

The Chairman: All the receivables that had accrued to December 31, 1971 must be brought back into income under certain conditions in subsequent years. However, as I understand the manner in which it works, if there were a sum total of receivables on December 31, 1971 of $100,000 and in the next year earnings were only $90,000, the presumption would be that to maintain the level of earnings and not interfere with the amount of receivables, $10,000 would have to be taken out of the receivables and eaten up in the current year's income. Is that not right?

Mrs. Vaucrosson: I do not understand that.

Mr. Davidson: It is the capital in the partnership which is measured against the 1971 receivables. If the capital falls below the 1971 receivables, the difference must be taken into income.

The Chairman: That is right.

Mr. Davidson: The only effect of this bill on that, perhaps, is that we have given a little longer for the capital to be taken out. Therefore, perhaps the 1971 receivables can be deferred a little longer. Otherwise, there is no effect.

The Chairman: My point is that if I retire at the end of a year and do not have any agreement for further income payments to me, but I do have a capital interest, do you say that I must take it out and cannot leave it there?

Mr. Davidson: No, you can leave it there.

The Chairman: Yes, but when I take it out I do not attract tax.

Mr. Davidson: Yes, you have to pay tax on the 1971 receivables.

The Chairman: No, I am referring to the capital.

Mr. Davidson: Not on the capital, but by reducing your capital you then have less reserve for your 1971 receivables, which then come to income.

Senator Denis: What would be the situation in the case of a man earning a salary of $20,000 a year who was put on trial lasting for three years and was ultimately acquitted? During that three years, however, his salary was stopped and upon acquittal he was paid the salary for the three years. Would he have to pay income tax as though he were earning three times the $20,000 in one year, which would put him in a higher bracket? I wonder if that is how the law would be applied.

Mr. Davidson: It is the law as it applies now. As far as we can do anything about it, I will turn you over to the others.

Mrs. Vaucrosson: That is because individuals are taxed on the amounts received in the year and he received the salary for three years in one year. He would be taxed in that year for that amount. However, general averaging would give him a lesser rate because in two years he had nil income and the marginal rate would be less than it would be otherwise.

Senator Connolly: But it would not bring it down to the same level as it would have been had he received it during each year.

Mrs. Vaucrosson: No.

Senator Connolly: It would help.

The Chairman: Mr. Cumyn has a couple of questions in relation to interpretation and administration.

Mr. Cumyn: I would like to ask Mrs. Vaucrosson what is the function of paragraph (1.6) at the bottom of page 173,

which refers to members of the partnership who are deemed to be carrying on business in Canada? What is the purpose of that?

Mrs. Vaucrosson: There are other provisions which would apply so far as paragraph (1.6) is concerned. This is a person who is a continued member of the partnership because of his income right to carry on business in Canada. Paragraph (2.3) allows a non-resident person a different method of reporting income earned in Canada, if he carried on business in Canada or was employed in Canada. Because of this income he would fall into paragraph (2.3) for purposes of reporting income and computing tax as a non-resident.

Mr. Cumyn: That would apply, for instance, to a man who retires from a partnership and goes to live in Florida.

Mrs. Vaucrosson: Particularly.

Mr. Cumyn: He would continue to be subject to Canadian tax?

Mrs. Vaucrosson: As a non-resident.

Mr. Cumyn: Would you term this specific measure favourable, or unfavourable to taxpayers?

Mrs. Vaucrosson: Favourable.

Mr. Cumyn: What would their position be without this provision? Would they be subject to more Canadian tax?

Mrs. Vaucrosson: Not in full, because this is now business income in Canada from which he would be able to make appropriate deductions. If the provision were not included there would be doubt as to whether it was income from business or from some other source.

Mr. Cumyn: Do you think it would be subject to Canadian tax, though, without this provision?

Mrs. Vaucrosson: Yes.

Senator Cook: Without this provision would he be subject to the 15 per cent withholding tax?

Mrs. Vaucrosson: It would depend on the source from which the income flows. It could be subject to different forms of taxation. If it was all business for a non-resident, it would be taxed as income from business.

Mr. Cumyn: But without this provision, would it be subject to such a tax?

Mrs. Vaucrosson: Possibly.

Mr. Cumyn: I am just looking at the date upon which it comes into effect, which is for the 1972 taxation year.

Mrs. Vaucrosson: Yes.

Mr. Cumyn: Does this mean, then, effectively that this provision, which is not necessarily helpful to taxpayers, will be implemented effective 1972?

Mrs. Vaucrosson: The existing allocations would apply and it would be allocations as of the coming into force of this provision.

Mr. Cumyn: I can visualize someone who retired in 1972 and moved to Florida receiving something of a shock when told some time this fall that he should have been filing returns on his income throughout all these years.

The Chairman: What is the reason for making it retroactive to 1972? Our policy here is that if there are items provided in a tax bill which are beneficial, we support their retroactivity; but if they are not beneficial, we do not like the retroactivity. That is why the first question was, are these beneficial? One way to answer that is to tell us why you made that provision retroactive to 1972. The sound system is out of order, so I would ask the witness to speak up.

Mr. Hierlihy: Perhaps it might have been contemplated under the old subsection 98(1.1), which has been replaced.

Mrs. Vaucrosson: In 98(1.1) it was intended to do what these two sections did. It was in effect from 1972 on. All that 96(1.1) through (1.6) and 98.1 do at present is clarify what originally existed in 98(1.1). We have been in touch with most practitioners and informed them how it would operate taxwise. This gives effect to what is presently being done.

Mr. Hierlihy: That was my understanding, that these new sections were simply to replace the old 98(1.1) and to clarify the situation. My own question on the timing is that 98(1.1) referred to a taxpayer who ceased to be a member of the partnership after 1971. Now, with 96(1.6) we are looking at a taxpayer who is deemed to have been carrying on business in Canada, but it would seem to apply even though he might cease to have been a member prior to 1972. It seems to be a departure from the old 98(1.1.)

Mrs. Vaucrosson: The (1.6) provision will not apply until 1972.

Mr. Hierlihy: That is right, but it applied from 1972 forward. It may apply to a person who ceased to be a partner prior to 1972. Let us say that someone retired in 1960 and had a retiring allowance paid to him which was not considered taxable in Canada. With the old 98(1.1), he would still seem to be treated on the same old basis. Under this provision, there is no timing on the agreement. I am wondering if this was intended.

Mrs. Vaucrosson: No, it was not intended.

Mr. Davidson: Mr. Chairman, in practical terms, I think that partners who retired before now have been getting a consulting fee in lieu of a share of the profits. Nothing has changed about that. This really is to produce a more sensible mechanism for future partners who retire and who could then get a share of the profits without going through the artificial method of a consulting fee.

Mr. Hierlihy: So these consulting fee situations would not be changed by this provision?

Mr. Davidson: That is correct.

The Chairman: Is the idea of having him continue to be deemed a partner, even though he has retired, because of the situation that if he still has a residual interest, that residual interest will be available to deal with the accounts receivable situation—his share of the residuals? If I retire at 71 or 72 and I have a capital or residual interest, and there are receivables that have accumulated up until 1971, as I understand it, depending on how the capital goes up and down, you will have to take from the receivables some amount each time to maintain the capital at a certain level. I thought the idea was that he is deemed to be a partner so long as he has not received his final payment on the capital account. Is the idea of keeping him in there so that the

portion of his capital would be related to the receivables which would be available in case capital has to be dug into in order to take care of or maintain the receivables? I am trying to determine why.

Mrs. Vaucrosson: We were previously discussing the income property—the one where the person who is a non-resident and has an income right. The residual interest is in respect of his capital right, his investment in the partnership. That also deems him to stay in for purposes only though of his capital investment. So that the receivables being dependent on his capital investment would be affected by this. He would continue to have the receivables, to the extent of his capital investment left in, until he is completely paid off. That is one aspect of it. The other aspect is that where he has not been paid off in full for his capital investment, if the partnership winds up, he is a member still with relation to his investment, to ensure that he has the right to receive his payment or to have a say in what happens to the partnership property which underlies his investment in it.

Senator Connolly: He would have that right under common law, anyway.

Mr. Hierlihy: In the case of two- or three-man partnership—let us say a two-man partnership of which one retires—it is my understanding that these provisions should apply in the case of the continuing proprietorship. My only concern is, for example, in paragraph 96 (1.1) (b) which refers only to a partnership and not to a continuing proprietorship. In subsection 2 to section 98 (1.1), we have the same reference to a partnership. Could we perhaps have some clarification on that?

Dr. Allan: Mr. Chairman, I believe these provisions will not apply in that case. This is a problem to which we shall have to address ourselves.

Mr. Hierlihy: There is a problem, so perhaps it will be amended.

Senator Connolly: My question does not deal with this bill, but I would like to raise it at this time. It arises from problems which do face partners, particularly engineers, architects, and so on, where there are peaks and valleys over the years in their earnings, and there are times when the level of income which the partners are entitled to take reaches a fairly substantial point. In other years, it might fall, and there is no provision in the tax law, of course, whereby there can be reverses built up, income left in the partnership and held there to look after these valley years. Has there ever been any consideration given to that, because I think it is a real fact of life, for professional partnerships, in any event.

Dr. Allan: The observation we would make is that the partner's share of the partnership income is fluctuating in the circumstances and general averaging would apply to those fluctuating incomes. So there would be some relief provided in that manner.

Senator Connolly: Through general averaging?

Dr. Allan: Yes, at the partner level.

Senator Connolly: I was wondering whether it might be possible to devise rules that might go a little further. Have you ever thought about that?

Dr. Allan: I cannot say that we have. We are certainly prepared to look at it.

Senator Connolly: I do not think it applies in the case of a medical or legal partnership.

Senator Flynn: Certainly not at this time.

The Chairman: Honourable senators, this covers the subject of partnerships. We now have a choice to make. We have some questions to ask Mr. Thompson and Mr. Short. They will take how long?

Mr. Cumyn: About 20 to 25 minutes.

The Chairman: Is the committee prepared to try to finish those by 12.30 p.m., which would leave us this afternoon to discuss what we are going to do with the bill; or do you want to adjourn now until 2.30?

Senator Cook: Can the questions be asked on the staff level?

Senator Flynn: If they are very technical. Do they suggest amendments?

The Chairman: No.

Senator Flynn: Clarification?

The Chairman: No. We just want to know whether they agree with the potential in the particular question. In some instances the affirmative has been indicated, and the matter is being studied. Once you know they are in line for consideration, I would not contemplate suggesting an amendment.

Senator Flynn: It all depends. It seems that we have been here a long time.

Senator Cook: A very long time.

Senator Flynn: It appears that way. The big question is how long you think we will need to prepare a report. Up to now I do not see any amendment of substance, except possibly on the question of royalties, which is a question of politics rather than a technical matter. If there is no specific amendment but only recommendations, possibly we could finish this afternoon and make a report later this afternoon.

The Chairman: That is right. What I suggest is that we adjourn until 2.30 and we will then take up these further questions. We want to determine the view of the department. It will not take very long, perhaps 20 minutes. We can then give consideration to what our report will be. I think these additional questions will require only Mr. Thompson and Mr. Short to attend.

Senator Connolly: Mr. Chairman, you say we should adjourn until 2.30. Is the Senate going to sit for only a short time? Have we permission?

Senator Flynn: We have had no permission. Let us see how it goes. If the Senate adjourns at 2.30, to reassemble later in the afternoon at the call of the bell, we could possibly report then.

The Chairman: That is what we will do. I will arrange it.

The committee adjourned.

The committee resumed at 2.45 p.m.

The Chairman: Honourable senators, when we adjourned we had four or five questions that we wanted to get answers to, and Mr. Cumyn is going to put the questions to Mr. Thompson and Mr. Short. They will be a matter of record. Then we will go on to consideration of how we will deal with the report.

Hon. Senators: Agreed.

Mr. Cumyn: My first question would be as follows: Where you have a "nothing" sale—a sale of what is called "goodwill" or "knowhow"—the act as it presently reads does not appear to give you a reserve in respect of amounts receivable in the future, and not in the year. I was wondering if this is something the department has considered.

Mr. Thompson: Mr. Chairman, I believe it was considered at the time when the tax reform bill was formulated in 1971. In general, Mr. Cumyn's question arises because there are a number of provisions in the act where the tax is not exigible until the amount becomes due. On the other hand, there are certain provisions, such as in the case of goodwill, or, I believe, depreciables, where there is no delay in the tax liability until the amounts become due. That is to say, if it is payable in instalments, the amount would nevertheless come into the computation of income in the year that the amount is determined. This point does arise from time to time, and I think part of the difficulty is an administrative matter, in the sense that if the computation of income is delayed until the amounts are realized, there can be difficulties in determining how much of the subsequent instalments relate to the item in question. For example, if a business has been sold out, it may be very difficult to determine in a subsequent year how much of the instalment relates to goodwill and how much to depreciables. Nevertheless, I can see why the point is raised, and we would certainly be willing to entertain further representations on it in the future.

The Chairman: Would you say it is on your agenda for a subsequent year for consideration when you may be settling what clarifications are needed?

Mr. Thompson: Yes. That would be safe to say.

The Chairman: All right. Next question, Mr. Cumyn?

Mr. Hierlihy: My question is addressed perhaps to Mr. Davidson in this case. Clause 134 provides an extension with respect to late filed section 83 elections, and refers to a dividend which became payable. It is my understanding that it is also applied to a deemed dividend. I understand that this is the intention. I am asking whether it will be administered in that manner.

Mr. Davidson: It is possible that it would apply to a deemed dividend provided, of course, the election was made before the dividend was deemed to have been paid.

Mr. Hierlihy: You mean by way of directors' minutes?

Mr. Davidson: Yes, and other things, too. All the various tests would have to be applied.

Mr. Hierlihy: But this provides an extension for filing the forms and making the election, and it refers to a dividend that became payable. I just want to be sure that it would also apply to a dividend that was deemed to become payable.

Mr. Davidson: Provided that at the time the dividend was deemed to have become payable the thing was supposed to be an 83 (1) type dividend. The main test here is what were the shareholders told on this late filing business? If the shareholders were told that they were getting a tax-free dividend, so-called, then the election may be late filed. If, on the other hand, the shareholders were told that this was an ordinary dividend, and they so reported it, as income, of course, it would be extremely difficult to go back and reverse that, particularly for those taxpayers who had died, who had gone abroad, who had sold their assets and used the wrong capital costs, and all that sort of thing; so as far as the Department of National Revenue are concerned, they will not accept an election after the fact in those circumstances.

Mr. Hierlihy: That is an answer to another question that I was going to ask.

Mr. Davidson: It was the second part of your question.

Mr. Hierlihy: Yes.

The Chairman: Next question?

Mr. Cumyn: This is a question to Mr. Short, if I may. On page 273 we see a proposed amendment to section 212 of the act, which concerns partnerships. The provision says, in effect, that for the purposes of levying Canadian withholding tax, which only applies to payments being made to a non-resident of Canada, where the person receiving the payment is a partnership, the partnership shall be deemed in respect of the payment to be a non-resident person, unless it is a partnership in which all of the members are Canadian residents. This seems to me to be a very broadly expressed provision which could, particularly in cases where the partnership is used as a public investment vehicle, cause considerable difficulty. I was wondering if Mr. Short could comment on that.

Mr. Short: Let me seek to approach the answer to this question in this way: the partnership is not a person as such, and therefore its status for tax purposes is quite difficult, particularly with reference to provisions that impose a tax on payments by persons or payments to persons. The partnership, not being a person, quite obviously fits awkwardly into this part of the statute, A partnership is a common form of carrying on a business, and our attempt was to clarify its position vis-a-vis the non-resident withholding tax.

Perhaps I could explain the problem by giving you an example—a simple example—involving two partners in a business activity carried on in Canada, one of the partners being a non resident. If he borrowed funds, and made those funds available to the partnership, the interest and expense would be a legitimate expense of the partnership business in calculating income for tax purposes. The withholding tax applies wherever a person resident in Canada makes a payment to a non-resident person. In this case, if it were the non-resident partner who borrowed the money and paid the interest, he would appear to be outside the scope of the non-resident withholding tax. This would be inappropriate, and the rules which Mr. Cumyn referred to are intended to put the position clearly and beyond very much doubt.

Mr. Cumyn: Do they not go further than that, though, Mr. Short?

Mr. Short: I do not believe they go further than that. With National Revenue, who were equally concerned with

this particular problem, my Division worked on a number of examples and had extended consultations with persons on the outside. We concluded that these provisions work fairly effectively. We have not had drawn to our attention any particular difficulties with them. However, in view of the complexities of the law in this area we certainly would welcome any comments as to the ways in which these provisions have unintended results, or inappropriate results.

Mr. Cumyn: If a non-resident partner elects to be taxed on rental income under section 216, it seems to me that as a member of the partnership he had already been subjected to withholding tax unless the partnership itself elected that way. Is that right?

Mr. Short: I am sorry, Mr. Cumyn, your example is leaving me a little confused. Could you give me a factual situation?

Mr. Cumyn: Are you satisfied that there are not situations here where a person paying tax under Part I of the act would not likewise be subject to withholding tax?

Mr. Short: We are satisfied.

The Chairman: Any other questions?

Mr. Cumyn: Just one more. You have not given the grandfather clause, as they call it, here for agreements entered into prior to the budget. Do you not feel that this would have been a case where that would have been appropriate?

Mr. Short: At the time of second reading the application rule for this clause was altered and subclause (12) now accommodates this by making reference therein to paragraph 212.(13.1)(a).

Mr. Cumyn: That is right, but I am referring to (b).

Mr. Short: Mr. Cumyn, you will appreciate that this provision does not take effect except for payments made after November 18.

Mr. Cumyn: But it may be made pursuant to an agreement entered into several years ago where this liability was not anticipated.

Mr. Short: I think that (b) reflects the law as it stood; it clarifies the situation rather than altering it. Therefore I don't think there is any retroactivity. We have not received that comment from anybody who was interested or has been adversely affected by this provision. We did respond in paragraph (a) to a case of retroactivity which was brought to our attention.

The Chairman: Is that all, Mr. Cumyn?

Mr. Cumyn: Yes, Mr. Chairman.

The Chairman: Any more?

Mr. Hierlithy: I did have a couple of questions on NRO corporations but we had discussed them with members of your staff, Mr. Short, and I am sure you are aware of what the questions were, and I do not think anything would be served by pursuing the matter further at this time.

The Chairman: What I was going to suggest was that these questions arose out of our staff's consideration of the various provisions in the bill, and there were certain areas where we could not conclude too definitely as to what the interpretation might be or how it might be dealt with administratively. Therefore we were concerned to know what, if anything, was being contemplated in respect of these points, and what, if anything, could be expected until such time as they were dealt with. I am thinking, for instance, of this morning when Mr. Thompson was discussing designated surplus. He said that this is a subject matter that they have been working on for some time and it is very complicated, so they are not ready to proceed on the basis of full consideration at this time. But we know the thing is in hand and these were the answers we wanted to get as to what would happen administratively if the problem arises before they get dealing with it and how they would deal with it. We got answers on that from Mr. Davidson today, and we got answers from Mr. Thompson on some of the other points, so what I was going to suggest was that as part of the proceedings for today we should include in the proceedings this series of questions and statements by the department and also the answers which we have gleaned from the questions put to the witnesses yesterday and today, as to what their attitude was and whether on their interpretation anything needs to be done. I thought we might make that part of the transcript of the evidence today so that we would have it all collected in one place with the answers that were given so that you won't have to go pawing through the transcript to find out what was said.

That would appear to conclude our consideration of the bill, and we have arrived at the stage where the question is: What do we do with the bill now? We have several courses of action open to us. We can agree to report the bill without amendment, or we can agree to report the bill with amendments, which means that we are going to have to sit for some time to consider that. So I would like, first of all, to know whether the committee is ready for the question, or whether the committee feels that there is something further to be said by way of discussion.

Senator Laird: Mr. Chairman, are you satisfied that appropriate consideration will be given to these various points raised if we now move that the bill be reported without amendment?

The Chairman: As far as I am concerned, being in on these discussions, and then relying on what Mr. Cumyn and Mr. Hierlihy have gathered from their day's conference with the departmental officers, there was basic goodwill in the approach and there was an appreciation of what we had done. They examined the situation very thoroughly and they were prepared to answer these questions here. My own view is that I honestly believe what they said as to how the matter might be dealt with and when it would be dealt with. I think that they sincerely mean that. Now, that is my position.

Senator Laird: In that case, I move that we report the bill without amendment.

Senator Flynn: Well, I disagree. I suggest that we tell the witnesses that we do not need them any more and we discuss whether we should have a report.

Senator Connolly: Mr. Chairman, I am sure you intend to do this, but on behalf of those sitting down here, we wish the officials to know that we are very pleased indeed with the attention they have given to these problems. This has been a good show with respect to this bill. The same comments apply to our staff members, who have done a great deal of work.

The Chairman: Basically we have received co-operation and full consideration, which is not always the case. However, it has certainly happened here in these discussions.

Senator Flynn: I am very satisfied with the way the witnesses have behaved.

Senator Desruisseaux: Mr. Chairman, I fully agree with the remarks of Senator Connolly and Senator Flynn with respect to the witnesses. I would like to know if there will be observations accompanying the reporting of the bill itself?

The Chairman: That is a matter for the committee. Senator Laird has moved that the bill be reported without amendment, which throws the matter to the committee.

Before commencing our discussion, we thank the witnesses very much. You may resume your regular endeavours.

Mr. Thompson: You are very welcome, Mr. Chairman and senators. Could I raise one question, Mr. Chairman?

The Chairman: Yes.

Mr. Thompson: You mentioned that there would be a summary of the questions raised by your advisors and our responses. If that summary is in addition to the transcript, it might be a good idea if we could just have a glance over your version of our responses to make sure we are on the same track.

The Chairman: We will send you a copy, and if you make comments, this committee will still be functioning, probably not with regard to this legislation, but we will accept and communicate them.

Mr. Thompson: Thank you, Mr. Chairman.

The committee continued *in camera*.

The committee resumed at 3:20 p.m.

The Chairman: If we are ready, there is a motion to approve the bill without amendment.

Senator Flynn: Mr. Chairman, I would like to draw the attention of the committee to the fact that the only contentious matter in the bill is, of course, the problem of the disallowance of the royalties. We heard the minister. I shall not argue for long on the merits of the position of the minister, or the merits of those who oppose the attitude taken by the government in this matter.

Because I think the federal government should show some lenience and disposition to compromise, and should help soften relations between Ottawa and the three provinces involved—and the others who will eventually suffer to a lesser or possibly the same extent—I move:

> That clause 4 of the bill be amended by adding thereto, next after line 8 on page 7, the following:
>
> (6) Subsections 4(2) and (5) and subsections 7(1) and (5) and any
>
> other provision of this act to the extent that it is necessary and incidental to or consequential upon those subsections or any of them shall not come into force and have effect as law except upon proclamation of the Governor in Council following upon the expiration of the 15th day of April 1975.

The objective of this amendment is quite clear. It is that the question of royalties be suspended until after the federal-provincial conference which will take place, I understand, on April 9 and 10.

It would permit possibly a better atmosphere to prevail at this conference, because the government would not say that this is definitive. It would say, "If we can find a compromise, or something else, we shall pursue it." In any event, it may not be a technical problem, but it may certainly be a psychological problem for the coming federal-provincial conference.

It is in this perspective and this mood that I have moved the amendment. I am quite sure it does not hurt the position of the federal government, because any time after April 15 it can proclaim into force the provisions relating to disallowance of provincial royalties. In the meantime, it would show that the federal Parliament would like the government not to take a too strong or inflexible attitude towards the problem of the provinces. I do not need to speak very long on that. I could say quite a lot, but all members of the committee know the problems involved. I put the amendment to the committee.

Senator Beaubien: Mr. Chairman, I quite agree with what the Leader of the Opposition has said, because it makes a great deal of sense. On the other hand, if we agree to the amendment, it will have to go back to the other house, and, of course, God only knows how long the delay might be. I do not wish to vote against my chief, but the amendment would have a delaying effect which would be bad for the Senate.

Senator Cook: Mr. Chairman, I must say that I was considerably impressed with the explanation given by the minister today. While I sympathize a good deal with the amendment, I think it will be, as he said, a numbers game, or whatever expression he used. For my part, while I wish that all governments would get together and act in a more responsible fashion, I will vote against the amendment, because I do not think we should do anything at this time to weaken the bargaining position of the federal people. So regretfully I shall vote against it.

Senator Molson: Mr. Chairman, I feel very much the same way. Some time ago I would have been completely in favour of supporting Senator Flynn's amendment, but there has been considerable progress in the field of relations with the provinces. I shall not try to suggest who is responsible for that, but there has been definite progress. The most important thing now is to get the bill passed so that the rest of the legislation can take effect.

Senator Desruisseaux: Mr. Chairman, I am a layman, so to speak, but I agree fully with the views just expressed. I would not want to disregard the matter of the proposed amendment. Having had the amendment before us, it may have some bearing on the future. However, I cannot think of the possibility of further delaying this bill, and therefore I agree with the views of Senator Cook, Senator Molson and Senator Beaubien.

The Chairman: Are we ready for the question?

Senator Flynn: Mr. Chairman, may I reply, for the record? It will be short.

The Chairman: Yes.

Senator Flynn: Senator Beaubien said he is afraid of the delaying effect of this amendment. I can only say that if the Senate would adopt it, I am quite sure that the Commons would not hesitate to concur in it. Senator Cook said he would not want to weaken the bargaining power of the government. I say it is too strong and it would be a good thing to weaken it.

The Chairman: Are we ready for the question? Would those who support Senator Flynn's amendment—it is not necessary for me to repeat it, as I assume all honourable senators know what it is—please indicate by raising their right arm? Would those who oppose it please raise their arm. The amendment is lost.

We now have the main motion, to report the bill without amendment.

Senator Flynn: On division.

The Chairman: Would those in favour please raise their hand? To the contrary, if any. The motion to report the bill without amendment is carried. That concludes our business for today.

The committee adjourned.

APPENDIX "A"

March 13, 1975

BILL C-49 - "An Act to amend the statute law relating to income tax".

Specific points considered by the Standing Senate Committee on Banking, Trade & Commerce during its study of the above Bill.

These points were submitted to and discussed with Officials of the Departments of Finance and Revenue Canada (Taxation), subsequently raised in the course of the evidence given before the Committee by the said Officials, together with their comments thereon.

Clause 1 (1) - subparagraph 6 (1) (b) (ix)

Non-taxable Schooling Allowances

It was suggested that this provision be made less restrictive by changing the reference to the "school closest to that place" to a reference to the "school, both suitable for and available to that child, closest to that place".

It was also suggested that the "official language of Canada primarily used by the employee" should be changed to a reference to the "official language of Canada primarily used by either the employee or the child".

* However, the representatives of the Department of Finance indicated that these changes would not be consistent with their policy at the present time.

Clause 2 - section 8 (1.1)

Expenses re: Assistant

Whereas this subsection will permit deductions for items not previously deductible by an individual, namely Canada or Quebec Pension Plan contributions and Unemployment Insurance premiums in respect of an assistant, it was suggested that it be expanded further to include any other contributions required to be made in respect of that assistant under any Federal or Provincial program.

This point was not raised at the Committee hearings, but was brought to the attention of the Department of Finance.

NOTE. * denotes response of Departmental Officials.

Clauses 4 and 7 - Paragraphs 12 (1) (o) and 18 (1) (m)

Royalties, etc. To be Included in Income and Disallowed as Deductions

Amounts to be included in income by this provision do not clearly qualify as "taxable production profits from oil or gas wells in Canada" as this expression is defined in Clause 80 of Bill C-49, although it is understood that this is intended. The result would be the taxation of the add-back at ordinary Federal corporate tax rates (in 1976, 46% less the standard Provincial abatement of 10%) rather than at the rates otherwise applicable to resource income (50% less the 10% provincial abatement and less the further special abatement which, in 1976, will be 15%). It would be desirable that the inclusion be mentioned in the definition referred to above, but in the meantime, as such would be the Department of Finance's intent, the Committee was given to understand by a representative of Revenue Canada that this is how his Department would strive to interpret the provision.

It would appear that the amount of the inclusion will be included in the post-1971 undistributed surplus of a corporation and hence in its designated surplus under the provisions of Part VII of the Act. This is anomalous and could be overcome by an amendment to paragraph 192 (15(b) in order to make it clear that the add-back is considered to be an expense incurred or disbursement made, the deduction of which has been disallowed.

The representative of the Department of Finance indicated that the entire area of designated surplus was being reviewed by his Department.

Clause 6 - subsection 13 (7.1)

Grants or Assistance Receivable

This provision refers to assistance that a taxpayer "has received or is entitled to receive" which must be applied to reduce the capital cost of depreciable property. Although this wording is the same as that of former paragraph 13 (7)(e), it was suggested that it was ambiguous and should be expanded to the following: "... entitled to receive in the year".

The representative of Revenue Canada indicated that this was his understanding of how the measure was to be applied.

Subsection 14 (1)

Sale of Goodwill
and Other "Nothings"

The provisions of this subsection are such that it would appear that an amount may be included in a taxpayer's income for a taxation year even though his receipt thereof is, by agreement, to be spread over one or more subsequent years. This can result in considerable hardship in a situation such as that where an individual sells his unincorporated business upon reaching retirement age. It would be desirable that in such cases a taxpayer be entitled to a reserve similar to that provided under subparagraph 40 (1)(a)(iii) in respect of a gain on the sale of capital property. This suggested amendment pertains to existing legislation and is not related to the proposed amendments contained in Bill C-49.

* The representatives of the Department of Finance indicated that their policy had indeed been to include the entire amount receivable by the taxpayer in his income for the year, despite the fact that certain portions thereof would not be received until a subsequent year. They added, however, that this was a matter on which they would welcome further representations from taxpayers, with a view to reconsidering their policy.

Clause 7 (2) and (3) - subsection 18 (2) and (3)

Limitation on Deductibility of Certain
Interest and Property Taxes on Land

This provision refers to land held for development which could include those situations where land is acquired for the purpose of erecting an apartment building, the construction of which was not commenced immediately. In such situations there is no cost of inventory to which the non-deductible amount can be added. It was suggested that some provision should be made whereby the non-deductible amounts could be carried forward for offset against revenue from the apartment building in future years or, alternatively, for such non-deductible amounts to be added to the cost of the building so as thereby to become depreciable.

* The representatives of the Department of Finance indicated that such a change would not be in accordance with Departmental policy at the present time.

* It would also have been preferable that the provision be so drafted that those taxpayers who have already contracted debt obligations in the knowledge of the income tax implications as they existed prior to the proposed amendments not be affected thereby. This was not raised at the Committee hearings, as in prior discussions, Department of Finance officials had indicated that such would not be their policy.

Clause 20 - section 48

Deemed Acquisition of Property on Becoming a Resident of Canada

Taxpayers taking up residence in Canada are deemed, as a general rule, to have acquired their capital property at its then fair market value.

If such property was purchased by them at a greater amount, their loss accrued to that time is thereby ignored for Canadian tax purposes. For instance, if they subsequently dispose of the property for proceeds greater than its value at the time they became resident in Canada, their gain, although it may be nothing other than a recovery of a portion or all of their previously accrued loss, will be exposed to Canadian tax.

A potential solution was suggested whereby such persons could benefit from a rule comparable to that of the tax-free zone, in which the value on Valuation Day would be replaced by the value on the day on which they took up Canadian residence. This suggested amendment is not related to the amendments in Bill C-49, but rather pertains to existing legislation.

* The Department of Finance representatives indicated that they had given the matter some consideration, but that in view of the difficulties of establishing the cost of assets prior to the taxpayer's assumption of Canadian residence, they had chosen the present rule.

Clause 22 (1) - section 51 (French version)

Convertible Properties

The English and French versions of the proposed first paragraph of section 51 are different. The English version refers to the converting of shares, etc. the "terms of which conferred upon the holder" the right to make such a conversion. The French version says "dont les conditions d'emission." In the past, the English version has been followed; it was therefore suggested that the French version be made the same.

* The representatives of the Department of Finance indicated that this was a clear mistake and that the matter would be looked into. The representative of Revenue Canada indicated furthermore that in practice, the rule as expressed in English would be followed by his Department.

Clause 25 (4) - subparagraph 54 (i)(i)

Superficial Losses

The phrase "any beneficiary under such a plan" appears to require further qualification. It seems intended for a situation such as that described under subparagraph 54 (c)(v) re transfers by "any such trust governed by a plan to a beneficiary thereunder". It was therefore suggested that the wording be revised to read; "where the taxpayer is such a plan, any beneficiary thereunder".

* The representative of the Department of Finance indicated that this would be in accordance with his Department's policy, and the representative of Revenue Canada confirmed that the provision would be administered in this manner.

Clause 26 (1) - Section 54.1

Exception to Principal Residence Rules

This provision permits an extension to the period for the qualification of a principal residence if the taxpayer does not ordinarily inhabit that residence as a consequence of the relocation of his place of employment. It refers to "the term of his employment by that employer". It was suggested that this latter qualification be extended to include related employers, for example, associated corporations.

* The representative of the Department of Finance stated that the point was well taken and that further amendment would be considered. The representative of Revenue Canada indicated that in his view, the proposed law was clear in its exclusion of related employers, and would have to be so administered.

Clause 29 - section 59

Dispositions of Resource Properties

As a result of the proposed amendments, the proceeds of disposition arising on the sale of most resource properties are no longer to be included in come; rather, they are to be applied in reduction of the taxpayer's cumulative Canadian development expenses. It would appear necessary to make a consequential amendment to subparagraph 39 (1)(a)(ii) so as to ensure that the same proceeds will not be taxed as a capital gain under subdivision C.

* This point was agreed to by the representatives of the Department of Finance, and the representative of Revenue Canada confirmed that the Act would be so administered.

Clause 33 (1) - subparagraphs 63 (1)(b)(ii)

Child Care Expenses

This provision extends the circumstances under which a man may claim child care expenses. It was suggested that the qualifications remained too restrictive as they would not include situations such as that where a man had been deserted by his wife. It was suggested that in order to qualify, the man simply be able to establish that he was separated from his spouse, or former spouse.

* The point was noted for further consideration by the Department of Finance.

Clause 38 (7) - paragraph 70 (9.1)(c)

Tax-free transfers of Depreciable Property

Where depreciable property is transferred under a tax-free rollover, it is generally provided that the capital cost of the property to the transferee shall be deemed to be that of the transferor for the purposes of sections 13 and 20 and the regulations made under paragraph 20 (1)(a). It was suggested that, for greater clarity, reference should also be made to subdivision C which, it is understood, is intended. Similar problems arise under the present provisions of subsection 85 (5) and paragraphs 87 (2)(d) and 88 (1)(f).

* The representative of Revenue Canada indicated that his Department was interpreting and administering the Act as though such references to subdivision C had been made.

Clause 48 - section 85

Transfer of Property to Corporation by Shareholders

A new paragraph 85(1) (e.2) is proposed to cover circumstances where, under a section 85 rollover, it is reasonable to assume that a gift has been made by the taxpayer to or for the benefit of some other shareholder of the corporation. It was suggested that the rule was expressed too broadly and could create uncertainty in many ordinary corporate reorganizations where the presumed donee was a corporation beneficially owned by the same shareholders as the presumed donor. It was suggested that these provisions should apply only where it was reasonable to consider that a gift had been made by the taxpayer to or for the benefit of any other individual who was related to the taxpayer.

* After some discussion, the representatives of the Department of Finance stated that this was a matter of policy. However, the representative of Revenue Canada indicated that his Department would be prepared to grant advance rulings on such transactions where the taxpayer was in doubt as to whether the rule might be invoked by Revenue Canada.

Clause 49 (1) - section 85.1

Share for Share Exchange

Because of the restrictions to the application of rollover treatment on a share for share exchange which restrictions are set out in subsection 85.1 (2), a question is raised as to the reason for the 10% minimum rule set out in clauses (A) and (B) of paragraph 85.1 (1)(b). If this minimum is not attained, the corporation has a "nil" cost relative to the shares it acquires.

In discussions with representatives of the Department of Finance, it was indicated that the minimum rule is intended to keep corporations from acquiring portfolio investments through the issue of shares and in fact, is directed more at the vendor in such cases rather than the corporation. It is suggested that, if this rule were removed, the use of section 85.1 as a means for improper tax deferral would be minimal. The adverse tax consequences to a corporation failing to atta-n the 10% level in connection with an ill-fated bid for a major interest in another corporation would appear to be considerably more serious.

* This point was not further raised at the Committe hearings.

Clause 51 - section 87

Treatment of Resource Properties upon Amalgamation

Paragraph 59 (3)(a) and subsection 59 (4) set out the "relevant percentage" rules on the disposition of a resource property held prior to 1972. It would appear that these rules will not flow through to the amalgamated corporation in rules will not flow through to the amalgamated corporation in respect of resource properties held by one or more of the predecessor corporations prior to 1972, at least in those cases where the predecessor corporations were dealing at arm's length. It was suggested that the general tone of the provisions of section 87 is such that it would be expected that there would be a flow through of the "relevant percentage" rules.

Similarly, provision might be made in section 87 for the flow through on an amalgamation of the goodwill of the predecessor corporations, so as to preserve the benefits of section 21 ITAR, which recognizes the value of goodwill existing on January 1, 1972.

* The representatives of the Department of Finance indicated that the matter had been given consideration, but that for policy reasons no action had been taken.

Clause 51 - paragraphs 87 (2) (gg) and (hh)

Designated Surplus of New Corporation Arising on Amalgamation

Bill C-49 does not propose any amendment to alleviate the situation presently existing with respect to the designated surplus of an amalgamated corporation. To the extent that any designated surplus of this new corporation is represented by 1971 undistributed income on hand of a predecessor corporation, it cannot be eliminated through the payment of the special 15% tax under Part IX of the Act whereas this procedure is available to any other corporation.

In any case where a predecessor corporation was controlled by a corporation that controlled the new corporation arising from the amalgamation, the Act provides that the designated surplus of that predecessor corporation will be carried through to the new corporation. However, no provision is included in the Act for a carry forward of the control period earnings of that predecessor corporation. As a result the designated surplus floats to the top of the surplus pool and the control period earnings of that predecessor corporation can no longer be distributed on a tax-free basis before a dividend is considered to have been paid from designated surplus.

* As indicated previously, the representatives of the Department of Finance stated that the entire area of designated surplus was being reviewed by their Department.

Clause 52 - section 88

Winding up of a Wholly-owned Canadian Corporation

Paragraph 88 (1)(e) provides that in such cases, the subsidiary shall be deemed to have paid a taxable dividend equal to the amount that would have been its designated surplus if control of the subsidiary had been acquired by the parent immediately before the winding up. It was suggested that there should be a further limitation to the amount of this deemed dividend so that the amount thereof would not exceed the fair market value of the net assets of the subsidiary less its paid-up capital limit. It is possible for designated surplus to exceed this resultant amount if post-1971 undistributed surplus cannot be a negative amount, and it is understood that this is the position which has been taken by Revenue Canada although such was apparently not intended.

* Once more, the Committee was advised that these matters were being considered by the Department of Finance.

Clause 53 (6) - paragraph 89 (1)(l)

1971 Capital Surplus

It was suggested that subsection 89 (5) should not apply with respect to any capital property disposed of before May 7, 1974.

This would avoid a retroactive change in the law with respect to 1971 capital surplus on hand which had already been realized, except to the extent that it had been distributed by way of dividend prior to May 7, 1974.

* The representatives of the Department of Finance indicated that this was a matter of policy.

Clause 59 - section 95

Foreign Accrual Property Income

* It was pointed out that the rollover provisions in respect of foreign affiliates were far less comprehensive than those available to Canadian resident corporations. The representatives of the Department of Finance indicated that the matter was under study, and that it was hoped that a further liberalization of these rules might be achieved at some future date.

Clause 60 (2) - subsection 96 (1.1)
Clause 63 (1) - section 98.1

Allocation of Share of Income to Retiring Partner
Residual Interest in Partnership

It is understood that these provisions are intended to include agreements made by retiring partners which are to be honored by a continuing proprietorship. However, since they refer only to a partnership this cannot be the result under the proposed amendments.

* The representatives of the Department of Finance indicated, however, that they would give consideration to rectifying this in the future.

Clause 70 (1) - subsection 110.1 (1)

Interest and Dividend Income Deductible

The preamble states the following: "... there may be deducted from his income for the year an amount equal to the lesser of". It was suggested that this be changed to the following: "... there may be deducted from his income for the year an amount not exceeding the lesser of".

With the present wording a specific amount is said to be deductible in computing taxable income whether or not that full amount is required to eliminate any taxable income otherwise determined. This has particular relevance where the unused portion of the spouse's deduction is to be taken into account in computing to his spouse under subsection 110.1 (6).

* The representative of Revenue Canada indicated the Act would be interpreted and administered so that only the amount required to eliminate taxable income would be deducted.

Clause 71 (1) - section 111.1

Ordering

This clause was intended to implement the amendment proposed in paragraph 82.1 of the income tax motion. The said paragraph in the motion provided that for 1975 and subsequent years individuals would be required to make deductions in computing their taxable income in the following order - 109, 110.1, 110.2, 110 and 111. New section 111.1 omits any reference to section 111.

* In discussions with officials of the Department of Finance the Committee staff was advised that the omission in Bill C-49 was intentional. In certain cases, however, there may be confusion as to the determination of the amounts deductible under section 111. This would be caused by the fact that the amount of a loss which is deductible is to be determined after giving effect to all other deductions, with the exception of personal exemptions. As a result of the "ordering", the amounts of certain other deductions would appear dependent on the personal exemptions and the deductible losses.

Clause 74 (5) - paragraph 115 (1)(b)

Taxable Canadian Property and NRO Corporations

The qualification in order that the shares of an NRO corporation be excluded from taxable Canadian property is very restrictive. If the corporation holds any taxable Canadian property on the first day of its taxation year in which its shares are sold, its share will constitute taxable Canadian property. In discussions with representatives of the Department of Finance, it was suggested that the gain taxable by Canada on the disposition of NRO shares be limited to the amount of any gain that would be realized on a disposition of the NRO's taxable Canadian property at that time.

It was also suggested that the definition of the capital gains divident account of an NRO corporation should be extended to include capital gains realized on the disposition of foreign property. Such gains are not taxable to the NRO thus it is only reasonable that any gains realized in connection therewith should not fall into normal surplus from which distributions are subject to withholding tax under Part XIII.

It was furthur suggested that the allowable refundable tax on hand be defined to include amounts determined in respect of the current year and not only for years ending before the particular time. This would bring the refundable provisions for NRO corporations in line with the corresponding provisions relative to the refundable dividend tax on hand of private corporations. There would seem to be no reason for a difference in the treatment of NRO corporations in this regard from that accorded private corporations.

It was also suggested that the definition of an NRO be amended so as to permit the qualification of existing corporations as NRO's if all of the tests are met, other than the test that it elect to be so treated not later than 90 days after the commencement of its first taxation year commencing after 1971.

* The latter three points do not arise from Bill C-49 itself, and were not discussed at the Committee hearings at which Department of Finance officials were in attendance. However, they were discussed previously with these officials, who indicated that they would be given consideration.

Clause 75 (3) - subsection 116 (5.1)

Liability of Purchaser in Certain Cases

This provision could place an onerous financial responsibility on, for example, the recipient of a gift of shares of a private corporation. Such person may not be able to generate sufficient funds for the withholding obligation placed upon him under subsection 116 (5) which could be as high as 15% of the fair market value of the property received.

It was suggested in discussions with representatives of the Department of Finance that at the very least, a provision be introduced for the extension of the period within which the receipient in such cases must remit the tax beyond the "30 days after the end of the month in which he acquired the property" now stipulated in paragraph 116 (5)(c).

* This point was not further raised in the Committee hearings.

Clause 99 (3) - subsection 146 (5.1)

Contribution to Spouse's RRSP

This subsection contains a reference to either paragraph 146 (5)(a) or (b), whichever is applicable to the taxpayer. The preamble in subsection 146 (5) refers to a taxpayer who is an annuitant under a Registered Retirement Savings Plan. As a result, it is unclear whether a taxpayer can make a deductible contribution to his spouse's RRSP if he himself is not an annuitant under his own RRSP.

* The representatives of the Department of Finance indicated that no such restriction was intended, and the representative of Revenue Canada stated that the provision would be administered accordingly.

Clause 100 - section 146.2

Registered Home Ownership Savings Plan

Subsection 146.2 (7) provides that any excess contributions to a trust under such a plan together with any interest, profits or gains attributable thereto, must be refunded to the taxpayer by the trustee within 120 days after the year end. Subsection 146.2 (6) provides that, with certain exceptions, all amounts received from a trust under such a plan must be included in the taxpayer's income. Excess contributions are not included amongst the exceptions. Accordingly, the receipt thereof upon the refund to the taxpayer will be fully taxable in the hands of the taxpayer together with any interest, etc., related thereto,

A question arises as to why that part of any refund which represents an excess contribution should be included in the taxpayer's income. If such excess contribution was the result of an error on the part of the taxpayer, he may be quite severely penalized in that the refund thereof will be fully taxable whereas the original contribution had not been deductible. While some provision may be necessary in order to inhibit taxpayers from deferring investment income from one year to another through making an ex cess contribution to a trust under such a plan, the present provisions may be too severe, particularly in those situations where the excess contribution was through oversight. It would seem more reasonable, for example, if the income related to the excess contribution were taxed at the marginal rate applicable in the year of the excess contribution and that an interest charge be applied as though the tax payable on this related income were payable in the year of the excess contribution.

* This point was discussed with representatives of the Department of Finance; it was not subsequently discussed at the hearings of the Committee.

Subclauses 118 (10) and (12)

Application of Part XIII to Partnerships

It is proposed that the Act be amended by the addition of a new paragraph 212 (13.1)(b) so as to deem a partnership to be a non-resident person for the purposes of Part XIII unless it is made up exclusively of Canadian resident partners. This could cause inequitable results where some of the partners were resident in Canada. Their share of the income of the partnership would suffer withholding tax, and it is not clear under the Act that they would be entitled to credit this tax against their tax liability under Part 1, since the partnership would have been deemed to be a separate non-resident person in respect of the payment for the purposes of Part XIII.

In addition, uncertainty would prevail in any case in which a partnership was used as a public investment vehicle, since the partners could never be sure that they all were, and would remain, residents of Canada.

It also seems inequitable that the rule is to be made applicable to situations arising out of agreements entered into in writing prior to May 7, 1974, when such is not the case in respect of other changes made by subclause 118 (10).

Furthermore, it is conceivable that the non-resident partners of such a partnership would elect under section 216, as it would be amended by Clause 121 of the Bill, to be taxed on their net rental income under Part I of the Act, and notwithstanding, that the gross rent paid to the partnership would remain subject to withholding tax under the new paragraph 212 (13.1)(b).

* At the Committee hearings, the representatives of the Department of Finance noted these points and indicated that although they hadn't been under the impression that there were problems in this area, they would give the matter consideration.

Clause 134 - ITAR 32.1 (3) and (4)

Late Filed Section 83 Elections

It was suggested that these provisions be extended to include a reference not only to a dividend that had become payable but also one that was deemed to have become payable under some provision of the Act.

* The representative of Revenue Canada, indicated that the provisions would be administered so as to apply to both dividends and deemed dividends, so long as they had been intended to be covered by an election under Section 83.

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1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*



Issue No. 32

TUESDAY, MARCH 18, 1975
WEDNESDAY, MARCH 19, 1975

Seventh and Final Proceedings on Bill C-29, intituled:

"An Act respecting Canadian business corporations"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

28758—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hays
Beaubien	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(19)
Hayden	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, February 4, 1975:

"Pursuant to the Order of the Day, the Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill C-29, intituled: "An Act respecting Canadian business corporations", be read the second time.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Hayden moved, seconded by the Honourable Senator Bourget, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, March 18, 1975
(44)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: *Bill C-29—"An Act respecting Canadian business corporations".*

Present: The Honourable Senators Hayden (*Chairman*), Connolly (*Ottawa West*), Cook, Desruisseaux, Laird, Macdonald (*Cape Breton*), Macnaughton and McIlraith.

Present, not of the Committee: The Honourable Senator Godfrey.

In Attendance: Mr. H. Purdy Crawford, Special Counsel to the Committee.

WITNESSES:

Foothills Pipe Lines Limited:

Mr. G. J. Gorman, Q.C., Counsel.

Mr. D. G. Gibson, Assistant General Counsel.

Canadian Arctic Gas Pipeline Limited:

Mr. D. M. M. Goldie, Q.C., Counsel.

Mr. Norman Cafik, Parliamentary Secretary to the Minister of Consumer and Corporate Affairs.

Department of Consumer and Corporate Affairs:

Mr. John Howard, Assistant Deputy Minister (Corporate Affairs);

Mr. Fred Sparling, Director, (Corporations Branch);

Mr. Digby Viets, Senior Legal Advisor (Corporations Branch); and

Mr. Phil Anisman, Director (Corporate Research Branch).

Following discussion and upon motion of the Honourable Senator McIlraith, it was Resolved to amend Item 6 of the Schedule attached to the Bill by redefining the word "company" therein.

At 12:15 p.m. following further discussion, the Committee adjourned consideration of the above matter until 9:30 a.m., Wednesday, March 19, 1975.

Wednesday, March 19, 1975
(46)

At 9:30 a.m. the Committee *resumed* consideration of the above matter *in camera.*

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Buckwold, Connolly (*Ottawa West*), Desruisseaux, Flynn, Laird, Macdonald (*Cape Breton*) and Macnaughton.

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel and Mr. H. Purdy Crawford, Special Counsel to the Committee.

The Committee then proceeded to the discussion of amendments to the following clauses:

Clauses 4, 11, 20, 21, 80, 106, 109, 110, 116, 122, 140, 143, 153, 180, 181, 182, 198, 218, 222, 244, 245 and Item 6 of the Schedule.

NOTE: (The full text of the amendments appears by reference to the Report of the Committee immediately following these minutes).

At 11:30 p.m., the Committee admitted the following witnesses:

WITNESSES:

Mr. Norman Cafik, Parliamentary Secretary to the Minister of Consumer and Corporate Affairs.

Mr. John Howard, Assistant Deputy Minister, Department of Consumer and Corporate Affairs.

At 12:05 p.m., following discussion of the proposed amendments with the witnesses, the Committee again proceeded *in camera.*

Following further discussion, it was Resolved to report the said Bill incorporating the amendments discussed earlier this day, including observations respecting corporate reorganization.

At 12:15 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,

Clerk of the Committee.

Report of the Committee

Wednesday, March 19, 1975.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-29, intituled: "An Act respecting Canadian business corporations" has, in obedience to the order of reference of Tuesday, February 4, 1975, examined the said Bill and now reports the same with the following amendments:

1. *Page 7:* Strike out lines 17 and 18 and substitute therefor the following:

   "corporations incorporated to carry on business throughout Canada, to advance the cause of".

2. *Page 10:* Strike out lines 29 to 32, inclusive, and substitute therefor the following:

   "name it had before such continuance."

3. *Page 15:* Strike out lines 24 to 27, inclusive, and substitute therefor the following:

   "(6) A corporation that, without reasonable cause, fails to comply with this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars."

4. *Page 15:* Strike out lines 34 and 35 and substitute therefor the following:

   "free of charge, and, where the corporation is a distributing corporation as defined in subsection 121(1), any other person may do so upon payment of a reasonable fee."

5. *Page 16:* Strike out line 1 and substitute therefor the following:

   "(3) Sharholders and creditors, of a corporation, their agents and legal representatives, the Director and, where the corporation is a distributing corporation as defined in subsection 121(1), any other person, upon payment of a".

6. *Page 17:* Strike out lines 24 and 25 and substitute therefor the following:

   "(10) A person who, without reasonable cause, contravenes this section is guilty of an offence and liable on".

7. *Page 63:* Strike out line 19 and substitute therefor the following:

   "(6) A person who, without reasonable cause, contravenes subsection".

8. *Page 75:* Strike out line 13 and substitute therefor the following:

   "106.(1) Notwithstanding subsection 109(3), but subject to subsections (3) and".

9. *Page 77:* Renumber subsections 109(4) to 109(8), inclusive, as subsections 109(5) to 109(9), inclusive, and insert a new subsection 109(4), as follows:

   "(4) Notwithstanding subsection (3), directors may transact business at a meeting of directors where a majority of resident Canadian directors is not present if

   (a) a resident Canadian director who is unable to be present approves in writing or by telephone or other communications facilities the business transacted at the meeting; and

   (b) a majority of resident Canadian directors would have been present had that director been present at the meeting."

10. *Page 79:* Strike out lines 1 to 4 inclusive.

11. *Page 85:* Strike out lines 1 and 2 inclusive and substitute therefor the following:

    "duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do any thing referred to in subsection 110(3);".

12. *Page 92:* Strike out line 36 and substitute therefor the following:

    "(9) A person who, without reasonable cause, fails to comply with".

13. *Page 106:* Strike out lines 41 and 42 and substitute therefor the following:

    "thereby relieved of their duties and liabilities to the same extent."

14. *Page 109:* Strike out line 22 and substitute therefor the following:

    "fails to comply without reasonable cause, with subsection (1), the".

15. *Page 116:* Strike out line 4 and substitute therefor the following:

    "(2) A corporation that, without reasonable cause, fails to comply".

16. *Page 136:* Strike out lines 12 to 15 inclusive and substitute therefor the following:

    "may be continued to be prosecuted by or against the amalgamated corporation;".

17. *Page 136:* Strike out lines 18 to 21 inclusive and substitute therefor the following:

    "amalgamating corporation may be enforced by or against the amalgamated corporation;".

18. *Page 137:* Strike out lines 29 to 32 inclusive, and substitute therefor the following:

    "against the body corporate may be continued to be prosecuted by or against the corporation;".

19. *Page 137:* Strike out lines 35 to 37, inclusive, and substitute therefor the following:

"body corporate may be enforced by or against the corporation."

20. *Page 139:* Strike out lines 40 to 43, inclusive, and substitute therefor the following:

"against the corporation may be continued to be prosecuted by or against the body corporate; and".

21. *Page 140:* Strike out lines 3 to 5, inclusive, and substitute therefor the following:

"corporation may be enforced by or against the body corporate".

22. *Page 154:* Strike out line 27 and substitute therefor the following:

"(1) An offeror who, without reasonable cause, fails to comply".

23. *Page 176:* Strike out line 24 and substitute therefor the following:

"(2) A person who, without reasonable cause, contravenes subsec-".

24. *Page 179:* Amend clause 222 by adding thereto the following subclauses:

"(5) An *Ex parte* application under this section shall be heard *in camera.*

(6) No person may publish anything relating to *ex parte* proceedings under this section except with the authorization of the court or the written consent of the corporation being investigated."

25. *Page 191:* Strike out line 33 and substitute therefor the following:

"Every person who, without reasonable cause, contravenes a".

26. *Page 192:* Delete subsection 245(2) and renumber subsections 245(3) and 245(4) as subsections 245(2) and 245(3).

27. *Page 206:* Strike out clause 1 of Item 6 and substitute therefor the following:

"1. The definition "company" in section 2 is repealed and the following substituted therefor:

"company" includes

(a) a person having authority under a special act to construct or operate a pipeline, and

(b) a body corporate incorporated or continued under the Canada Business Corporations Act and not discontinued under that Act."

In addition to the specific amendments proposed, the Committee gave consideration to the question of corporate reorganizations. Concern has been expressed that the failure to include reorganization provisions of the type contained in the *Canada Corporations Act* and in various provincial corporations acts, will result in preventing certain reasonable types of business reorganizations from being accomplished under this Act. The Ministry of Consumer and Corporate Affairs points out that many of the business reorganizations of the type referred to have related to bankruptcy or insolvency situations and that these will be dealt with in a new federal bankruptcy act to be introduced shortly.

In addition, the Ministry refers to the provisions of Part XIV of the Bill relating to Fundamental Changes and suggests that in the non-insolvency bankruptcy situations these provisions would permit any type of corporate reorganization which heretofore could have been conducted under the reorganization provisions. Your Committee doubts that such is the case. In particular, the ability under court supervision to force an exchange of securities in various circumstances seems to be lacking. On the other hand the insertion of reorganization provisions into the Bill at this time would require careful consideration and a substantial change in the Bill. The Ministry has undertaken to give this matter careful consideration and, if desirable, include reorganization provisions in the first amending bill which is introduced. Your Committee recommends that this course of action be followed.

Respectfully submitted,

Salter A. Hayden,

Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Tuesday, March 18, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-29, respecting Canadian business corporations, met this day at 9.30 a.m. to give further consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, you will recall that we had one part of Bill C-29 left to deal with, the part having to do with investigations.

Mr. J. L. Howard, Assistant Deputy Minister (Corporate Affairs), Department of Consumer and Corporate Affairs: We touched on Part XVIII earlier. There was a problem with clause 222. Other than that we had gone through Part XVIII. One part that had really been left outstanding was Part XIX.

The Chairman: We have several people here this morning who wish to address our attention to one of the schedules, which has to do with the National Energy Board Act, on page 206. The question has to do with the definition of "company" in section 2 of the National Energy Board Act. It is proposed by this bill to amend that definition. We have here Mr. Gorman. Would you explain what your position is, Mr. Gorman?

Senator Connolly: Before Mr. Gorman begins, Mr. Chairman, I would like to declare an interest to the extend that I am a partner in the firm in which Mr. Gorman is a partner, so I will not participate in this discussion.

Senator Laird: We wont't hold that against him!

Senator Connolly: I was just wondering whether the other members of the committee think I should withdraw.

The Chairman: I do not think so. You have declared your interest.

Mr. Gorman, would you care to tell us what your problem is and what suggestions you have to make?

Mr. G. J. Gorman Q. C. Counsel, Foothills Pipe Lines Limited: Mr. Chairman, honourable senators, the concern my clients have has to do with the consequential amendments to the Nationall Energy Board Act.

The Chairman: Perhaps you should tell us who you represent.

Mr. Gorman: I represent Foothills Pipe Lines Limited, which is a company incorporated by special act of the Parliament of Canada in 1959. The company has been inactive up to now and does not hold a certificate of public convenience and necessity issued by the National Energy Board. However, it has publicly announced its intention to apply to the National Energy Board in the near future to construct a pipeline from the Mackenzie Delta in the Northwest Territories to a point just north of the 60th parallel of latitude. That pipeline will then connect in with other facilities to be built by other parties, so that the gas can be brought down through British Columbia and Alberta, and thus serve the rest of Canada through the TransCanada system.

I should say further that, according to a story in the *Globe and Mail* on Saturday, a spokesman for the National Energy Board announced late last week that they expected to receive the application of Foothills, and that a joint hearing on the pipeline proposal might be held starting this year.

The concern, sir, arises out of the reading of the new proposed definition of "company," as it appears in the schedule at page 206 of the bill under consideration, when that is read together with sections 27 and 28 of the National Energy Board Act as they now stand. Perhaps I can just read parts of each of those sections. Section 27 provides:

> Except as otherwise provided in this Act, a company shall not begin the construction of a section or part of a pipeline until
>
> (a) the Board has by the issue of a certificate granted the company leave to construct the line;

Now, on one construction of that it might be argued that the certificate could only be granted to a company, and, if we have the definition of "company" as it now appears in you schedule, namely, as one to which a certificate has been issued, it might be argued that the intention of Parliament was, by this amendment, to prevent any company which does not now hold a certificate from applying for or receiving one. So it goes to the status of my client.

Certainly, the opposite could be argued. Our concern is that with a matter of such great importance as the Mackenzie Valley pipeline, the tremendous possible opposition which may arise to it, the great need for the gas which will be transported by it, any uncertainty in the legislation which could give rise to appeals to the Federal Court, the Federal Court of Appeal, and possibly even to the Supreme Court of Canada on a question of law, as would arise here, might result in delays which could be very serious, not only to the company but to all consumers of gas in Canada.

I have, therefore, taken the liberty, Mr. Chairman, in my brief letter to you yesterday, of suggesting what appeared to us to be a satisfactory definition of "company" which might be used in the schedule in place of the one now proposed. Would it be your wish that I read that proposed definition?

The Chairman: Have you seen the form of amendment we have already come up with?

Mr. Gorman: No, I have not seen it, sir.

Senator Macnaughton: Mr. Chairman, I would suggest that Mr. Gorman's letter be entered as part of our record.

The Chairman: In view of its brevity, I see no harm in that. The letter is addressed to me and is dated March 17, 1975.

Dear Senator Hayden:

I represent Foothills Pipe Lines Limited, a company incorporated by Special Act of the Parliament of Canada, being 7-8-Elizabeth II, 1959, which has announced its intention to apply to the National Energy Board within the very near future, for a Certificate of Public Convenience and Necessity under the National Energy Board Act, to enable it to construct and operate a natural gas transmission system, the main line of which will extend from the Mackenzie River Delta in the Northwest Territories to a point just north of 60° North Latitude.

Our concern is about one of the proposed amendments to the National Energy Board Act contained in Item 6 of the Schedule to the Canada Business Corporations Act, Bill C-29, now before your Committee. By confining the definition of "company" to an entity that already holds a certificate, it can be argued that on a proper interpretation of the whole of the National Energy Board Act, and particularly Sections 27 and 28, that only those companies which already hold a certificate under that Act, have the status to apply for authority to construct a new pipe line.

I would therefore, respectfully suggest that the following be substituted for Clause 1 as it appears in the proposed Schedule:

1. The definition "company" in section 2 is repealed and the following substituted therefor:

" "company" includes

(a) a person having authority under a Special Act to construct or operate pipelines, and

(b) a body corporate incorporated or continued under the Canada Business Corporations Act and not discountinued under that Act."

I am informed that your Committee is in the final stages of its consideration of Bill C-29 and I would request the opportunity of appearing before the Committee on March 18th or at a later sitting.

I am arranging for a copy of this letter to be delivered to Mr. Jackson, Clerk of the Committee.

Yours very truly,

Gregory J. Gorman

Mr. Gorman: Mr. Chairman, I have had a chance to read the amendment proposed and I think it is quite satisfactory.

The Chairman: We now have Mr. Goldie and Mr. Gibson representing the Canadian Arctic Gas Pipeline Limited.

Mr. D. M. M. Goldie, Q.C., Canadian Arctic Gas Pipeline Limited: Mr. Chairman, honourable senators, I appear for Canadian Arctic Gas Pipeline Limited, a federally incorporated company which has an application pending before the National Energy Board for a certificate of public convenience and necessity to construct and operate the Mackenzie Valley Pipeline.

As you may have gathered, Mr. Gorman's client has the same idea in mind, and the joint application to which he referred would involve his client and my client. This will probably be the last time that Mr. Gorman and I will be appearing on the same side of anything, but I am here to support the proposition which he put to you a few minutes ago. He read to you part of section 27 of the National Energy Board Act and pointed out that on a fair construction of that—and by "fair construction" I refer to the bill as it now stands—it might be restricted to a company which already had a certificate. I do not want to belabour the point, so I simply say that I associate myself with what he said. But I also direct your attention, honourable senators, to section 28 of the National Energy Board Act, which in part reads as follows:

> Upon an application for a certificate, the company shall file with the Board—

and so on. That suggests that an applicant at the time of filing must hold a certificate. My client has already made its application and the literal combined effect of the present definition, as proposed in the bill, and section 28 of the National Energy Board Act would be to invalidate that application as it now stands.

The Chairman: Mr. Goldie, if you look at the definition of "company" in the National Energy Board Act, in my view it would appear to support what you have said, in that it defines a company as:

> "a person having authority under a Special Act to construct or operate pipelines;"

Mr. Goldie: That definition poses no problem for my client, of course, because it is given the authority in its Letters Patent to construct and operate, but the new definition would suggest otherwise; and when I say "new" I am not referring to the one which is before you now as an amendment but the one which appears in the bill as printed.

The Chairman: If you look at the definition of "certificate" in the National Energy Board Act, it states:

> "certificate" means a certificate of public convenience and necessity issued under Part III;

Certainly, you are not in that position.

Mr. Goldie: No, we are not in that position and that is why we are here. I second everything that Mr. Gorman has said, because it would be most unfortunate if what I am sure is an unintended technicality were to create a doubt about the certificate, if issued, to either one of our respective clients. I need not point out the problems which might arise with respect to powers of expropriation or, indeed, the financing of a line in which the certificate was under some question.

There is a further—and I am equally certain it is unintended, Mr. Chairman—effect of the definition as printed, in that it would appear to allow a provincially incorporated body to apply to the National Energy Board for a certificate. That has not been the policy of Parliament as reflected in the National Energy Board Act, which restricts applications to federally incorporated companies. But that arises out of the use of the word "body corporate" in the definition as printed.

I might say that I have read the proposed amendment, Mr. Chairman, and I concur in it.

The Chairman: It covers your situation completely.

Mr. Goldie: It does, indeed. Thank you very much.

The Chairman: We will now hear from Mr. Cafik.

Mr. Norman Cafik, M.P. Parliamentary Secretary to Minister of Consumer and Corporate Affairs: Thank you, Mr. Chairman. The question I am about to deal with was brought to my attention about a week and a half ago. At that time I was led to believe that the technical problem created in this consequential amendment could be overcome by such a body taking over an existing shell corporation on a temporary basis in order to comply with these provisions; but I have subsequently found out, after further discussions, that this is not possible, and clearly the section of the act dealing with the National Energy Board is inappropriate in our view. It is a very serious matter, and it does require an amendment, which we would hope that the Senate would introduce to this bill.

I have looked at the proposed amendment that the chairman handed me, and as far as we are concerned in the Department of Consumer and Corporate Affairs, in respect to Bill C-29, it is a very worthwhile amendment and something that is an absolute necessity. We therefore would have no difficulty whatever living with the amendment that has been circulated here today.

The Chairman: Is there anything you want to add, Mr. Howard?

Mr. Howard: No, sir, except in respect of paragraph (b). We have used the broad phrase there, "a body corporate" rather than, "a federal body corporate". As I have stated many times to this committee with regard to this bill, we have not tried to look upon a federal corporation as some kind of federal property, and we have deprecated those parts of provincial statutes which have precluded transfer out of the provincial jurisdiction, because the provinces do tend to look upon their corporations as their provincial property. That is why we have used the broad phrase here, and, in effect, by doing that we have left to the National Energy Board the discretion to determine whether it would grant a licence to a body corporate that was not originally incorporated at the federal level.

The Chairman: I have caused to be distributed to you the form of amendment which is proposed. This amendment meets the wishes and the position in which the Canadian Arctic Gas Company and Foothills Pipe Lines Limited find themselves, and it also carries the imprimatur of the department via Mr. Cafik and Mr. Howard. In those circumstances, is there any discussion, or do I have a motion?

Senator McIlraith: I move that it be adopted.

The Chairman: The wording of the amendment, then, would be:

> That Bill C-29 be amended by striking out clause 1 of Item 6 on page 206 thereof and substituting therefor the following:
>
> "1. The definition "company" in section 2 is repealed and the following substituted therefor: "company" includes
>
> (a) a person having authority under a Special Act to construct or operate a pipeline, and
>
> (b) a body corporate incorporated or continued under the Canada Business Corporation Act and not discontinued under that Act."

Are you ready for the question? Those in favour? Contrary, if any? The amendment carries.

Senator Connolly: Could I be shown as not participating in that vote, Mr. Chairman?

The Chairman: Yes. The report will show that Senator Connolly did not take part in or vote on that amendment.

We have the text in French as well.

The purpose this morning was, first, to hear Mr. Cafik, who has some urgent appointments later in the day, and then we propose to deal with the remaining parts of the bill. If we have further time left this morning we would start in to discuss the amendments which appear from the discussions in committee to be desirable. A copy of those proposed amendments has been furnished to the department, and while there may be some variations in the material you have, I do not think they are particularly substantial, in any event, as soon as we get them copied we will let you see them.

Now, Mr. Cafik, do you want to address yourself either to our attitude as disclosed in the examination of the bill, and/or to the proposal as to amendments that might be desirable in this bill?

Mr. Cafik: Mr. Chairman, I think I should point out first of all that, indeed, earlier I did have some other engagements, but I have made arrangements to forestall those in order to be here for your entire hearings today, however long they may be. If you wish, it is certainly agreeable to us to go through the technical aspects of it with Mr. Howard before I would make a concluding statement. I think it might be desirable to do it that way, but that would be entirely up to you.

The Chairman: As a matter of fact, that would be the most orderly way of proceeding, but since I understood you were only available this morning, and of course we wanted to hear you—you had asked to be heard, and we told you you would be heard—we will defer the pleasure of hearing you. Mr. Howard, shall we get on with the business of the meeting now? That is, Part XVIII.

Mr. Howard: You will recall, Mr. Chairman, that we did go through Part XVIII once before, very hurriedly, and we reserved clause 222 particularly.

The Chairman: What is the page?

Mr. Howard: Page 179.

The Chairman: Yes. We had looked at clause 222 and after some discussion I marked it "stands"; so the floor is yours, Mr. Howard.

Mr. Howard: I do not think there was any difficulty with any other particular provision in this, other than clause 222.

Two problems were raised there. The first one was whether all applications made *ex parte* should be made *in camera*. The second problem concerned publication of any information about the *in camera* proceedings by any party. Those were left open. They were discussed at the time by various members of the committee. I do not recall that there was any particular difficulty with the rest of it.

The model here, of course, as I pointed out before, in effect, compels anybody who wants to initiate an investigation to have it authorized by the court. Under the present act the application is not made to a court, but to the Restrictive Trade Practices Commission. This bill takes that power away from the Restrictive Trade Practices Commission and puts it back into court.

There are two reasons for this. The first is that the Restrictive Trade Practices Commission just happens to be centralized in Ottawa, and we wanted to make sure anybody could apply to a court anywhere across Canada in order to initiate an investigation. The second thing was that under this bill, since we have conferred such wide powers on the superior courts in the provinces, we thought we should vest this power also in that court, in order to be consistent.

The Chairman: Yes. If the committee recalls, the objection that was raised when we were discussing this clause was the fact that any shareholder could apply *ex parte*, whatever motives he might have for so doing, which means that in the first instance an order would be obtained without notice to the company concerned until after the event.

Mr. H. Purdy Crawford, Special Counsel to the Committee: Mr. Chairman, when we reach an appropriate point it might be in order to ask Mr. Howard what he thinks of the amendment proposed by the Canadian Bar Association.

The Chairman: Yes. I take it, Mr. Howard, that you are familiar with the amendment which was proposed by the Canadian Bar Association.

Mr. Howard: Yes, sir. I am generally familiar with it. I do not recall the exact wording.

The Chairman: May I read it to the committee? The Canadian Bar Association proposed that clause 222(2) be amended by adding the words:

> Provided that if the application is proceeding *ex parte* the order shall be limited to those provisions in clauses (b), (d) and (e) of subsection 223(1) until a hearing upon notice of the corporation has been held.

Now if you look at clause 223(1)(b), which we also stood, it deals with the appointment of an inspector who may be the Director, (d) deals with an order authorizing the inspector to enter on the premises, et cetera, and (e) deals with an order requiring any person to produce documents or records to the inspector

Senator Cook: How does the amendment start again, Mr. Chairman?

The Chairman: It says:

> Provided that if the application is proceeding *ex parte* the order shall be limited to those provisions in clauses (b), (d) and (e) of subsection 223(1) until a hearing upon notice of the corporation has been held.

In other words, under (b), (d) and (e) the action taken *ex parte* would enable the seizure of assets to prevent any wastage, et cetera. But as to all the other subclauses of 223, they shall not be enforcible until there has been a hearing on the merits.

Senator Cook: Until the company has been heard.

The Chairman: That is right. Now Mr. Howard, could we have your views on the proposed amendment?

Mr. Howard: Mr. Chairman, for two reasons I do not like the Canadian Bar Association proposal. First of all, as a matter of technical wording, we have succeeded in drafting a very comprehensive bill without ever using a proviso clause.

The Chairman: There is always a first time.

Mr. Howard: We would rather avoid it, if we may, Mr. Chairman. We have succeeded so far in doing so. The second thing they are doing is confining the investigatory actions that can be taken, but they are not meeting at all the objections of the committee members to the publicity being given to it because it is not being made *in camera*. Then there is the wider publicity if any party is free to go out to the press and discuss the proceedings. I would prefer to defer this, if we could, until I have had an opportunity to discuss specific wording with counsel to the committee. My objection is that I do not think it meets the points that have since been raised by the members of this committee.

Senator Connolly: You said, Mr. Howard, that if the hearing is not conducted *in camera*, and publication is allowed by the parties, then perhaps the purpose to which the Canadian Bar Association is directing its attention may have been served?

Mr. Howard: No, I think the Canadian Bar Association, when they prepared this draft, did not know of the comments of this committee, and what they did would simply confine the number of investigatory acts which the investigator could make.

The Chairman: But that is in an *ex parte* proceeding.

Mr. Howard: Yes, we are only discussing an *ex parte* proceeding and I would prefer something to the effect—having regard to the discussions that came out of this committee—that where a proceeding is made *ex parte*, then it must be *in camera*, and where it is made *in camera* no party may make any publication in respect of those proceedings without the authorization of the court or the corporation. I think that would reflect the reservations stated by various members of the committee. In fairness to the Canadian Bar Association, they did not know about these reservations and their only concern was that there could be a full-fledged investigation predicated upon an *ex parte* order.

The Chairman: Yes. Our concern in the committee was that any shareholder could make this *ex parte* application and his purposes might not be as pure as you might ordinarily intend such an application to be. He may be interested in depressing the shares of the company, which makes for easier acquisition, and therefore we thought there was a danger and a risk of information going out in some form without any answer being made by the corporation, which could suddenly find itself under an order to be investigated and the Director moving in and publicity and so on. So your suggestion, about no publicity without an order of the court and unless the corporation consents, would appear to deal with that point, but if you wish to talk it over with our counsel, then we will stand that clause still further and come to it at the end of the other clauses that we have looked at.

Senator Cook: I am somewhat confused. Are there two separate points here? What the Canadian Bar Association suggests stands on its own feet, apart from being heard *in camera*.

The Chairman: There are two distinct points of view, yes.

Senator Connolly: I wonder whether Mr. Howard was thinking, Mr. Chairman, that perhaps there should be some adjustment made in clause 222 to prescribe first of all that

ex parte applications should be *in camera*, and secondly that there should be an order forbidding publicity.

Mr. Howard: Unless the court otherwise authorizes or the corporation consents to it.

Senator Connolly: So you are in fact thinking about something to accommodate the views previously expressed in this committee.

Mr. Howard: Yes, but there is still the other point that has been raised. I am still, with that suggestion, leaving to the court wide discretion to determine in *in camera* proceedings what steps an investigator may take. I can see no purpose in confining the court's discretion in those circumstances.

Senator Connolly: Perhaps (a) to (k) in subclause (1) of clause 223 would be left open to the discretion of the court.

Mr. Howard: That would be consistent with this whole bill.

The Chairman: What we discussed in committee was the danger of the kind of publicity that might develop. Some of these things in clause 223 are bound to come to public attention in any event.

Mr. Howard: Yes, Mr. Chairman, they will in time.

The Chairman: And frankly I would not have any feeling in the matter as to putting the judge on terms. I mean, we provide that the *ex parte* proceedings, as they may take place, must have no publicity attached and if the judge regards that as a limitation on his authority, why, then, Mr. Howard has suggested the words "unless the judge otherwise orders."

Senator Cook: If we go along with that idea and it is held *in camera*, does that mean a judge can make an order under clause 223(1)(b) without giving notice to the corporation?

The Chairman: Yes.

Senator Cook: I would think that notice to the corporation would be more important than having it heard *in camera*. However, if that is the only way . . .

Senator Connolly: I am not taking an adversary position in this, but this is for the appointment of an inspector, and there would have to be notice to the corporation by the very fact that the inspector, having been appointed, would immediately have to be in touch with the corporation to inspect. Does it not follow that the corporation automatically would know of the order?

Senator Cook: Yes, but my point is, has the corporation had any opportunity to argue the merits of the order?

Senator Connolly: No; so far, no.

Senator Cook: So the inspector walks in and the corporation may have a very good observation to make.

The Chairman: The whole subject of this is that at some stage the corporation should have the opportunity of contesting this on the merits. Under clauses 222 and 223, as I read them, unless I have missed something, the corporation does not have that opportunity.

Senator Cook: One can see the desirability of the Director moving swiftly in order not to give the corporation the opportunity to burn its papers, or something, but somewhere along the line they should have power to lift the order.

The Chairman: One of the reasons I like the suggestion of the Canadian Bar Association—and maybe we can join the two elements together—is that the authority provided in the Canadian Bar Association's proposed amendment does permit the freezing of the assets, so that there cannot be any dissipation of them, and there would really be direction and control of the business until such time as there is discussion on the merits.

Now, what is the objection to providing for discussion on the merits? I notice that under clause 225:

> Any interested person may apply to the court of an order that a hearing conducted by an inspector under this Part be heard in camera and for directions on any matter arising in the investigation.

But this is after the event.

Mr. Howard: Yes, sir; this is not the application to the court to initiate investigation. This is a hearing or interrogation conducted by the inspector, who is, of course, an officer of the court.

The Chairman: Of course, that is a necessary provision, but the question is when does the corporation have an opportunity to contest this application on the merits?

Mr. Howard: Only after the investigation has been initiated. The whole investigatory power is of no use in the statute if there is no surprise element in it.

The Chairman: If there is no what?

Mr. Howard: A surprise element in it. It must be equated always with a search warrant. That is the power sought here. It is a limited search warrant power to enter premises, seize documents, make copies of documents and freeze the operations of the business, if necessary, and to place these under the supervision of an inspector appointed by the court for that purpose.

The Chairman: The Canadian Bar Association's proposed amendment, however, does not prevent that.

Mr. Howard: No, I do not believe so. As I say, I think the Bar itself acknowledges that there must be this surprise element. They just try to confine the power of the court to deal with these problems, and I see no reason to confine the court's power.

The Chairman: But you are only confining it on the original application.

Mr. Howard: Yes.

The Chairman: But there should be the opportunity, at some stage after the order has been made, for those affected by the order to appear and make an issue on the merits.

Senator Connolly: Could I supplement that question, Mr. Chairman, by saying this to Mr. Howard: Would you direct your attention to this set of circumstances? Suppose an application is made under clause 222 by a person and that application happens to be frivolous and also troublesome to the company and, perhaps, damaging to the company. It would be made *in camera* and the order subsequently made. What, then, under this legislation is the remedy of the company to avoid that?

Mr. Howard: There would be two applications possibly to deal with this, both under the common law procedural rules and the civil procedural rules. If the proceedings were frivolous it would be possible to move to set them aside as frivolous.

Senator Connolly: On the originating notice of motion?

Mr. Howard: That is correct. However, under this bill this specific remedy is provided in clause 242, an appeal to the court of appeal from an order of the court. That would be the method provided by this legislation to deal with it most effectively.

Senator Connolly: What would the situation be under the civil law?

Mr. Howard: It would be by petition.

Senator Connolly: There is a remedy, in other words, by which the company could protect itself?

Mr. Howard: Yes. Clause 242, the general appeal remedy, would be the best solution available to the company. In my opinion, that would be better than an argument as to an allegedly frivolous application.

Senator Cook: If the application were entirely without merit and under clause 223 the wheels started, surely there should be some course under clause 223 for the company to have the wheels stopped without having to appeal? This would be a situation in which anyone could come in without giving any surety as to costs, make an ex parte application to the court and the wheels get going but the company has no remedy other than appealing.

Mr. Howard: It is provided in clause 223 (1)(c) that the court has broad powers to require notice to be given to any interested party at any time.

Senator Cook: Surely.

The Chairman: Or dispensing with notice to any party.

Mr. Howard: Or dispensing with the notice, yes, but the court has very broad powers to deal with these situations at all times. Indeed, it can refuse the inspection order altogether, or vary it at any time.

Senator Cook: Does the requirement to give notice mean that the person has the right to be heard? There is no mention that the company has the right to be heard at all.

Mr. Howard: No, the court can dispense with the notice. There would be no use in having an investigatory provision if the surprise element were not included.

Senator Cook: I know; I am dealing with a case in which, let us assume, there is little merit in the application. Now, how does a company get before the court to be heard, arguing the merits of the application, other than by appeal?

Mr. Howard: It could bring on a motion before the court. I presume that could be done under any rules, anywhere. There is a motion before the court; the court has made a decision; anyone can make another motion and ask the court to amend the decision that was rendered. That has not been set out expressly in the bill. In fact, we have endeavoured to avoid re-writing the rules of court procedure in the corporations bill.

The Chairman: When they learn about it.

Mr. Howard: Oh, indeed, yes, when they learn about it they can apply to the court for amendment or, even, for termination of that particular application.

The Chairman: What is the notice to which reference is made in clause 223 (1)(c)?

Senator Connolly: I suppose it is a notice that the court would prescribe.

Mr. Howard: Yes, and the court could, for example, refuse any *ex parte* order and require that pre-notice be given to the corporation proposed to be investigated before it hears the application for the investigation.

The Chairman: But you are not addressing yourself to my question. You made reference to clause 223 (1)(c), which provides that:

> an order determining the notice to be given to any interested person, or dispensing with notice to any person;

What notice is intended by that paragraph?

Mr. Howard: We are focusing on the case where the court thinks that an *ex parte* application is not appropriate and that notice of the application for an investigation should be given to the corporation so that the corporation can come in and argue on the merits.

The Chairman: Why should you not say "determining the notice to be given on this application"?

Mr. Howard: You are starting to confine the judges' powers. If you look at the preamble to this section we say "In connection with an investigation ... the court may make any order it thinks fit." We then go on to say "including". The court has a lot of inherent powers. If someone makes an application for an *ex parte* order and gets the order, the corporation is free at any time to apply by motion to the court to seek an amendment or cancellation of the order.

Senator Cook: If under clause 222 you think it necessary to say "if a shareholder makes an application under subsection (1), he shall give the Director reasonable notice and the Director is entitled to appear to be heard by counsel," why cannot you say exactly the same about the company?

Senator Connolly: We are concerned here with whether or not we want to allow the element of surprise on the company to be injected into these sections of the act. I can certainly see a company being victimized by some frivolous application, but I would think that there would probably be many cases where it would be desirable to have surprise, if there were a danger of assets being dissipated.

The Chairman: I do not think there is any contest on the element of surprise. It is certainly consistent with the element of surprise if the corporation is given notice, and the notice is after the event. The *ex parte* order has been made, and if the judge does not make any direction, there is only one person before the judge—that is the shareholder or the director. The corporation is not there. It is an *ex parte* order. Who is going to ask for the right to contest on the merits? You may say, well, you can bring a motion.

Senator Macnaughton: Several days later.

The Chairman: Yes.

Senator Macnaughton: In the meantime you have publicity, perhaps, or rumours.

Senator McIlraith: There is something here that puzzles me. A single shareholder, or a corporation with a very large number of shareholders, may make this application on an *ex parte* basis, and if he succeeds and the company is, in fact, innocent of any wrongdoing, a great deal of damage may be done. What about the 9,999 poor innocent shareholders who have no notice of this, and yet they are being damaged by this one eccentric shareholder? I am sure there is one in every large corporation's list of shareholders.

The Chairman: Senator McIlraith, in my opinion, the element of surprise is a necessary element in an investigation; that is, to be able to obtain a search warrant under proper circumstances. I have seen, under too many bills, and acts which are in force at present, where the basis on which a search warrant is obtained is most unsatisfactory. I have seen in such circumstances where those making the search actually had in their possession material which would have answered the opinions they expressed to justify going in in the first place. This is the sort of thing we are trying to get at. Even in the Combines Investigation Act, there is provision under which when there is an order for search and seize, you must, within so many days, furnish copies or return the original documents after having photostated them, because the photostats of the original documents are made evidence in any subsequent proceedings. This is another element here.

Mr. Howard: Mr. Chairman, I am pleased you have raised this, because it gives me an opportunity to discuss subclause (2) of clause 222. One of the characteristics of this entire bill is that no one, neither the administrator nor the court, gets sweeping discretion to decide any issue. The bill sets out very careful criteria on which a judgment must be based. If a shareholder or Direcotr of the Corporations Branch wants to apply for an investigation order, under this section he must satisfy one or more of the standards set out in subclause (2)(b). Those of you who are lawyers will see that they are tough standards to meet, that you must have evidence that will support your application before you can get such an order from the court. I should like to underline that. This is consistent throughout the bill. We give broad powers to the court to decide an issue, but the court must nevertheless, as a matter of law, decide the issue in accordance with detailed statutory standards.

The Chairman: We have thrashed this back and forth. The points to be covered in clause 222 and 223 should preserve the *ex parte* position, subject to some limitations. It should preserve the element of surprise. You are not as capable as I think you are, and our counsel is not as capable as I think he is, if you cannot work out something from that basic starting point.

Mr. Howard: Thank you, Mr. Chairman. That is what we need—some instructions.

Senator Laird: Mr. Chairman, I would like to direct a question to you. Really you are equating this procedure to that which exists under the Income Tax Act. So far as I can recall, under that act, there are no alleviating provisions such as we find in clause 223(1)(c), providing that the court at its discretion can direct notice. It has that distinct advantage, is that it gives the element of surprise, and gives the judge an opportunity, if he sees fit, to direct that notice be sent. So far as I can recall, that does not exist in the Income Tax Act. Is that right?

The Chairman: There is power in the Income Tax Act to apply to a judge for a search warrant. There is no notice.

Senator Laird: That is right.

The Chairman: But there must be an affidavit setting out the grounds for believing that this material is necessary. It may be an opinion expressed by an accountant or chartered accountant who is not aware of the complexities of the conspiracy law in relation to income tax and fraud. He swears to the best of his information and belief, and you then try to cross-examine that officer on that affidavit. The judge looks you right in the eye and says, "Well, what does the statute say? It says this, this and this. Have they not done all of those things?" And there you are!

Senator Laird: That is what I am referring to. So far as procedure is concerned, this bill is an improvement on the Income Tax Act by virtue of subclause (1)(c).

Senator Cook: That is if you confine the element of surprise to the director. But here you are giving the element of surprise to any shareholder—with one share. There is a difference. If you want to maintain the element of surprise, you may give that discretion to the director, but to give it to the shareholder is going too far.

The Chairman: Any shareholder—that means one shareholder—holding one share may make an application. I do not know what answer you would have to that, Mr. Howard. In many places, in the Ontario act, and in the present federal act, there are provisions giving authority to a percentage of shareholders.

Mr. Howard: Traditionally in the act there has been a 10 per cent or, more commonly, a 5 per cent rule; but in the large, widely distributed corporation—let us take IOS—the one with which I have had a lot of experience. There is no way that anyone can get together a 5 per cent block of the publicly distributed shares in order to bring an application to the court until, of course, all of the assets are gone. That is the problem.

As a further safeguard and to protect the public interest, we require that notice of any application be given to the Director of the Corporations Branch so that he can come in and represent the public interest to see whether there is anything in the application that is frivolous or whether there is something that he should be investigating independently and perhaps himslef apply to the court. An example would be conduct such as taking the assets out of the jurisdiction.

The Chairman: Looking at clause 222, Mr. Howard, it says, "A shareholder or the Director . . ."

Mr. Howard: Yes, the Director of the Corporations Branch. Under subclause (3), the Director of the Corporations Branch is always entitled to notice.

Senator Cook: Why should the shareholder not go to the Director first? He drags the Director in after he has made the application and then the Director looks into it. Why is the shareholder not protected if he goes to the Director first and the Director then has the element of surprise?

Mr. Howard: Because we believe that under this law no one should have to go to a public servant in order to obtain that right.

The Chairman: Of course, we may have a different view.

Mr. Howard: Throughout this bill we have stated again and again that if a shareholder has rights, he should be able to invoke those rights directly, without the necessity of going through a public servant.

Senator Cook: We feel the companies have rights, too.

Mr. Howard: By referring the decision making to a public servant we could diffuse the responsibility and delay the decision-making process, thereby, perhaps, losing the whole thing. Generally, speed in respect of such actions is essential, particularly with respect to assets being moved out of the jurisdiction.

The Chairman: There are two people who can make this application, a shareholder and the Director of the Corporations Branch.

Mr. Howard: That is correct.

The Chairman: If we put limits on the number of shareholders who can exercise this authority, any shareholder can still go to the Director.

Mr. Howard: Yes, and we fear this will happen and we will come under great pressure from people who feel terribly concerned, but who really do not have very good reason. Those people will bring pressure on us to initiate legal action.

We considered doing the same thing in the draft bankruptcy bill, but decided against it, simply; because of the number of people affected by bankruptcy law who may feel they have been treated unfairly. We felt we should not get involved in such matters in the bankruptcy legislation. However, under this law we felt that because the shareholders are so widely distributed and have so little strength as a united group, the Director should have the authority to act in some circumstances.

I might add, Mr. Brazeau, who is not here today, in an actual case under the present law acted a few months ago to stop a meeting of shareholders because the proxy material was obviously misleading. He went in and threatened the company with an injunction, and the company postponed the meeting and put out new proxy material. That is the way we would prefer to act.

The Chairman: Whatever way you prefer to act, Mr. Howard, what we are trying to achieve is a combination of things that will reflect your general view on the question of the element of surprise, as well as endeavouring to reflect the views of the companies with respect to one shareholder holding, perhaps, one share being able to go into court. There is no way to prevent that shareholder from talking about it afterwards.

Mr. Howard: Unless we put some provision in the bill to prevent it.

The Chairman: Yes.

Mr. Howard: You know as well as I, Mr. Chairman, that if one shareholder holding one share that he recently acquired came before the court applying for an investigation, the court would take that into consideration. We have not required that disclosure, but it is one of the elements of the case that the court will consider; that is, the interest of the shareholder; what stake he has in it; what he stands to gain or lose.

The Chairman: Regardless of what the shareholder is trying to achieve, he could quite easily talk off the record. That is going on all the time, even in parliamentary business.

Mr. Howard: Not within our department, Mr. Chairman.

Senator Macnaughton: Mr. Chairman, do I understand that the representatives of the Canadian Bar Association and Mr. Howard and company will get together? There seems to be a great deal of merit in drawing on the experience of the Canadian Bar Association.

The Chairman: Mr. Howard will have an opportunity to sit down with Mr. Purdy Crawford to see what they can work out in draft. That is the way I suggest we leave clauses 222 and 223. I think the committee has indicated its view. We are not opposed to maintaining the element of surprise. We think it is necessary. We are concerned, however, about the right of a shareholder, who may hold just one share of stock, being able to initiate all these processes. I would much prefer to force the shareholder to go to the Director, and the Director, in turn, would make the application to the court.

Senator Cook: The Director would make the preliminary judgment as to whether the application has any merit and then it would go before the court.

The Chairman: With respect to the reviewable section by the Restrictive Trade Practices Commission in the competition bill, the procedure is that the person who feels he has been injured goes to the Director and the Director is the one who makes the application to the commission.

Senator Cook: Alternatively, Mr. Chairman, if one wished, we could leave the right to the shareholder, provided he gives notice to the company, as well as giving him the alternative right of going to the Director. If he is going to act on his own, however, whether he has one share or 100 shares, then he has to give notice to the Director and to the company.

The Chairman: But we do endorse the idea of surprise as a necessary element.

Senator Cook: Then he gives notice to the Director.

The Chairman: If the shareholder goes to the Director, then you may remove some of the element of surprise.

Senator Connolly: Certainly, you will remove the element of surprise completely if you require that notice of the application be given to the company.

The Chairman: Yes.

Senator Cook: There may be applications where the element of surprise is not very important. In such cases, the shareholder would take that avenue. However, where the shareholder feels the element of surprise is of some importance, then he goes to the Director, thereby maintaining the element of surprise.

The Chairman: I would wonder then who would make these decisions. I think there is something in the amendment proposed by the Canadian Bar Association on the limitation of the scope of the authority that an inspector can exercise until such time as there is a hearing on the merits of the application.

Senator Macnaughton: I agree.

The Chairman: That does not destroy the element of surprise. The inspector moves in and takes possession of the assets right away.

In any event, both Mr. Howard and Mr. Purdy Crawford have heard the view of the committee on this.

We move now to clause 224.

Mr. Howard: Mr. Chairman, clauses 224, 225, 226 and 227 are, essentially, mechanical provisions. Clause 228 is a continuation of something that is in the present Canada Corporations Act. This provides for special investigatory powers on the part of the Director of the Corporations Branch to enable him to obtain information respecting beneficial ownership of securities. This arises particularly in connection with suspect insider trading where no insider trading report has been filed, as required under the law.

Senator Connolly: Do the insider trading provisions only apply when the person who may be in a position of an insider is the beneficial owner? What about the case of a trustee who is a director? A director is an insider under all the rules. Is a trustee holding shares and being a director an insider?

Mr. Howard: Technically he would be an insider as a shareholder.

Senator Connolly: I would have thought so. I am just getting some free legal advice here, that is all.

Mr. Howard: If you look at the definition of "insider" under clause 121 of this bill, you will see that it is very broad.

Senator Cook: Anyone who can benefit by his knowledge is an insider, I suppose.

Senator Connolly: He is not benefitting for himself. The inside information he has may help the trust, but not him.

The Chairman: This procedure is part of the investigative process. It may become important to know who are the real owners and what kind of facade they have erected.

Mr. Howard: I mentioned the insider trading rules. There are also the national ownership rules, the constraints on the transfer of shares to foreigners, and so on, where in many circumstances we will want to know who the beneficial owners are, and it will be impossible to enforce provisions under this act unless we do have such powers.

The Chairman: Under the Foreign Investment Review Act the department could, under the authority of that act, make representations to ascertain who the real owners are, to see whether some scheme or other has been put over them by which they have approved of a transaction they have reviewed on a certain share ownership basis.

Mr. Howard: Yes, that is correct. I have forgotten the exact wording, but they do have power to require disclosure of beneficial ownership, and power to investigate whether in fact there has been any misrepresentation about beneficial ownership. If they did not have it, if a federal corporation were involved we would get the information for them under this; that is, the Director of the Corporations Branch would invoke this provision to get the information.

The Chairman: It is not the inspector's purpose to dig into that kind of information, is it?

Mr. Howard: No, only the Director of the Corporations Branch. That is why I focussed on this particular provision.

Senator Connolly: But that would not apply in the case of a provincially incorporated body.

Mr. Howard: No. That is the problem here. If the Foreign Investment Review Agency has a problem with a provincially incorporated body it will have to invoke powers under its own statute.

Senator Connolly: Under the provincial statute?

Mr. Howard: No, under the Foreign Investment Review Act.

The Chairman: That is a federal statute.

Senator Connolly: Of course.

The Chairman: We had it here many years ago.

Senator Connolly: We sure did.

The Chairman: On page 103, the only point I want to call your attention to at the moment is subclause (5) at the top of the page. In reading all the penal provisions in this bill, it seems to me that somebody felt that $5,000 was a scarifying figure, because if you wink an eye the wrong way under the statute it is $5,000. Whatever you do it is a $5,000 fine. How did you choose $5,000?

Mr. Howard: Arbitrarily.

The Chairman: Therefore, if we become arbitrary as to what we think the amount should be, we have just as much right to be arbitrary as you have in making this selection.

Mr. Howard: That is why I stated that quite frankly. It is just a question of balancing. What really is a threat to a director or officer of a corporation or a corporation? If you reduce it too low it is a paper tiger.

Senator Cook: Is it indexed?

Mr. Cafik: "—not exceeding".

The Chairman: This is the penalty for not complying. This is clause 228. We have collected a whole list of the offences in this bill, and it is surprising how the penalty of "not exceeding $5,000" runs through pretty well all the clauses.

Mr. Howard: I believe it is consistent in every penalty section.

Mr. Purdy Crawford: There are a few places where you do not have six months' imprisonment, you just have $5,000. In most cases it is $5,000 or six months.

Senator Connolly: Probably the six months is eliminated when only the corporation is involved.

Mr. Howard: That would normally be the rule, yes.

The Chairman: I am glad you have clause 229 there; that is, you are preserving the solicitor and client privilege. There is no machinery for determination, though. Do you think that exists apart from this bill?

Mr. Howard: To determine where that privilege exists?

The Chairman: To determine whether the privilege exists.

Mr. Howard: That could be done only by application to the court under this. There is a very general provision in Part XX permitting an application.

The Chairman: In the Income Tax Act originally there was machinery for application to the court and determination by a judge.

Senator Connolly: As to the privilege?

The Chairman: Yes, whether the solicitor-and-client privilege exists. However, if you do not want anything more in the way of procedure except this declaration, I guess we will not raise a voice against it.

Can you tell me the purpose of clause 230, that says:

> The Director may make inquiries of any person relating to compliance with this Act.

Mr. Howard: It just legitimates inquiries made by the Director. It does not compel anybody to respond to the inquiries made by the Director, but there is no doubt that the Director has the legal authority to send out a letter requesting information.

The Chairman: The point is, there certainly is compulsion, because somebody can be charged and fined if he does not comply with clause 230.

Mr. Howard: No, there is no duty imposed upon anybody to give any information under this clause. It is drafted accordingly.

The Chairman: Subsection (4), on page 182 says:

> A person who fails to comply with this section is guilty of an offence.

Mr. Howard: That is only clause 228. That cannot apply to clause 230. We have had difficulty with informal investigations, usually instigated by a shareholder complaining to the Director of the Corporations Branch, where we send out a letter seeking information from the corporation and the corporate management just tells us, "Go away! You have no power under the statute to inquire in this matter." All this does is to legitimate the inquiry; it does not compel anybody to answer. If the Director of the Corporations Branch feels they are not co-operating with him but that something is seriously wrong, then he will have to apply to the court for an investigation, or take some other proceeding under this statute.

The Chairman: We now move to Part XIX, dealing with remedies, offences and penalties. What is the design of this derivative action on page 184?

Mr. Howard: Before plunging into this—I am not trying to digress—I would just like to remind the members of the committee that certainly the most interesting thing in this bill is the pattern of remedies that are set out. First, there is the appraisal remedy under Part XIV. If there is a fundamental change a dissenting shareholder can require the corporation to buy back this shares from him at a fairly appraised price. Back in this part, we complement that with two other remedies. One is the derivative action under clause 232, and the second is the oppression remedy under clause 234. Thus, there are three basic shareholder remedies under this: the appraisal right, the derivative action and the oppression remedy.

To get back to your question, Mr. Chairman, in clause 232 on page 184, this is the derivative action; that is, an action in the name of the corporation, that is instigated by a shareholder, or in fact by a complainant, which is a broad class of persons, in order to enforce some right of the corporation. Normally this is an action initiated by a shareholder, either in his own right or as a representative of a class to compel the corporation to take an action against the managers of the corporation, alleging serious mismanagement or fraud.

The Chairman: I notice that clause 232 deals with an action related to or on behalf of a body corporate. That would appear to be limited to a company incorporated under the existing act, and certainly not in relation to a company incorporated under this bill.

Mr. Howard: I am sorry. The way it is drafted, in subclause 1 it applies to a corporation or any of its subsidiaires. We had to use "body corporate" below to pick up its subsidiaires which may be incorporated in a jurisdiction other than the federal level in Canada.

The Chairman: You noticed the wording, though:

> Subject to subsection (2), a complainant may apply to a court—

and a "complainant" is defined as being "a regsitered holder or beneficial owner," et cetera—

> for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries,—

That would be a company incorporated under this bill.

Mr. Howard: Or continued under this bill.

The Chairman: Yes.

> —or intervene in an action to which any such body corporate is a party—

Where does "body corporate" appear before that?

Mr. Howard: It is a defined term. It is generic to include a corporation incorporated or continued under this bill or any other corporation wherever or however incorporated. This specific rule is what is known as a "double derivitive action." That is where the shareholders can go through the parent corporation and go right down to a wholly-owned subsidiary and initiate action in the name of the wholly-owned subsidiary, although the shareholder himself is not actually a shareholder of that subsidiary. Only the corporation is.

The Chairman: You are using "body corporate" as a generic term.

Mr. Howard: That is correct.

The Chairman: I thought there were places in the bill where you used it with the connotation of "other than a corporation incorporated under this bill."

Mr. Howard: No, it should not be. If it has appeared in that way in the bill, then it would be incorrect. It is to be a generic concept. We say "a body corporate other than a corporation," where we want to draw that distinction.

The Chairman: I remember coming across it, but I have to find it and I have no aids to finding it because I have no index.

Mr. Howard: I do have a computerized index. I think I mentioned to the members of the committee that we have a very good index to the bill.

Mr. Crawford: Mr. Chairman, this contemplates the possibility of an application to the court by any complai-

nant—being a shareholder of the parent corporation which is a federally incorporated company—for an order to bring an action in the name of its subsidiary, which may be Ontario or a Pennsylvania or a British Columbia corporation. I just query whether you have any comment as to whether the court can make such an order.

Mr. Howard: I have no doubt about the court's power to make such an order if it has *in personem* jurisdiction over the corporation that is in question under the local rules of court procedure. Usually that will require that the corporation in question, more correctly the body corporate in question, is carrying on business in the jurisdiction and so on. If the court has *in personem* jurisdiction over the corporation, this statute will then give it power to make a distinction in respect of the derivitive action.

The Chairman: To put it in simpler form, if there is a federal company, a corporation incorporated under this bill, which has a subsidiary which was incorporated in Ontario, you say that this clause would give a complainant who may be a shareholder—of what company?

Mr. Howard: The parent corporation.

The Chairman: The parent company. It would give him the right, on obtaining leave from the court, to bring an action in the name and on behalf of such an Ontario subsidiary?

Mr. Howard: That is correct.

Senator Connolly: That is one problem, Mr. Chairman. I think Mr. Crawford has raised another one. Suppose the subsidiary is outside the jurisdiction, would the court also have power there? I suppose it would have power to say that there should be security for costs in the event—

Mr. Howard: In respect of these provisions the court cannot require security for costs. That is expressly set out in these provisions. It can award costs after the event, but it cannot require security for costs. That is expressly set out in connection with these provisions. It can award costs after the event, but it cannot require security for costs before the event.

Senator Connolly: I would have thought the rule to have security for costs in the event of a subsidiary being called into the proceedings in a case like this would be important, would it not? Why do you eliminate the right?

Mr. Howard: The security for costs?

Senator Connolly: Yes.

Mr. Howard: Only to make clear under here that there should be no artificial barriers to an action of this type. Where there are provisions under court rules for security of costs, sometimes the courts feel impelled to require security for costs. We did not think they were pertinent here, because we are not trying to drive at, say, a Delaware corporation which is a subsidiary of a federal corporation, but does not carry on business anywhere in Canada. In order to get at that corporation, I am afraid the only way is through the parent corporation. But where the subsidiary carries on business in Canada—remember it is by definition a subsidiary. That parent corporation has more than 50 per cent of the shares. It has absolute control of the subsidiaries. That is the definition of subsidiaries under this bill.

The Chairman: I may under this clause, with leave of the court, bring an action in the name of and on behalf of a subsidiary of a corporation incorporated under this bill.

Mr. Howard: That is correct.

The Chairman: That subsidiary might be a non-resident company.

Mr. Howard: It could be a Delaware corporation.

The Chairman: Take for instance Ontario; we have rules under which, in circumstances of that kind, you can require that security for costs be given or the action will be stayed until the security is given.

Mr. Howard: But that would only arise if the foreign Delaware corporation were the plaintiff in the action.

The Chairman: That is what I am talking about.

Mr. Howard: But here the question is of a Canadian shareholder trying to institute a derivitive action against that foreign corporation. That is another reason that we did not want to raise the bugbear of security of costs.

Senator Connolly: In the derivitive action does not the corporation become the co-plaintiff with the shareholder?

Mr. Howard: In effect under these rules, yes. As a matter of form it is named as plaintiff.

Senator Connolly: Is that the reason why you eliminate it.

Mr. Howard: That is one of the reasons. The corporation, as co-plaintiff, is there only as a matter of form. It is the shareholder who initiated the derivitive action who controls the carriage of the action.

The Chairman: But he is bringing it in the name of the shareholder. It may only be a formality, but there is the question of security of costs provincially that must be dealt with.

Mr. Howard: Well, it could arise, but that is exactly the kind of problem we are trying to get away from on this. We do not think the directors, for example, who are being sued for some fraud should be able to come in and say,—"this is really a Delaware corporation. Therefor we want security for costs under the general court rules." Admittedly, the court has a lot of discretion under this, but that is the kind of problem we are trying to get away from.

The Chairman: I am telling you what the law in Ontario is.

Mr. Howard: The law in Ontario will be qualified by this bill, unless the provision of the bill is amended.

Mr. Crawford: I guess I am quarrelling a little bit. I agree with Mr. Howard's basic premise that, if you have *in personem* jurisdiction, which is over the corporation, you would be successful. But here, in effect, you are creating a derivative action for a shareholder of a federal company, or a complainant, or creating a derivative action with respect to an Ontario incorporate company. I am not really objecting to it, but I think it is going to be an interesting issue for a court to determine some day.

Mr. Howard: It is a question of whether or not this is ancillary. We say it is ancillary because that subsidiary, by definition, is more than 50 per cent controlled by the

parent. All we are doing is ignoring the formalities and going right to the heart of the problem, and empowering a shareholder, through the court, to do just that.

The laternative would be a derivative action, of course, in the name of the parent corporation to compel, or to seek an order, compelling the directors of te corporation to rectify an alleged wrong in the subsidary. The difficulty is that you might have different sets of directors in the two corporations, and it becomes very complicated that way.

The Chairman: Yes. You would certainly have problems there. I can see them.

Mr. Howard: Much as we have tried to avoid causing problems I have no doubt, Mr. Chairman, that there will be many new ones under this bill. It is a very comprehensive act, and as I say, it makes some very fundamental changes in our thinking about corporations.

Senator Connolly: What is the clause that eliminates the problem of security for costs?

Mr. Howard: It is at the top of page 188, subclause(3).

The Chairman: Yes. Of course, that provision would not override provincial law, and the rules of court of the province, which require that in certain circumstances the action will be stayed unless security for costs is given. You can get such an order from the court in the province of Ontario.

Mr. Howard: Yes, sir, I know that; but I would disagree with your interpretation of what the law is.

The Chairman: Of what the law is where?

Mr. Howard: There is no question at all that the Ontario procedural law cannot override a provision in this federal statute, and if this federal statute says, "No security for costs", then no security for costs could be demanded. The irony of a provision of this type is that, for example, a New York shareholder could come up here, initiate a derivative action, and no security for costs would be required; although of course he would be liable for costs after the event in the normal course. The attempt here, however, is to try to maintain a normal balance between outside shareholders, on the one hand, and management, on the other hand, which has the resources of the corporation available to it to fight these actions.

The Chairman: With all due respect, Mr. Howard, I do not agree with your statement that this particular section we have been talking about overrides the provincial law.

Mr. Howard: As I say, it is another one of these issues that will have to be determined under this bill, Mr. Chairman. There are several of these provisions, in here which in our view are ancillary to the corporation law, and they will just have to be settled by the courts.

The Chairman: Well, then, we can make a note on that for further consideration.

Let us now move along.

Mr. Howard: Before leaving this clause, Mr. Chairman, I would like to point out that under subclause (2) the real safeguard against any abuse by shareholders under this clause is court scrutiny, and of course the obligation on the complainant to satisfy the court that one or more of the conditions or, indeed, all three of the conditions under subclause (2) are fulfilled. In short, it will be very difficult to maintain, or to inititate and maintain, a frivolous action under this particular section.

The Chairman: All I can tell you is that the first time the section is tested you are going to have a lawsuit. I am sure of that.

Mr. Howard: You mean on the constitutional issue you have raised?

The Chairman: Yes.

Mr. Howard: If it is a double derivative action, I would agree with you; but as a lawyer I would not hesitate to start out the action that way.

The Chairman: Oh, no. This may be an intrusion, but I have seen actions brought against a married man for seduction under promise of marriage. Now, you know, in law there is not basis for that.

Mr. Howard: I did not think anybody could get sex into a discussion on a corporations bill, but I am pleased you raised the issue.

The Chairman: You are pleased it is there. Is that it? I was just answering your question about bringing an action. Anybody, I expect, can find a lawyer who will start an action for him; but I am not talking about that situation. I am talking about a proper action, a well based action.

Mr. Howard: This issue does arise. There are several problems with regard to it, and problems we quite frankly have not tried to resolve in the statute itself. We think the common law is developing on this. There is the question of whether, for example, one of these remedies, if it is invoked, precludes the plaintiff from invoking other remedies under other parts of this bill, or under other clauses. We have not tried to resolve these issues.

The Chairman: We will give more thought to that. Any comment on 236?

Mr. Howard: Clause 234, Mr. Chairman, if you please.

Senator Connolly: That is the oppression remedy.

Mr. Howard: Section 234 is the oppression remedy. This is the one that we brought in from English law. It has been in English law, as I mentioned, since 1948. A great deal of writing has been done on this oppression remedy. We tended to follow the recommendations of the Jenkins Report, which was an English study of the lack of provision in the English Companies Act, published, I believe, in 1962. We picked up the recommendations of that committee and added them into this draft as a further gloss on the English provisions. Now, these are not in the Ontario law. In our view this was one of the mistakes they made when they enacted the new Ontario Business Corporations Act of 1970.

The Chairman: Well, there have been actions maintained even in Ontario, whatever the statute there may say, to meet that kind of a situation, alleging, of course, fraud.

Mr. Howard: Yes.

The Chairman: And it is hard to envisage a situation where, if what is being done is oppressive, or unfairly prejudicial, or if it unfairly disregards the interests of any

security holder, et cetera, there might not be some element of fraud in there.

Mr. Howard: There could be, and this aims at something that is considerably less broad, particularly the squeeze-out of a minority shareholder where, for example, the controlling directors are giving jobs to members of their families, and literally skimming off all of the profits.

Senator Cook: I think it is an excellent clause myself, because I have seen in practice a great many cases of small shall I say, family companies—it does not matter whether they are small or not—where this provision would be very beneficial to the minority shareholders.

The Chairman: What is the next clause you want to call our attention to, Mr. Howard?

Mr. Howard: The next one is clause 235. This is a minor technical point, but we want to make it clear that majority shareholders cannot use their voting power, clearly, to ratify a wrong, particularly a wrong allegedly committed by the directors where the directors themselves have majority voting power. It is just one of the obvious flaws in the common law, and we have stated here that we would prefer to see this characterized as a question of evidence. The court can look at ratification, but when it considers ratification it should consider whether it is made by shareholders who are really acting at arm's length.

The Chairman: Well, in effect, what clause 235 is doing is giving you the right to challenge an action that may be taken by a vote of the majority of the shareholders.

Mr. Howard: Yes. Most of the other provisions in this part, Mr. Chairman, are mechanical. I should like to point out, again, clauses 239, 240 and 241.

Clause 239, on page 189 of the bill, makes a number of decisions of the Director reviewable by appeal to the court or by application to the court. His decisions, therefore, are subject to judicial review under this appeal procedure, not only by the prerogative writ that enables you to question the procedure followed. This enables the court to go in and re-examine the decision on the merits. This is one of the characteristics of this bill giving the court has wide power to review the decisions of the Director.

Senator Connolly: Would you say that this is a wider power than the powers conferred by the prerogative writ?

Mr. Howard: The prerogative writ, essentially, only enables you to look at the fairness of the procedure employed by the public servant in arriving at his decision. In theory, unless there is an error in law on the face of the record, the court is not empowered to go in and look at the merits of the case.

Senator Connolly: You can examine a question of fact and a question of law on this.

Mr. Howard: That is right. A very frequent problem for us is the granting of a corporate name. It sounds strange, but people have a thing about corporate names. Mr. Purdy Crawford presently has a conflict with us in this respect. What we are trying to do is set out a number of detailed regulations to show people how we exercise our discretion. If someone disagrees with our decision, he can take us to court and we will state our case before the court. We would therefore not have the present practice, which amounts to letters being sent to Members of Parliament and, I am sure, to members of the Senate, requesting that they bring pressure on us with respect to the granting of the name. What we want to do is to get these things out into court. If we lose, we can live with the decision, as long as we have our day in court to state what we feel the law is.

Clause 240, as I mentioned earlier in the discussion on criminal sanctions, is, from the point of view of the administrators of the corporate law, far more important. Where we really think there is a serious breach, this enables us to move relatively quickly to restrain improper conduct or to compel the management of a corporation, or others, to comply with the law.

The Chairman: Clause 241 provides for a summary application. We have already talked about clause 242, the right of appeal from any order made by the court under this act. I take it "court" is defined somewhere.

Mr. Howard: Yes, "court" is broadly defined but does not include the Federal Court.

The Chairman: Good.

Mr. Howard: We had "Federal Court" in the orignial proposal, but the government recommended that it be taken out. Quite frankly, I have wondered ever since why that is good.

The Chairman: You have my comment. Next, clause 243.

Mr. Howard: Clause 243 deals with offences with respect to misleading reports. You will notice that it is one of those offences where, under subclause (3), there is the possibility of a due diligence defence.

Mr. Crawford: Mr. Chairman, I have a comment in this respect. I appreciate that in subclause (3) there is the possibility of a due diligence defence, but the offences created under clause 243 are, to some extent, overlapping with other offences created elsewhere in the bill where there is no due diligence defence.

Let me illustrate the point. If you look at clause 198(1), it creates the offence of failing to comply with Part XVI of the act and the regulations, and that part deals with take-over bids. The regulations will necessitate full disclosure of certain types of take-over bids and certain types of information in relation thereto. That offence does not allow for a defence of due diligence, so I assume that if the filing of a take-over bid contains an untrue statement of material fact, theoretically at least, the department could prosecute under clause 198(1) and not under clause 243.

Mr. Howard: That is correct, and you would be faced with absolute liability. There would be no defence of due diligence.

The Chairman: It is a matter of choice for the director as to which way he goes.

Mr. Howard: To that extent, there would be that discretion, Mr. Chairman.

The Chairman: And if he goes under clause 198, there is no defence.

Mr. Howard: There is no due diligence defence. Of course, there is always the defence that the person did not do it.

The Chairman: This is what we call strict liability.

Mr. Howard: Clause 198(1), as Mr. Purdy Crawford stated, is trict liability.

The Chairman: Why should there be a difference between clause 198 and clause 243?

Mr. Howard: What clause 243 is essentially driving at, Mr. Chairman, are annual returns, notices of directors, and so forth, that are required to be filed. There is an overlapping, but where the prosecutor has the choice of proceeding under clause 198 or clause 243, he would always prosecute under clause 198, simply because it is, essentially, strict liability and it is easier for the prosecutor to make the charge stick.

The Chairman: Well, we may not necessarily buy that, but we are looking at it.

Mr. Howard: I have nothing further to add, Mr. Chairman, on Part XIX, unless there are some questions.

The Chairman: I have a question with respect to clause 245(2). We discussed this earlier. If you are required to file a statement and you do not file it on the day you are required to do so, it is an offence. If you are 30 days late in filing it, you have committed 30 offences, and on each one you are subject to a penalty of $5,000.

Mr. Howard: As I stated previously, Mr. Chairman, it is a question of how tough you want to be with the sanctions.

Mr. Crawford: May I ask a question about this?

The Chairman: Yes, go ahead.

Mr. Crawford: I do not purport to have any great knowledge about offences and the elements involved in creating them, or the prosecution aspects, but I know that both the Business Corporations Act in Ontario and also the present Canada Corporation Act do not have the continuing offence concept in them.

Mr. Howard: The continuing offence concept will be found in most of the recent federal statutes. If I recall correctly—and Mr. Purdy Crawford may correct me—the continuing offence concept originated in the labour relations law where it was very common many years ago, and it seems to have been carried over to other statutes.

The Chairman: I do not think we have it in the competition legislation.

Mr. Howard: I am not sure whether it is in the competition legislation, Mr. Chairman, but it is fairly common in federal statutes.

Mr. Crawford: It originated earlier than that, I think, Mr. Howard, where you had to get an extra-provincial licence and the failure to do so was a per diem offence. I can see the logic of it in that respect, and perhaps under this legislation in certain cases, because you fail to get a licence which enables you to carry on business in the other jurisdiction.

Mr. Howard: As administrators of the law, we will seek a court order forcing the manager or director to comply. Of course, if he ignores the court order or refuses to comply with it, then I am sure the court will be able to deal with him accordingly.

The Chairman: Subclause (2) on page 192 goes further than that.

Mr. Howard: Yes,indeed. It is a tough clause. As I say, the penal sanctions are in here because the government felt that these provisions have a very useful prophylactic effect in compelling people to comply with the law. If you do not have provisions here, then people do not take the law seriously.

The Chairman: You may not even for $5,000.

Mr. Howard: $5,000 can be petty cash to a large corporation.

Senator Cook: It is up to $5,000, is it not?

Mr. Howard: Yes. The court has, of course, complete discretion.

The Chairman: This is one that we are going to have to look at. It may well be that there should be some variation of that.

Mr. Crawford: Without delaying this, but because I do not understand what we are involved in, what would it do to the process, Mr. Howard, if you said in the clause, "Where an offence under this act is committed on more than one day or is continued for more than one day, it may, in the discretion of the court, be deemed a separate offence"?

Mr. Howard: The difficulty is that when you put in a qualification like that, the court has total discretion on maximum fines anyway; it can be a 50-day offence with a penalty of one cent per day, and you have a 50 cent fine. Quite frankly, we have not tried to cover these subtleties in these provisions. We have given the court a very broad discretion to determine what the fine will be under certain ceilings.

Senator Cook: Are there any minimum fines?

Mr. Howard: No, there are no minimums.

Senator Cook: It does not seem to be very dangerous in that case, if there is no minimum fine.

The Chairman: There are two things there. If a person fails to file something he is required to file under the bill, there is a penalty for that failure to file provided for in the bill. If the department does not get an order for compliance in that situation, if he does not file, then he has committed another offence. If he does not file for 30 days, then he has committed 30 offences. It certainly makes necessary the due diligence clause wherever offences are created, because there may be a very good reason. The way the bill is drawn those reasons would only be of any assistance in mitigation of sentence. I think we will have to look at this one.

Senator Connolly: In this and in other clauses that we have discussed here this morning at length we are really relying very much on the wisdom of the discretion of the courts. This you cannot write. I suppose we have just got to take it that judicial discretion is a wise thing, yet you and I know, and we all know, that it is not always wisely exercised.

The Chairman: Judicial discretion is a wise thing, but if a statute so harnesses the court in how it can deal with the problem you have negated the judicial discretion.

Mr. Crawford: In affect, then you are dealing with the wisdom and discretion of the prosecutor.

Senator Connolly: That is right.

The Chairman: Mr. Howard, we have dealt with all parts of the bill now, have we not?

Mr. Howard: Yes, that is it, Mr. Chairman.

The Chairman: The next order of business, in the ordinary way, would be any representations that Mr. Cafik, or you, Mr. Howard, would like to make, because when we get to the stage of how we are going to deal with the bill, that is our business. We have given you a lead as to what we are thinking about, but when we discuss whether to amend this or that clause, if we are not clear as to the direction in which the amendment might go we might invite you, Mr. Howard, or Mr. Cafik, or both of you, to come in and explain this. However, I think it would be out of order for us to discuss now what amendments we are going to make. We have given a list of suggestions, and I think we have incorporated a few changes. Is that not right, Mr. Purdy Crawford?

Mr. Crawford: Yes.

The Chairman: They will develop. Mr. Cafik, you asked for the right to speak, and this is the stage at which to do so.

Mr. Cafik: Thank you very much, Mr. Chairman. I say right off, in connection with the comments you have made about your right to amend the bill and determine your own course of events, that that is self-evident and something I certainly know and understand full well.

In making my remarks on behalf of the Minister and the department, I want first of all to say that I am impressed. I have been present at only three of your hearings on this bill before the Senate, and I must admit that I am deeply impressed. On only one other occasion have I had the opportunity of appearing before one of the Senate committees, and I must admit I was impressed then. This, however, is a much more technical bill.

I took the bill through all the stages in the House of Commons, and, without making any reflection on the committee stage there, I can say that the questions, the observations and the detailed discussion in connection with clauses of this bill in this committee have interested me a great deal. I must admit that in part it has gone over my head, if I can say so honestly and frankly. I am not a professional in terms of corporate law. I am very, very impressed, and I want to thank honourable members of the Senate for the contributions they have made.

Senator Connolly: It goes over our heads too!

Mr. Cafik: In our department we have studied the proposals you have been kind enough to make us aware of. I must say right off, it is extremely difficult for us to have any basic disagreement with most of the proposals you have brought forward. We think they are good proposals. I think that is our typical response. Even in the House of Commons committee, where we made a number of amendments, a number were put forward by ourselves, and two were, I think, generated from the House of Commons committee. Those were incorporated into the bill that received third reading and was referred to the Senate.

There are basically five fundamental issues to which I could perhaps address myself, if I may: one is the resident Canadian director issue; the second is the criminal sanction clauses of the bill; the third is the role of the Director of the Corporations Branch; the fourth is the regulation-making powers under this bill; and the fifth is the inter-jurisdictional changes in the act itself. Perhaps I could address myself to them for a moment.

First of all is the resident Canadian director issue, which has been discussed. Two issues have been raised before the committee with respect to this question. The first is the requirement that every federal corporation have a majority of Canadian directors; the second is the suggestion that the corporation law deal in some way with the foreign law issue. I would like to recapitulate very briefly the resident Canadian director issue, knowing that most of you are very familiar with that topic.

You will recall that the government has repeatedly underlined that the limited purpose of this policy is to ensure that the Canadian viewpoint is expressed in the corporate board room. No one has at any time stated, or even implied, that a corporation law can be used to control foreign direct investment in Canada. Thus, the rules of the bill that have been set out are rather simple.

The predecessor bill, Bill C-213, in addition to requiring that each federal corporation have a majority of Canadian directors, required also that the corporation have a majority of outsider directors, and precluded any employee, even a Canadian employee, from being counted as an outside director. In the light of the many comments received on that provision in Bill C-213, this bill dropped the rule barring employees from being counted as Canadian directors, but continues the general policy of requiring every federal corporation to have a majority of Canadian directors.

The one outstanding issue discussed in the committee concerns a Canadian citizen who is retired or employed by a multinational enterprise, and who is not ordinarily resident in Canada. These specific topics will be dealt with in the regulations, hich will parallel the like provisions set out in the Foreign Investment Review Act regulations.

For two reasons I shall deal even more briefly with the question of extraterritorial application of foreign law in Canada. First, as Mr. Gray pointed out in his brief to the committee, the corporation law is not an appropriate vehicle through which Parliament can resolve this problem. Second, Parliament is already considering a Bill—Bill C-2—that deals specifically with this problem, and I gather that the Senate is already seized with the general discussions in connection with that topic.

The basic issue is to develop a procedure to resolve international conflict of law problems where the host country of a parent corporation and the host country of its subsidiary have different policies concerning all products under a trading with the enemy law, and strategic products under an export control law. Most industrial countries have such laws. The pertinent Canadian statute is the Export and Import Permits Act, R.S.C. 1970, chapter E-17. Section 15 of that Act precludes "diversion", that is, evasion of the law by effecting transactions through foreign affiliates.

The usual control technique used by the most country of the parent corporation is to impose sanctions on the directors of the parent corporation and upon citizens of that country who participate in the transaction anywhere in the world. Obviously we cannot change that foreign law by juggling the internal structure of federal corporations, which, in addition, constitute only 10% of the universe of all Canadian corporations, in this country.

Far more appropriate is to empower a Canadian tribunal to consider and resolve such conflict problems in respect of all Canadian corporations. And that is precisely what the

government is doing under the Combines Act Amendment Bill (C-2), which adds two new sections—31.5 and 31.6—that empower the Restrictive Trade Practices Commission to hear these cases. The commission will, under that bill, have power to resolve such problems quickly, effectively and in accordance with express statutory standards that state when Canadian interests must take priority over the laws or policies of a foreign country.

The next point is in connection with criminal or penal sanctions. As the Canadian Manufacturers' Association pointed out in its brief, the original proposals for a new federal business corporation law minimized the use of penal sanctions and, instead, emphasized the effective use of administrative and civil remedies.

During the preparation of the bill, the government decided that the proposals had underestimated the value of penal sanctions, which can have a useful prophylactic effect in anticipating and precluding misconduct. A number of penal sanctions were therefore added to the bill.

The department officials pointed out to the committee that they still consider the civil and administrative remedies to be the most useful and effective sanctions to enforce compliance with the corporation law, particularly the administrative restraining or compliance order under section 240.

We agree with the committee that, as a matter of principle, it would be appropriate to review carefully each penal sanction in the bill. We feel, however, that this is not a particularly urgent matter, since these sanctions are rarely invoked because as a matter of practical administration, before commencing criminal proceedings, the Director notifies the corporation and the corporation usually complies as quickly as possible.

There is one further advantage in waiting to review these penal provisions. The Canada Law Reform Commission is currently preparing a study paper on corporate criminality. We would prefer to review these provisions in the light of the recommendations set out in the Commission's study.

I would now like to talk about the role of the Director of the Corporations Branch. One of the reasons why the policy analysts who designed the bill did not rely heavily on criminal sanctions was because the Director was given effective power to deal with common abuses. I shall elaborate later the care taken in the bill to confine the discretion of the Director and to structure clearly the procedures required to be followed in order to comply with the law.

Under the present Canada Corporations Act, the Director has essentially only a crude club to dissolve a corporation in certain restricted cases. Otherwise the Director is frequently powerless to act even where there is quite obvious mismanagement of a corporation.

Under the bill, although the Director's discretion to decide issues is clearly confined, he has power to apply to a court to request the court to hear the parties, to decide the issue in accordance with the express statutory standards set out in the bill and to apply the most appropriate remedy.

In sum, consistent with the entire bill, the Director is not cast in the role of a policeman maintaining continuous surveillance but rather as a fireman who can move—and move effectively—if not to prohibit misconduct at least to force a court to consider the allegations of misconduct and to apply a remedy accordingly.

The bill has not been designed only to resolve extraordinary cases such as Atlantic Acceptance, COFOMO, and IOS; but Parliament cannot ignore such cases either. Hence these provisions that give the Director express power to initiate a legal action or to intervene in an existing legal action with a view to protecting the public interest or the interest of minority shareholders who are too weak or too disorganized to act in their own interests. To say that the Director has power to act is not to say, however, that he has sweeping administrative discretion. The exercise of the Director's powers in these cases is always subject to judicial supervision, a procedure which we think is a practical and desirable compromise between the administrator's need for quick, effective remedies and the basic legal requirement that all parties be treated fairly.

In respect to regulation-making powers, may I comment that closely related to these powers of the director to invoke judicial remedies are the regulation making powers set out in the bill. Although not discussed in detail by the committee, this issue of exercising regulation-making powers was raised several times in connection with specific provisions. As the department officials stated in connection with those specific provisions, copies of the draft regulations are available at any time to any member of a parliamentary committee who would like to scrutinize them on a confidential basis.

Aware that these regulation-making powers are broader, but not significantly broader, then under the present act, great care has been taken in the bill to add procedural safeguards and to require justification for each proposed regulation.

The safeguards are of four kinds. First there is informal prediscussion of drafts with technical experts both inside and outside government. Second, the bill requires pre-disclosure of draft regulations for at least 60 days before they are proclaimed in force. Third, in any event, the regulations must comply with the Statutory Instruments Act. And finally, the Joint Parliamentary Committee on Statutory Instruments is present to scrutinize and to require the executive to explain any alleged over-reaching through the exercise of regulation making powers.

Senator Connolly: If I may interject, Mr. Cafik, when regulations are drafted and put out and when it is said that they will come into force on 60 days' notice, frequently, and particularly in cases where there is a policy decision of the government involved, it is virtually impossible to get those regulations changed before they become effective; and after they have become effective, it is almost an insuperable difficulty.

Mr. Cafik: I would comment, senator, that I have not the experience you have in parliamentary matters, but I have a fair amount of in-depth experience from the last year with this particular department. I would just mention in passing that the regulations, for instance, have already been enunciated in connection with packaging and labelling, which is a very sensitive area for a very large industry in this country. As a result of my travels across this country, discussing this with people directly affected, we have just a few days ago enunciated some basic changes in those regulations. I feel that we are enormously sensitive to legitimate points brought forward by either a parliamentary or Senate committee, or by the people directly affected. I think that you can feel fairly confident that our attitude in the past, within this department, has been such that it would lead you to believe that if there were legiti-

mate points in connection with regulating powers, we have adjusted, and I think we would continue to do so.

Senator Connolly: Do you think there is more sensitivity to pleas for amendment now than, generally speaking, there has been?

Mr. Cafik: I do not think there is any doubt about that, and particularly in connection with the Canada Corporations Act, which we have been dealing with now for about eight years. There have been just innumerable amendments come forward at all stages, I guess literally hundreds of them, since the beginning, and I do not doubt that there may well be some that will come forward here that we will find acceptable. That will not be the closing of the door, because I am confident that there will have to be, in the light of experience, adjustments and changes and refinements made even after this committee has completed its deliberations, and we are aware of that.

Mr. Howard: Mr. Cafik, may I interject here just a moment? We have already had considerable experience under the present Canada Corporations Act with the predisclosure of regulations. I might add that among others who commented on them is Mr. Crawford, and I think those people support my statement that we try very hard to be responsive to the business and professional community that must live under these regulations, and we certainly propose to be equally responsible in the future; indeed, this bill requires us to sound them out before these regulations become law.

Senator Connolly: Mr. Chairman, do you mind if I just pursue that for a moment? You do get individuals who can be disaffected, or lawyers who represent clients who can be disaffected, on an individual basis; but do you find, when you issue regulations under proposed legislation of this character, that you get representation about such regulations from organizations like the Canadian Bar Association, the Chartered Accountants, and other similar groups?

Mr. Howard: Yes, sir; because we are doing this now, and because we are institutionalizing this procedure under the statute, those organizations are setting up specialized committees to respond quickly and effectively to these draft regulations.

Senator Connolly: Is their input useful? Is it effective?

Mr. Howard: Oh, yes. And we get down to meet with them before we put out final drafts, if there is any serious difference. Quite frankly we do not always agree with them. We never get complete consensus, but we are able to give them the reasons for what the government is doing.

Senator Connolly: At least they have an opportunity to come, and they are prepared and are able to deal with the regulations and the proposed changes.

Mr. Howard: That depends on the organization, but, yes, most of the organizations can respond and respond usefully in these situations.

Mr. Cafik: In addition to this procedural safeguard, each power to make regulations has been placed in the bill to achieve a specific and demonstrably desirable goal. For example, the exemption procedures have been set out in the regulations to ensure that exemption policies will be expressly stated, and that the procedures will be clearly and simply constructed.

Regulations governing the grant of corporate names, and the content of financial statements, have been set out in the bill to ensure that the exercise of discretion by administrators is clearly confined by express standards. At present corporate name-granting policies and procedures are completely discretionary. The requirements concerning the content of financial statements are determined partly by statute and partly by informal policy statements. In addition, regulation-making power is required to ensure that the executive has reasonable flexibility to modify technical details of the law to keep the law in step with changing business and accounting practices, and also to keep the law in step with changing provincial laws, particularly the provincial regulations concerning proxies, take-over bids, financial disclosure, and so on.

Finally, regulation-making powers are most useful to deal with very infrequent but complex cases which would otherwise require the addition of a great deal of verbiage in the statute itself. Good examples are the disclosure exemption for specific financing arrangements whereby a lender becomes a registered shareholder in a corporation, and also the constraining shareholder rules concerning the restrictions placed on the issue and transfer of shares of publicly distributing corporations.

I would like to point out that the present Canada Corporations Act already contains extensive regulations concerning insider trading, proxies and take-over bids. The proposed regulations are therefore not a radical change from past policy, but only a logical extension. As has been stated, it is better to structure procedures and confine the discretion of administrators.

The next point is in connection with intra-jurisdictional changes.

I would like to discuss this point now, which is one further major current issue, namely, the question of arrangements that was raised in one of your committee meetings. Suggestions were made that the fundamental change provisions set out in Part XIV of the bill are not as flexible as the arrangement provisions set out in the present law. The departmental policy analysts earlier considered this issue in the department. At that time they concluded that all the traditional arrangement transactions, other than those involved in insolvent corporations, were expressly legitimated as fundamental changes under Part XIV. The only outstanding problem was with respect to intra-jurisdictional transfers of corporations, particularly intra-jurisdictional amalgamations. The particular problem concerned a business amalgamation that was effected through a share exchange or an acquisition of assets, rather than under statutory amalgamation rules.

The bill legitimates the transfer of corporations in and out of the federal jurisdiction. Administrative discretion of the Director of the Corporations Branch to block a proposed transfer out of the federal jurisdiction is narrowly confined by express statutory standards, and the Director's decision is subject to judicial review on the merits of the case. The assumption in the bill is the all Canadian jurisdictions ultimately will permit such transfers, and that intra-jurisdictional amalgamations may be made through a two-step process: first, a transfer of all the pertinent corporations to one jurisdiction; and then, a statutory amalgamation under the corporation law of that jurisdiction.

Unfortunately, some provinces have not set out any intra-jurisdictional transfer provisions in their statutes; or if they have any, they make them subject to broad

administrative discretion. In short, some of the provinces seem to look upon provincially incorporated corporations as provincial property. The only unilateral solution under federal law is to permit continuance at the federal level, subject to concurrent dissolution at the provincial level; but such unilateral action will require an amendment to the Income Tax Act to make it clear that a dissolution at the provincial level concurrent with continuation at the federal level is not a taxable event, and therefore there is no deemed distribution of corporate surplus. Obviously this is a very complex problem. Indeed, there are probably other cases that have not yet been brought to our attention. We would prefer resolution of this problem until a later date.

In conclusion, Mr. Chairman, these are the major questions and principles that we think have been brought out in this committee. I hope that I have responded in a reasonbly satisfactory manner to the questions that have been raised by members of the committee. I would be prepared, and our officials, clearly, would be prepared to discuss any other major issue that may come out now or at a later date.

If I may, Mr. Chairman, I should like to point out that this bill—and I think everyone is aware of it—has been discussed in great detail for many years. As I pointed out earlier, whatever we do, it seems that there will always be room for desirable changes that would occur as a result of experience in this field. It is our intent to have, through this bill, very good modern corporate law, and in order to keep that particular principle intact, it goes without saying that adjustments will be made in the future.

In respect specifically to the proposed amendments that have been brought forward by this committee, in the vast majority of cases we do not have any objection. A lot of them are of a technical nature, and we have no basis objection to them. However, running the risk, I suppose, of perhaps being indelicate, which I do not want to be, Mr. Chairman, I would point out that, as a practical matter, we would be quite prepared ourselves to advocate these changes that you have proposed, or many of them, and perhaps even others, because we have had other representations made directly to us. Clearly, the bill has to be amended in any event in one particular case, that being the case we discussed right at the beginning of the meeting in respect of the pipeline problem. That is an absolutely essential amendment, in our view.

However, we are very nervous and very concerned about the opening up of the whole broad scope of the legislation in the House of Commons itself. I am not in any way trying to impose on you what, clearly, is your own decision, but I think it is incumbent upon me to draw to your attention some of the practical problems involved. The department has waited for a long time for this very good legislation to be passed into law. I think the general consensus is that it is good law and a vast improvement over the existing law. We are loathe to encourage any action that would open up the whole scope of the bill when it is referred back to the House of Commons. We fear a very protracted debate would ensue if there are a whole series of amendments from the Senate, however desirable those amendments may be.

For that reason, I wonder whether members of the committee and yourself, Mr. Chairman, might consider one thought, that being that under this proposed legislation there is a five-year period for continuance, which allows the business community and the department time to come forward with further provisions and amendments, adjustments, revisions, and so forth.

I particularly draw to your attention a commitment that I made to the committee of the other place in respect of Part XVI, clause 187(b), where there is provision for a rather broad area of discretion in terms of regulatory-making powers. Members of the committee of the House of Commons felt that was inappropriate, and felt that such regulation-making powers should be in the act itself. At that time, on behalf of the department, I agreed with the general sentiments of the committee and stated that the department itself would like to see it brought right into the law. I made a commitment to the committee that we would, within a year, bring forward further amendments, particularly in respect of that clause.

I am wondering, in light of the five-year continuance period, whether the Senate might want to consider the possibility of allowing many of these very worthwhile amendments to be brought forward when an amending bill is introduced.

With respect to clause 187(b), the committee of the House of Commons decided to accept our commitment to bring in an amendment within one year. That is really what we would like to do with respect to the proposed amendments by this committee.

As to the amendment that was referred to at the beginning of the meeting dealing with the National Energy Board Act, that is a slightly different kind of amendment in terms of it opening up the whole act. It is a consequential amendment affecting only the definition of a corporation under the National Energy Board Act and would not, when a motion was put for concurrence in the other place, open up the Canada Corporations Act itself, and the debate at that stage would have to be directly germane to the specific admendment, which is the definition of a corporation under the National Energy Board Act. Such a procedure would make it easier for the department.

Perhaps honourable senators feel very strongly in connection with certain amendments that your committee thinks are a must at this stage, amendments that you would rather not defer, and I would be very anxious to hear your comments in that respect. Clearly, it is a decision for the committee. I am simply putting forward our concerns with respect to house time in the other place. The committee, obviously, will make its decision in light of the situation as it views it.

In conclusion, Mr. Chairman, I should like to thank the committee for the opportunity of appearing before you. I am deeply impressed with the work of the committee and the valuable contribution that it has made. I am sure it will be beneficial to a better Canada Corporations Act today and in the future.

The Chairman: Are you suggesting that in connection with some or all of the proposals which we have before us, and of which you have copies, that the minister give an undertaking that the proposals which we make would be implemented in legislation within a year or at the next session of Parliament?

Mr. Cafik: Perhaps I could outline the proposed undertaking, Mr. Chairman, and then we can go into the specific points that are of grave concern to the committee. I am prepared to say that we will make a solemn commitment to bring forward an amended Canada Corporations Act, or proposed amendments for the Canada Corporations Act, in

1976, and we would be quite agreeable to referring the amending bill directly to the Senate, first, so that the Senate would have an opportunity to consider it prior to its going to the other place.

In connection with the specific amendments that I know of, perhaps I could make a comment in respect to each one, as to the attitude we have towards it. Without taking too much time, I will go through the list I have had prepared for me.

The amendment you proposed in respect of clause 4 is to delete "for objects other than provincial". We are prepared to accept that. We see no objection to changing it in the way that has been proposed by yourselves, to read, "to carry on business throughout Canada", to replace that particular provision. We see no objection to that being done right now. However, because of what I have already said, we hope that it could be deferred.

Senator Connolly: May we look at that?

Mr. Cafik: Do the members of the committee have this list? Would it be useful to pass copies around?

Senator Cook: I guess we could refer to it.

Mr. Howard: These are really abstracted from Mr. Purdy Crawford's memorandum. I believe everybody has seen it.

Mr. Cafik: Apparently not.

The Chairman: The committee has not seen it.

Mr. Cafik: Perhaps I can go into it in a little bit more detail to put it into context.

Senator Cook: We know that one.

The Chairman: It is either that or the order I had thought of, and still prefer. That would be that we as a committee deal with it and crystallize our own views before we hear you on it. Is that the view of the committee?

Senator Macnaughton: I think so.

Senator Connolly: It may be helpful to everybody, I think, including Mr. Cafik.

Mr. Crawford: I think that is right.

The Chairman: This afternoon we are sitting at 2.30 in room 263-S. We will then look at the draft report on the competition bill. That may take an hour or an hour and a half. We would have the latter part of the afternoon to go over these proposals . There are a few more other than what you have, Mr. Cafik.

Mr. Cafik: Yes, there are some that have come to light today.

The Chairman: It might be better to defer hearing you on this until the members of the committee have been furnished with these copies, which I think will be typed by the time we meet this afternoon, say at around 3.30. Are you available tomorrow morning?

Mr. Cafik: I am sure that I could arrange to be available tomorrow morning.

The Chairman: I would say that by tomorrow morning we would be ready to go into this question in depth.

There is one observation I would like to make at this time. The question of directors is something that bothers me tremendously. If a quorum must have resident Canadians and one is absent for any reason at all, or dies, there is a situation in which you cannot have a legal directors' meeting to replace that director. This just should not be.

What I had thought was that there should be some provision to say that notwithstanding the requirement to have three resident Canadian directors, for the purpose of replacing a Canadian director, for any reason, a quorum of directors could do that job. We would not be violating any principle of the bill. What they would have to do would be to replace a resident Canadian with a resident Canadian, and you thus re-establish a quorum. If you put in that "notwithstanding" you have covered that problem very simply, and I do not think you would commit hara-kiri on Mr. Howard's bill.

Mr. Cafik: Do I gather correctly that you are going to be preparing a list of your specific amendments, taking into account what happened here today, that you will present it to us, and tomorrow morning we will have an opportunity of coming before you and responding with respect to each one of them?

The Chairman: That is right.

Mr. Cafik: I think that would be good. Perhaps I could reserve my judgment on that until such time. I agree, Mr. Chairman.

The Chairman: You realize that, depending on the progress we make tomorrow morning, there might be the possibility of a report by this committee to the Senate either tomorrow or Thursday.

Mr. Cafik: That would be great, as far as we are concerned.

The Chairman: As Mr. Howard knows, we have been pushing ahead as fast as we can to get this bill through.

Mr. Howard: We appreciate that, Mr. Chairman. We would appreciate it if your counsel could give us notice of any proposed changes as quickly as possible.

The Chairman: You will get them some time this afternoon.

Mr. Howard: That would be fine, so that we can settle on the wording and draw up formal motions in both languages.

Mr. Crawford: I should like to make certain of one thing. I had a meeting yesterday with the chairman and got considerable quidance. I have drafted possible amendments, which I can give to Mr. Howard this afternoon. When the committee considers them this afternoon, you may decide you would like to delete some or change some, but he will be warned as specifically as I can warn him in advance.

The Chairman: We will give them to him some time during the afternoon, after we have gone over them.

Mr. Cafik: I think what we would like to see is the strength of your feeling about them, which I am sure will come out tomorrow.

The Chairman: It certainly will.

Mr. Cafik: There may well be some that you consider to be absolutely essential right now, and others that you may

be prepared to see brought in to a later bill. I think that would be very helpful.

The Chairman: I know what my view is on the directors' situation. I think that is something that has got to be dealt with. It does not make sense that we should sit here and pass a bill as a result of which it is impossible for a board of directors to meet.

Mr. Howard: Mr. Chairman, you are raising a very exotic question. As I have pointed out to this committee before, there is a possibility of telephone meetings, and of course written resolutions in lieu of meetings. Thus, for your case to arise, we have to have a director ill—

The Chairman: A dead man could not do that.

Mr. Howard: A dead man can easily be replaced by the directors, of course. There are special provisions for replacing a dead man. It means that somebody has to be out of the country, ill or otherwise indisposed, that there is no possibility of a written resolution and no possibility of a telephone meeting before that case arises. In addition, that rule will affect only those corporations incorporated or continued under the new bill because of the five-year transition provision.

The Chairman: I know.

Mr. Howard: That is a very exotic case in fact. For obvious reasons, which Mr. Cafik has raised, it would be easier for us to consider them later.

The Chairman: We will adjourn until this afternoon at 2:30, when we will meet in room 263-S.

Mr. Cafik: And 9:30 tomorrow morning, for us?

The Chairman: Yes.

Mr. Cafik: In this room?

The Chairman: Yes.

The committee adjourned.

Ottawa, Wednesday, March 19, 1975

Senator Salter A. Hayden (*Chairman*) in the Chair.

The committee proceeded *in camera* at 9.30 a.m..

At 11 a.m.:

The Chairman: Mr. Howard, in accordance with my advice to you when you asked for the opportunity to be heard at this stage, you are now sitting here with that full opportunity to be heard.

Mr. Howard: I do not think I really have anything to say at this stage, Mr. Chairman. I have gone over the technical changes recommended here by counsel to the committee. I do not know what discussion has taken place since, but there is no real technical conflict over the wording except for one minor thing. We have all of these done in the Department of Justice format in both official languages. We would like ultimately to use our format, but there is no particular need to worry about that now.

The Chairman: I should tell you that we made one change this morning in what you saw last night, at page 180, I think it is. We have given some further thought to that.

Mr. Howard: Mr. Chairman, once this is settled, Mr. Cafik has several remarks he would like to make in general, but I think it would be appropriate to make sure we are all working from the same text.

The Chairman: I think we now have the same texts. Would you look at clause 180 (e) and (f) on page 136? We can tell you why we have done what we are proposing to do. If you look at paragrpah (e), in the form that our proposed amendment to (e) was, as Mr. Crawford will tell you, we have decided to exclude in line 12 the words "or its directors of officers", and in paragraph (f) we have also decided to exclude in lines 17 and 18 the words, "or its directors or officers".

The reason for doing that is that if there is an action pending, either civil or criminal, against the directors or officers of an amalgamating company, there is no way that I know of, short of a pardon, by which you could stop those proceedings. Therefore, you do not need any authority to continue these proceedings. There is no way you can stop them unless you want to give up.

Mr. Howard: These are, essentially, declaratory provisions to make absolutely clear how continuance works. The reason was that in the case law there had been suggestions that where amalgamation had taken place the old corporation died and the new entity was created, and we wanted to make clear beyond any possible doubt that there was no question of one dying but that instead we were adopting the confluence theory of merging two or more corporations into one that continued.

The Chairman: The *Black & Decker* case says that the amalgamating corporation does not cease to exist.

Mr. Howard: That is a specific case interpreting, as you know, the specific wording of an Ontario statute.

Mr. Crawford: The amendments suggested by the committee this morning, Mr. Howard, do not change the provisions of the bill. They continue to make it clear in a declaratory way that the right of action of continuance against the amalgamating corporation flows into the amalgamated corporations. For the company that is continued by import there is a right of action which continues in the company that is continued by export.

We had some confusion through all the references to directors and officers, and we did not think there had to be any declaratory provision to make it clear there so we just took out the references to directors and officers.

Mr. Howard: If you refer to the company and not to the directors and officers of the company, are you not impliedly exculpating those directors and officers from liability?

The Chairman: Mr. Howard, if there is a criminal proceeding going on in the court against a director or an officer of an amalgating company, then no matter what you say, unless you give him a pardon or you decide to discontinue the action, it goes on.

Mr. Howard: What you are saying is that we cannot amalgamate the individuals; we can only amalgamate the corporations. We are only talking about wording, and I do not want to hold up the session for that.

The Chairman: Is there anything further you wanted to say, Mr. Howard?

Mr. Howard: It is not appropriate for us to come in and haggle over the wording. We will work that out with your counsel. Mr. Cafik had a few points he wanted to raise in respect of specific matters.

The Chairman: The fact that Mr. Cafik had a field day yesterday does not interfere with his speaking again today. I would expect, however, that he will not rethresh old straw.

Mr. Cafik: Thank you, Mr. Chairman. I simply want to make a few brief comments. I do not think you will find them difficult. I have gone through the proposed amendments with Mr. Howard and the officials. Basically, we have no disagreement with any of the amendments you have proposed. Some of the amendments are of a technical nature, about which we do not feel strongly one way or the other. We do not feel it will hurt the law by doing them. In some cases there will be substantial improvement, we think. We have no disagreement in respect to any of them.

Perhaps I could make a point in response to two or three of them. On page 1 of the document which you have had distributed, in connection with clause 4 we have no objection at all. We do not consider it an essential change, although it is some improvement so far as we are concerned. We have no objection to that. We think, ourselves, that perhaps it could be dealt with at a later stage. That is a decision obviously of the committee itself, however.

With respect to clause 12(3) in connection with the name problem, and the continuance provisions there, there can be a challenge under the present act as it is proposed and then they would have to fight it out in the courts before they would be allowed to continue if there were a conflict of names. I realize that you want to change that and not deal with that problem at this time. You want to allow them to be continued anyway, if it is an existing corporation. Mr. Howard will make a couple of specific comments with respect to some of the problems generated from that.

Mr. Howard: As I mentioned to Mr. Crawford, the counsel to the committee, I received a very strong representation from a member of the trademarks bar that we should give the Director of the Corporations Branch even more discretion to deal with these conflicts where we are continuing corporations. We tried to take a midway position. You are going to the opposite extreme of saying that the Director has absolutely no discretion at all, that he must continue every corporation with the name it had before continuance. I just wanted to mention on the record that we have had representations from someone who takes the opposite polar position, that the Director should have unlimited discretion to deal with these and resolve them at the time of continuance.

We took the intermadiate position of trying to force it into the court for resolution when a conflict arises. That means that first on the register is first served. When the second one comes, he will be refused, and at that point he will be forced to litigate the name claim in order to clarify the issue.

Mr. Crawford: The only point I have about that, Mr. Howard, is that we did discuss this last night and the second one would be forced to litigate. The probabilities may be that he has no right to ligigate because he has waived, over the years, by conduct or otherwise, any possibility of arguing that he has a prior right to the name.

Mr. Howard: Then he should change his name.

Mr. Crawford: But he may have the equities on his side.

Mr. Howard: I just wanted to mention that point, Mr. Chairman. I do not want to belabour it.

Mr. Cafik: But we are prepared to accept that amendment. We just have some reservations.

In respect of items 4 and 5 on page 2, both of them dealing with clause 21, and again providing more privacy to close corporations—I listened to part of that argument, I think, the first day I was before the committee—in respect of minutes of shareholders' meetings and lists of shareholders, we have no objection. But we feel again that it could be dealt with at a later date if that were the decision of the committee, and we would be prepared in those cases that I have already outlined to propose an amended bill in 1976 that would cover those particular points if that were agreeable.

In respect to page 3, clause 21, the argument here, I think, applies to quite a number of the amendments which deal with criminal provisions of the act. In this case, as I mentioned, we would rather like to see the Law Reform Commission report in connection with corporate criminalty and offences and liabilities. However, we have no basic objection to this, and we would be prepared to make an amendment later on or now, but preferably later on in connection with clauses 21 and 80. Here I am talking about clause 21 and clause 80 which on my sheet appear on page 3.

Then the next item is in respect to clause 106, and this is the clause which deals with the death provisions. And then clause 109 deals with the board of directors and the problem that you pointed out, that if there is a majority of one Canadian on a board and he happens to die or to be sick or to be absent for some reason or other, this could cause difficulties. I would just point out to the committee, Mr. Chairman, that I think there are other ways this might be dealt with. We have no objection to this amendment, but at least on a temporary basis it could be dealt with by someone continuing under the act changing the size of the board of directors on a temporary basis so that they always have a majority of two Canadians, or changing the quorum provisions which would allow that problem to be dealt with in corporations which would become continued immediately if it was decided by the committee to make that adjustment in a subsequent bill, at a later date. Again, that is your decision and we do not view it as being a major problem in that a corporation that was moving to continue under the act can clearly take some kind of appropriate course of action before it continues, to be able to avert this kind of problem.

The Chairman: But it would need a shareholders' meeting.

Mr. Cafik: Yes, but they are quite capable of handling a shareholders' meeting.

The Chairman: Yes, but in a large company with the cost of the notices, et cetera? Why should a company be put to that expense when a simple way of dealing with it is outlined here?

Mr. Cafik: I agree this is a much simpler method. I am simply pointing out that I believe that there are other ways by which one could achieve that objective.

Senator Connolly: We canvassed quite of few of those, Mr. Cafik. We thought this was the simple and easy way to

do it, and we did not think there would be any difficulty for you in the other place in any of these.

Mr. Cafik: In respect of this one and in response specifically, Senator Connolly, in respect of the difficulty in the other place, that is something that no one can really prejudge. It is a matter of a value judgment. This whole section dealing with Canadian shareholders in corporations—it seems to me that that would provoke a considerable amount of debate in the other place but, as I say, that is just a value judgment.

Senator Connolly: I think the point that we want to make on that is that what we propose here continues the policy of the act, that there should be at all times a majority of Canadian directors and to make it possible to have that work even in an unusual situation. I think you have a good talking point there.

Mr. Cafik: Well, I think the point is well taken, and I think it is a very well worthwhile point. We have no objection to making that amendment at all.

The Chairman: As a matter of fact, we are using that portion of the bill which provides for a director who is unable to be present to telephone in. We are only tidying it up.

Senator Macnaughton: And we are saving a lot of money too, which is an important factor on many occasions. At least, it should be.

Mr. Cafik: I gather there is a different amendment that I have been addressing myself to. I have been referring to clause 9(b) on the list. I have not read clause 9(a), but Mr. Howard points out that he rather suspects this could constitute some problem.

Mr. Howard: It involves very much a straight political decision. This is the kind of thing that will engender tremendous controversy in the House of Commons. I know this from my experience before the House of Commons committee. What they did was focus very strongly on Canadian director provisions. They feel very strongly about them, and clause 9(a) is diluting the force of those provisions.

Mr. Crawford: Mr. Chairman, clause 9(a) and clause 9(b) were in last evening's draft and they have been deleted and a new clause 9 has been inserted. On page 4 you will find the new clause 9 that I discussed with Mr. Howard last night.

Mr. Cafik: I am sorry, this is presented to me as if it were the most recent one, but obviously it is not.

Senator Flynn: Is it accepted then that you have the same comments?

Mr. Howard: I have no particular difficulty with clause 9 as it is proposed now.

Senator Connolly: This is the one to which I was speaking, and I understand that this is the wording that was worked out between the two of you last night. I do not think it will pose any problem for you in the House of Commons.

The Chairman: No. Mr. Cafik was addressing himself to an earlier edition.

Mr. Cafik: The basic comments I made were in respect to the current edition, Mr. Chairman. Again I simply point out that we have no basic disagreement at all with your proposal. We do think, like we do about a number of these things, that it might pose some difficulties for us in terms of timing, and that is something we are going to have to face following whatever decision you reach as a committee.

Clause 110(4). We do not think that this is a particularly urgent matter, but we are quite prepared to accept that and it is to be hoped that at a later date we will revise the bill.

Clause 116(1). Again, we have no objection in respect to this, but we do not consider it of immediate importance ourselves, but this committee may well do so.

Clause 92(9), page 5. Here again this is one of those questions that we would like to await the recommendations of the Law Reform Commission with respect to.

The Chairman: The only comment I want to make on that, Mr. Cafik, is that there are some clauses here which impose penalties on individuals and directors. And you do now have a report of the Law Reform Commission dealing with that particular situation, and you still did not pay attention to what they recommended.

Mr. Cafik: I agree that the recommendations you are making here are quite consistent with those recommendations of the Law Reform Commission.

Senator Connolly: What we are saying is, in the case of absolute liability, where absolute liability is proposed, that there should be the test or reasonable cause.

Mr. Cafik: Yes, and we agree with that.

Clause 144. We again have no difficulty in connection with this.

Senator Connolly: It is the same thing.

Mr. Cafik: It is exactly the same problem.

Clauses 143 and 153 are the same problem again. Clauses 180(e), 181(6)(d), 181(6)(e), 182(9)(d) and 182(9)(e), again, are all, really, of the same class, which deals partially with the problem of new directors not being liable for acts of earlier directors, and we basically agree. We again consider it not to be one of those matters of immediate urgency.

Senator Flynn: Well, that all depends. If it could be interpreted as permitting an action to be taken against a director of an amalgamated company for something done by the former companies, I think it is important; it is urgent. We should do something about it.

Mr. Cafik: Well, of course, the period for compliance, I think, is one of the basic reasons we feel it could be lived with now, but, again, that is your decision.

In connection with clause 198(1) or 219(2), that again is the same thing in connection with—

Senator Connolly: —absolute liability.

Mr. Cafik: That is right. It is exactly the same question that we have discussed before.

Clause 222. We discussed this yesterday, of course, in connection with *ex parte* applications and *in camera* provisions. We have no objection to that, as we indicated yesterday. We think that there are ways, of course, by which some frivolous actions can be thwarted by either the Director of the Corporations Branch under the existing proposals or through the notice of the court directly to the

corporation affected. We think this is an improvement on it, and would be prepared to accept that.

Clause 244 is the same question in connection with my comment about the Law Reform Commission. The same situation exists with regard to clause 245 and clause 1 of item 6, which deals with the definition of a company in respect o the National Energy Board. Of course we consider that as an absolutely essential amendment at this time.

I do not think, Mr. Chairman, that I have any further comments in respect of the specific amendments you propose, except very briefly to reiterate the commitment that I made yesterday, that we are prepared to come forward with a bill and refer it directly to the Senate to accommodate all of these changes by 1976. Hopefully you might find that an acceptable proposal, covering at least, perhaps, the majority of the amendments that you have in mind.

Perhaps you might find, in your wisdom as a committee, that you could boil it down to where we do not have to open up too many sections of the act when it goes before the house for concurrence with the report; but that is your decision.

We feel strongly that it is important to us in terms of timetable. We have a lot of legislation coming down the pipe and we would like to get this bill passed into law before the end of this session, or we will be back to square one again. We simply want to apprise you of our concern in that respect—that is, finding house time, so as to be able to have an extended debate in the house.

Clearly the amendment to the National Energy Board section—that consequential amendment—is one that is very specific and does not touch the act itself, but is only on the definition of a corporation.

The Chairman: It is part of the act, however.

M. Cafik: Yes, but the discussion in the house on a motion for concurrence could only zero in on the question of the definition of a corporation in that act. It could not touch anything else. That would be the most desirable think from our standpoint.

The second most desirable thing, of course, would be to shake down the amendments to where you decided that three or four or five are really essential, that you feel strongly about now, and the rest might be able to wait; but that is your decision.

Obviously, to do that—and we have no criticism; I simply want you to be aware of our concern about it—we will leave that with you.

The Chairman: I want to thank you again, Mr. Cafik. We appreciate what you have said. We have a job to do ourselves, and whether that provokes controversy or not in the Commons may or may not be a consideration. It certainly has been a consideration in some bills where the benefit to the public at large was so great and so immediate and so material in its form, if you understand that last expression—

Mr. Cafik: Yes, I do.

The Chairman: —that we felt we should move as quickly as we could. For that reason, while we contemplated amendments, we accepted the undertaking of the minister that the amendments would be proceeded with in the next session; but, frankly, I do not see that sort of characteristic here. We cannot conduct our affairs in the Senate solely with both eyes on what may be controversial in the Commons as a result of what we do. We have to do what we think is best. If controversy develops, it is not because we develop it; it is because of the attitude that might be taken over in the Commons.

Certainly we have not, at this moment, passed a motion to report the bill with amendments, although it is obvious that there will be a motion to report it with one amendment, in any event. But very shortly, after you leave, we will deal with that phase of it.

If you have said everything that you feel you wish to say, we will continue *in camera* once more.

Mr. Cafik: I think I should make one further point, Mr. Chairman. This is with respect to one thing that was perhaps an embarrassment, not so much to me but to the department, which was brought to my attention some time ago, and that is that a commitment was made, I gather, in connection with the Bankruptcy Act that certain amendments would be coming forward at a later date, which commitment was not fulfilled. I can assure you that that will not be the case here. If you decide to accept our proposal that some of these amendments be put into a second bill, we have made a very sacred commitment to the House of Commons to do just that in 1976, and I am repeating it here. We mean every word that we say in respect to this, and I hope that will be borne in mind.

The second thing I wish to mention is that in connection with the Bankruptcy Act, I think, as everyone knows, it has been under considerable study. There is a bill—a voluminous bill—that will be coming down the pipe in the month of April, and as a result of our exposure here I have made recommendations to my minister that the bankruptcy bill be referred directly to the Senate in order to allow you to perform your enormously valuable function in respect of it, with all your expertise, before it goes to the house. That might ensure that we get a lot of this kind of input into the system prior to its being dealt with by the house, and I think—in fact, I know—that that is a formula that we will follow in connection with the bankruptcy bill.

The Chairman: What I want to say, first of all now, is to Mr. Howard, namely, that on behalf of the committee I want to thank you very much, sir, for the real assistance you have given to the committee. It is true we had arguments, but that is the way questions are resolved. Maybe there was even some feeling in some of the arguments, but that is part of the process of resolving arguments. We do, however, appreciate what you have done for us here, and I want you to know what the feeling of the committee is. You were very helpful.

Mr. Cafik, you have a responsibility in connection with this bill, and your contribution has been useful. We have appreciated it. If we do not do everything you have asked us to do, it will not mean that we like you less.

Honourable senators, there is one other thing we might say, before we bid adieu to our friends. Your panel, Mr. Cafik and Mr. Howard, was of considerable help. Some of them participated directly—Mr. Anisman and Mr. Sparling did—from time to time. I know they would not be with you if you did not feel that they were capable of providing you with good help. Therefore, I want our appreciation to extend to include them. The fact that some of them were not called on to say anything here does not mean that we do not appreciate the value of their presence. We thought they made you even more efficient than you were, if that is possible. So we say thanks to all of you. We have had a

good run at this bill, we think we understand it, and I hope we have given evidence of that from time to time.

Mr. Cafik: There is no question about that, Mr. Chairman. I think you have shown a good deal of understanding of its problems.

The Chairman: If we propose amendments in addition to what I call the Energy Board amendments, we are not doing it for any reason except that, in our opinion, it should be done. With that, we say adieu.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*



Issue No. 33

TUESDAY, MARCH 18, 1975

Thirteenth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

INTERIM REPORT

(Witnesses: See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald
Desruisseaux	(*Cape Breton*)
Everett	Macnaughton
*Flynn	McIlraith
Gélinas	Molson
Haig	*Perrault
	Sullivan
	Walker—(19)

Ex officio members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, March 18, 1975
(45)

Pursuant to adjournment the Standing Senate Committee on Banking, Trade and Commerce met this day at 2:30 p.m. *in camera*.

Subject: "The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Buckwold, Connolly, (*Ottawa West*), Cook, Desruisseaux, Macdonald (*Cape Breton*) and Macnaughton.

In Attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel, Mr. R. J. Cowling and Mr. John F. Lewis, Advisors to the Committee.

The Chairman, assisted by the advisory staff, read to the Committee a draft of a proposed Interim Report prepared with respect to the above matter.

Following discussion and certain revisions and amendments being made thereto, it was resolved that the Chairman present the Interim Report to the Senate on Wednesday, March 19, 1975.

Following discussion, it was Agreed that the Chairman move that the Report be printed as an appendix to the Parliamentary papers of that day.

At 4:50 p.m., the Committee adjourned until 9:30 a.m. March 19, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Interim Report

Wednesday, March 19, 1975

INTRODUCTION

On October 16, 1974, the following order of reference was made by the Senate:

> "That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the Combines Investigation Act, in advance of the said bill coming before the Senate, or any matter relating thereto;
>
> That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and
>
> That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee."

Pursuant to a similar order made in the preceding session, your Committee held three meetings prior to the dissolution of Parliament on May 9, 1974 for the purpose of considering Bill C-7 entitled "An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code", which received first reading in the House of Commons on March 11, 1974.

In the present session, Bill C-2, having the same title and which is in exactly the same form as Bill C-7, received second reading and reference to Committee in the House of Commons on October 28, 1974.

Attached hereto as Schedule "A" is a complete list of briefs considered by your Committee in connection with the subject matter. Your Committee has held a total of 14 meetings to date in the present session.

MINISTER'S PROPOSED AMENDMENTS

On December 3, 1974, the Hon. André Ouellet, Minister of Consumer and Corporate Affairs, tabled in the Commons Committee on Finance, Trade and Economic Affairs a series off proposed amendments and comments thereon to Bill C-2. The table of contents accompanying such amendments is reproduced as follows:

Subclause 1(1)	Section 2	Definition
Clause 2	Section 4	Collective Bargaining
Clause 2	Section 4.1	Underwriting of Securities
Clause 2	Section 4.2	Amateur Sport
Clause 9	Section 27	Proceedings before Commission
Clause 10	Section 29	Intellectual Property
Clause 12	Section 31.2	Refusal to Deal
Clause 12	Section 31.3	Consignment Selling
Clause 12	Section 31.4	Exclusive dealing, market restriction, etc.
Clause 12	Section 31.5	Foreign Judgment
Clause 12	Section 31.6	Foreign Laws
Subclause 14(3)	Section 32	Combination in restraint of trade
Clause 15	Section 32.2	Bid-rigging
Clause 15	Section 32.3	Professional Sport
Subclause 16(1)	Section 34	Price Discrimination
Subclause 16(2)	sub-section 34(3)	Cooperatives
Subclause 18(1)	Section 36	Misleading Advertising
Subclause 18(1)	Section 36(2) (d)	Misleading Advertising
Subclause 18(1)	Section 36(4)	Misleading Warranty or Guarantee
Subclause 18(1)	Section 36.1(1)	Tests and Testimonials
Subsection 18(1)	Section 36(2)	Double Ticketing
Subclause 18(1)	Section 36.3	Pyramid Selling
Subclause 18(1)	Section 36.4	Referral Selling
Subclause 18(1)	Section 37.1	Sales above Advertised Price
Subclause 18(1)	Section 37(2)	Bait-and-Switch Selling
Subclause 18(1)	Section 37(3)	Bait-and-Switch Selling
Subclause 18(1)	Section 37.2(1)	Promotional Contests
Subclause 18(1)	Section 38	Price Maintenance
Clause 19	Section 44	Procedure
Clause 22	Section 45.3	Statistical Evidence

Your Committee's study of these proposed amendments indicates that a reasonable attempt has been made to meet many of the criticisms of the proposed legislation which were indicated in various submissions.

The Minister has indicated that he may propose further amendments in connection with new section 31.6, which deals with foreign laws and directives in their effect on business in Canada.

With respect to the following amendments proposed by the Minister, your Committee either has no comment or is of the opinion that they are satisfactory and that no further changes to the sections to which they relate are required:

Definition (tickets evidencing a right to transportation included in definition of article)
Collective Bargaining
Underwriting of Securities
Proceedings before Commission
Intellectual Property
Foreign Judgment
Foreign Laws
Combination in restraint of trade
Price Discrimination
Cooperatives
Misleading Warranty or Guarantee
Tests and Testimonials
Double Ticketing
Pyramid Selling
Referral Selling
Sales above Advertised Price
Bait-and-Switch Selling
Promotional Contests
Statistical Evidence

It will be seen that the above list comprises over half of the Minister's proposed amendments. In the case of most of those not included in the above list, your Committee considers that the proposed amendments, as far as they go, are satisfactory, but that redrafting or major changes for other reasons may be required in the sections to which they relate. Those proposed amendments of the Minister will therefore be commented on hereunder in the context of your Committee's own observations on the sections.

REGULATED TRADES, INDUSTRIES AND PROFESSIONS

Bill C-2 would extend application of the Act to services. Because certain activities of the professions and service industries have been regulated by provincial law for many years, conflicts would undoubtedly arise where activities contemplated by provincial law nevertheless appear to constitute an offence under the amendments to the Act.

The same problem has of course arisen in the past with respect to the activities of trades and industries (in relation to their dealings with articles) which were regulated under provincial law and the courts have held that what might otherwise have constituted an offence under the Act could not be so considered where the activity was regulated by provincial law. Apparently relying on this line of cases, no specific exclusion of regulated service industries from the application of the Act has been proposed in the Bill C-2 amendments. The Department of Consumer and Corporate Affairs explanatory booklet says at page 27:

> "Services such as telephone and other forms of communication, electrical power and the *professions* would continue to be immune from the legislation to the extent that their activities were regulated or were expressly authorized by law. This immunity is not stated in the Bill, but stems from judicial interpretation.
>
> "The leading case in this connection was *In Re The Farm Products Marketing Act,* where the Supreme Court of Canada in 1957 held that regulatory schemes based on valid legislation could not be held to be 'to the detriment or against the interests of the public' as the then Combines Investigation Act put it, nor could they be schemes to unduly limit or prevent competition, within the meaning of the then section 411 of the Criminal Code."

Your Committee considers that it would be consistent with the law reform movement to embody the effect of these judicial decisions in the Act, the more so because failure to do so might lead a court to conclude that it was Parliament's intention to override them with respect to activities to which application of the Act was extended subsequently.

Concern was also expressed by the professions as to the possible effect on them of new Part IV.1 of the Act. In view of the special relationship of mutual confidence and trust which must exist between professional and client, your Committee considers that it would be inappropriate that a professional be forced to provide services to anyone. Also, for very good reasons, a professional entrusted with a mandate on behalf of a client may be directed by that client or he may feel himself that he must not act for other clients in the same line of business. Other matters dealt with in Part IV.1, i.e., consignment selling, market restriction, foreign judgments and foreign laws and directives, would appear inapplicable to professional services in any event. Your Committee therefore considers that there should be an amendment clarifying that Part IV.1 would not apply to the provision of professional services.

Neither of the amendments recommended by your Committee would leave the professions or service industries free to fix the fees for their services (or trades or industries to fix prices) or to do anything else prohibited by the Act other than as might be permitted by another law.

EXEMPTION FOR AFFILIATES

The Act as it stands does not specifically exempt arrangements or practices between affiliated companies

from the offences created therein although it could probably be argued successfully that the Act was not intended to apply in such circumstances.

Bill C-2 would add a new subsection 38(2) providing that the resale price maintenance provisions (which have themselves been amended by the Bill) would not apply between affiliated companies and a new subsection (7) defining the circumstances in which a company is affiliated with another for the purposes of subsection (2).

Similarly, with respect to the proposed new jurisdiction of the Commission to review exclusive dealing, market restriction and tied selling practices contained in new section 31.4, it is provided in subsection (4) that no order of the Commission applies in respect of such practices between affiliates. Subsection (5) contains exactly the same definition of affiliates as new subsection 38(7).

Your Committee welcomes the inclusion of these specific statutory exemptions. However, the fact that they are provided only with respect to certain offences and reviewable practices raises an implication that they are not intended to apply with respect to others.

The purpose of the legislation is to prohibit in the public interest unlawful arrangements between parties from whom the benefits of independent action should be expected. Since there is no reason to expect affiliated companies, which by definition have common control, to act independently, it follows that arrangements of practices between them should not be prohibited any more than those between departments of a single company. If a group of affiliates is so large that their common practices have an anti-competitive effect on the market, the monopoly provisions of the Act provide the remedy.

Your Committee therefore recommends (1) that new provisions be inserted exempting arrangements or practices between affiliates from the conspiracy provisions (section 32), the proposed new bid-rigging provisions (new section 32.2) and the price discrimination provisions (sections 34 and 35) and (2) that the definition of affiliates proposed in new subsections 31.4(5) and 38(7) be included in the definition section of the Act (section 2).

CONSTITUTIONAL

Several of the new provisions which Bill C-2 would enact may rest on questionable constitutional ground. Reference is made particularly (1) to the provision (new s. 31.1) which would give to a person who has suffered loss or damage a civil right of action to recover damages for breach of any of the statutory offences under the Act or for failure to comply with an order of the Commission and (2) to the "civil jurisdiction" (new Part IV.1) given to the Commission which, in effect, enables it to look into a specific set of facts under very broad legal criteria and make an order affecting one or more named suppliers.

Speaking of the civil damages provision, the explanatory booklet "Proposals for a New Competition Policy for Canada" published by the Department of Consumer and Corporate Affairs says as follows at p. 67:—

> "While the constitutionality of new section 31.1 may be challenged as relating to property and civil rights or matters of a local or private nature which, under section 92 of the B.N.A. Act, are within provincial rather than federal, jurisdiction, it is nevertheless hoped that the section will be upheld* as a matter ancillary to the criminal law, or relating to trade and commerce, and therefore within federal jurisdiction under section 91 of that Act."

*In a later edition of the booklet, this phrase was changed to read "it is considered that the section is supportable".

Federal combines legislation to date has largely been upheld constitutionally on the basis of Parliament's criminal law power. Can the creation of a civil right of action be said to be ancillary to such powers? Can an order of an administrative tribunal which does not affect the entire population or even a particular class thereof but perhaps only one supplier be said to be a criminal law or is it the regulation of a trade, possibly within a province?

In cases such as the *Board of Commerce* case, 1922 1 A.C. 191 in which the Privy Council considered legislation not unlike Bill C-2, a court would find precedents for holding the above-mentioned provisions *ultra vires*. However, judicial interpretation of the constitution is an evolving process and it is impossible to predict with any certainty what view of the legislation might be taken today by our highest court. Earlier cases can always be "distinguished" or "explained" as was done in respect of the *Board of Commerce* case decision in the *Proprietary Articles Trade Association* case, 1931 A.C. 310, where the constitutional validity of the predecessor of the present *Combines Investigation Act* was in issue and in *Goodyear Tire & Rubber Co. v. The Queen* 1956 S.C.R. 303 where it was held that the provision of the *Combines Investigation Act* empowering a court to prohibit the continuation or repetition of an offence by injunction was a legitimate exercise of Parliament's powers ancillary to criminal law.

Parliament cannot be expected to refrain indefinitely from legislating in constitutionally grey areas on the chance that legislation may be declared *ultra vires*. On the other hand, it is unfair to citizens to expect them to reorganize their affairs both to comply with and to take advantage of provisions of legislation which may be ultimately declared invalid.

The solution to these difficulties in the present case, in your Committee's opinion, is to provide that section 31.1 and Part IV.1 of the Act shall not be proclaimed into force until such time as the Supreme Court of Canada has had an opportunity to render its opinion on the constitutionality thereof pursuant to a reference to the Court by the Governor in Council and then only to the extent they have been upheld as valid.

CIVIL DAMAGES (new section 31.1)

The Bill would provide that a person aggrieved by a breach of the provisions of the Act by another person would have a right of action in the civil courts for the damages suffered as a result of such breach. While the position may be different under the civil law of Quebec, the leading jurisprudence under the common law leaves considerable doubt as to whether a party has such a right of action on the theory that the only sanctions intended are those provided in the Act itself, namely, fines and imprisonment. Thus, for the common law provinces at least, a statutorily created right would be required in order to ensure the right to claim damages.

Your Committee sees no reason why someone who is guilty of an offence under the Act should not be required to make full compensation to all those who have suffered thereby. However, in your Committee's opinion, the civil right to damages would be on firmer constitutional ground if it were limited to those cases in which there had been a conviction under the Act. The recommendation of your Committee accordingly is that the Bill be so amended and, as stated above, that the constitutionality of the provision be referred to the Supreme Court of Canada.

The Bill provides that the aggrieved party may recover "an amount equal to the loss or damage proved to have been suffered by him". Your Committee recommends that this should be clarified to ensure that only those damages which are the direct result of the acts complained of can be recovered. This would appear consistent with the ordinary rules relating to damage claims under provincial law and your Committee considers that there is no need to deviate from such rules in the present matter.

Subsection 31.1(2) provides that, in any civil action, the record of proceedings in any court in which the defendant was convicted of an offence under the Act is, in the absence of any evidence to the contrary, proof that he engaged in the conduct complained of for purposes of the civil action. The subsection goes on to provide that any evidence given in the criminal proceedings as to the effect of such conduct on the plaintiff in the civil action is evidence thereof in the civil action.

It is not clear what is meant by "record of proceedings". If this is to include transcripts of evidence given in the criminal proceedings and exhibits filed therein, confusion and injustice would result, in your Committee's opinion, in the conduct of the civil case.

Your Committee considers therefore that this provision should be amended to make it clear that "record of proceedings" is not to include transcripts of testimony given or documents or other exhibits produced in the criminal proceedings.

The foregoing suggested amendments of your Committee would require consequential amendments to proposed subsection (3).

PRACTICES REVIEWABLE BY THE COMMISSION (NEW PART IV.1)

Bill C-2 proposes a new concept in the supervision of certain trade practices only considered undesirable in certain circumstances. Under the Act as it stands, the sole approach is the creation of criminal offences. Charges are laid against the accused in the ordinary courts and the accused may be acquitted or convicted. If convicted, he is subject to the usual criminal penalties and to an injunction with respect to repetition or continuation of certain conduct.

Under the reviewable practices jurisdiction, the Commission would be empowered to make specially tailored orders affecting particular suppliers and customers, breach of which would constitute a criminal offence; i.e., the supplier would not be punished for practices ante-dating the order.

Your Committee in a previous section of this report has expressed doubts concerning the constitutionality of this proposed new jurisdiction of the Commission and made a recommendation that the question be referred to the Supreme Court of Canada. Even if this new jurisdiction is found to be constitutional in whole or in part, your Committee has further concerns as to its desirability. While it agrees that the more flexible environment for settling questions affecting competition policy which the proposed powers of the Commission would provide may be more desirable than the criminal law approach, its concern is with the selection of subject matters for review proposed by the Bill. For example, it may be that certain aspects of what are now covered by the price discrimination sections of the Act (sections 34 and 35) or the resale price maintenance provisions (section 38) could be more suitably dealt with as reviewable practices than as *per se* offences.

Your Committee particularly questions the desirability of the "refusal to deal" provisions. Your Committee is concerned that the proposed new provisions. are more likely to be invoked, not in the interests of the consumer, but in those of businesses that are in or, worse still, new businesses that simply wish to get into the distribution segment of the economy.

In case there may be circumstances where an order is warranted, your Committee considers that its concerns can be overcome by amendments which would have the effect of raising the threshold of intervention by the Commission, setting out more detailed guidelines as to the circumstances in which the Commission may make an order and providing for a more substantive right of appeal from decisions of the Commission than would be afforded by the rudimentary jurisdiction contained in section 28 of the *Federal Court Act*.

It has been suggested that the right of appeal from orders of the Commission should not be any more extensive than rights of appeal from decisions of other federal boards or tribunals. Your Committee points out, however, that in the case of several federal boards the Cabinet may exercise review powers on questions of fact or policy. Moreover, most of the parties affected by these tribunals have long since become accustomed to carrying on their activities in an atmosphere of heavy regulation.

In contrast to this, new Part IV.1 of the Act would put under the possibility of extensive regulation long established business practices which have developed in accordance with the realities of a relatively free market. The sudden impact of an order by the Commission which may drastically change the manner in which certain business activities must be carried out could have adverse effects not only on that business but on the economy as a whole. For this reason, your Committee does not share the view that it would be inconsistent with the existing practices in respect of other tribunals to provide a more viable right of appeal to the courts from orders of the Commission.

With the foregoing considerations in mind, your Committee makes the following recommendations for amendment to the proposed provisions of new Part IV.1:

1. Your Committee concurs with the Minister's proposed amendment to various sections whereby it would be made clear that no findings could be made by the Commission until after it had heard the parties against whom an order is sought. However, in the same vein, your Committee considers that the provisions should provide that the Director has the burden of proof in any proceedings before the Commission. In addition, in your Committee's opinion,

the words "and after affording every supplier . . . a reasonable opportunity to be heard" are not a sufficient safeguard of the suppliers' rights. Further provisions should be added to make the Commission a court of record and "for greater certainty" clarifying the suppliers' right to cross-examine witnesses produced by the Director and to call witnesses and produce documents on his own behalf in answer to any evidence made by the Director.

2. Your Committee considers that mere insufficiency of competition as determined by the Commission will result in too low a threshold of intervention and that this should be changed so as to make it clear that the Commission cannot make an order where there is a substantial degree of competition in the market amongst suppliers of the product.

3. To be enforceable, it would appear that an order of the Commission, especially under section 31.2 will have to specify at the least a period during which it is to remain in force. Your Committee considers that the supplier affected thereby should have the right to apply directly to the Commission to have the order repealed, amended or varied in the event that any of the circumstances present at the time the order was made have subsequently changed. While it may be that the Commission has such power without a specific provision in view of subsection 26(4) of the *Interpretation Act*, it would appear that a special provision is required in order to permit the Commission to act on the application of the supplier himself since the original order can only be made on the application of the Director.

4. Sections 31.2, 31.3 and 31.4 provide that the Commission "may" make an order when certain factors have been established by the Director. The use of the permissive "may" implies that, even though the Commission considered that the factors had been established, it could still, in its discretion, refuse to grant an order. Since the thrust of certain recommendations of your Committee is to spell out instances in which the Commission may *not* make an order, your Committee recommends that a provision be inserted clarifying that the Commission retains the freedom to refuse to make an order where it considers for any reason deemed sufficient by it that no order should be made notwithstanding that the basic factors had been established.

5. There has been considerable debate as to whether the Commission should make an order under the refusal to deal provisions with respect to a particular brand name product. The Minister's position on this was clarified by one of his proposed amendments which would provide in effect that failure to obtain supplies of a single brand name product would not constitute grounds for an order under the refusal to deal provisions unless that particular brand name was so dominant in the market that failure to obtain it would substantially affect the ability of a person to carry on his business in that class of articles. While this clarifies the position, in your Committee's opinion it does so in the wrong direction. Your Committee is particularly concerned with the suggestion that a person's business *in that class of articles* is all that needs to be affected. Thus, failure to obtain, e.g., a particular brand of toothpaste by a retailer might result in an order being made (if the other requirements of section 31.2 were met) notwithstanding that the retailer had access to other brands and that toothpaste sales accounted for only a minor part of his total operations. Your Committee therefore recommends that the Minister's proposed subsection 31.2(2) be discarded and that the definition of product in section 2 of the Act be amended as follows:

> "'product' includes an article and a service *and, unless the context shall otherwise require, all articles and services that are functionally competitive therewith or may be reasonably substituted therefor.*"

6. Your Committee agrees with the Minister's proposal to change the word "adversely" to "substantially" in new paragraph 31.2(a). However, your Committee does not consider that the reviewable practices jurisdiction should be available to someone who has never been in business and consequently it recommends the deletion of the words "or is precluded from carrying on business" in that paragraph.

7. One of the requirements that must be met by a person wishing to invoke the refusal to deal provisions is that he be "willing and able to meet the usual trade terms of the supplier . . . in respect of payment, units of purchase and otherwise". In response to criticism that this might not include other reasonable requirements of the supplier, the Minister proposed a new subsection 31.2(3). This proposal represents a substantial improvement, in your Committee's opinion, but still is not sufficiently broad. Your Committee therefore suggests that the new subsection read as follows:

> "For the purposes of this section, the expression 'trade terms' means terms in respect of payment, units of purchase and reasonable technical, servicing and *merchandising* requirements *and otherwise.*"

8. In the provision dealing with exclusive dealing and tied selling, the Minister has proposed an amendment to new subsection 31.4(2) reading as follows:

> ". . . . . because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to *lessen competition substantially by* (a) *impeding* entry into or expansion of a firm in the market, ... ".

The Comment accompanying this proposal of the Minister indicates that the purpose was to raise the threshold of intervention by the Commission. While your Committee regards this purpose as commendable, it is concerned that the specific drafting technique used may have the reverse effect in that it implies that the mere "impeding" will constitute a substantial lessening of competition. Your Committee suggests the provision be reworded as follows:

> ". . . . . because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to
>
> (a) impede entry into or expansion of a firm in the market, or
>
> (b) impede introduction of a product into or expansion of sales of a product in the market
>
> with the result that competition is likely to be lessened substantially . . ."

9. An important instrument in the life of the business community is the franchise agreement, e.g., an agreement

whereby the supplier permits the customer to use his trade mark or trade name in connection with the customer's business, on condition that certain standards with respect to the operation of such business designed to protect the goodwill associated with the trade mark or trade name are maintained. These arrangements permit a decentralization of economic activity which is in the interests of both the consumers and the small businessman. However, they may necessarily involve some degree of exclusive dealing, tied selling and market restriction practices.

Your Committee recommends that an amendment be made to make it clear that no order under section 31.4 shall apply to such practices where they are carried on in accordance with a franchise agreement as described above.

10. Your Committee recommends that an appeal should lie to the Federal Court of Canada from any order of the Commission on questions of fact or law or both and that the court be empowered to dispose of an appeal by dismissing it or allowing it and vacating the order or referring the matter back to the Commission.

BIG-RIGGING (new section 32.2)

Your Committee agrees that these new provisions are desirable but shares the concerns that, because of the manner in which they have been drafted, they may unwittingly prohibit bids by joint ventures and similar groups, the purposes of which may be entirely legitimate and beneficial to the economy.

In recognition of this complaint, the Minister proposed an amendment which would, in effect, except bids by joint ventures from the prohibition provided the agreement or arrangement between the parties thereto was made known to and accepted by the person calling, for the bid before the bid was made.

Your Committee considers that it would be unnecessarily complicated to have to obtain the consent of the person calling for the tenders prior to actual submission of the tender and that the concluding words of subsection (1) should therefore read simply as follows:

> "where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or prior to the time any bid or tender is made by any person who is a party to the agreement or arrangement."

AMATEUR AND PROFESSIONAL SPORT

Subsection (1) of proposed new section 32.3 to the Act would make it an offence for anyone to conspire with another person to limit unreasonably opportunities to participate as a player in professional or amateur sport or limit unreasonably the opportunities for anyone to play for the team of his choice. Subsection (2) would direct the court, in a prosecution under subsection (1), to have regard to (a) whether the sport in question was organized on an international basis and whether for that reason it was necessary to accept certain limitations in Canada and (b) the desirability of maintaining a reasonable balance amongst the teams in the same league.

Included in the Minister's proposed amendments is an amendment for the purpose of removing amateur sport from the application of the Act. While your Committee supports this amendment, it is concerned that it may not have the desired effect in view of the restrictive definition which it provides for amateur sport, namely, "sport in which the participants receive no remuneration for their services as participants." Your Committee understands that some amateurs do on occasion receive some compensation or remuneration which should not, nevertheless, qualify them as professionals. It is therefore recommended that the definition found in subsection (2) of new section 4.2 proposed by the Minister should be deleted.

As far as professional sport is concerned, your Committee heard representations from the National Hockey League and from the National Hockey League Players' Association. The League was opposed to inclusion of professional sport in the Act. The Players' Association agreed that the Combines Act was inappropriate legislation to deal with the subject but was content to see the provisions remain until other legislation could be introduced.

The gist of the offences created by the Combines Act, even as amended by Bill C-2, is the prevention of activity which is likely to increase the prices which the public is required to pay for goods and services. Provisions which single out a particular group of individuals with a view to regulating their relationship with their employers therefore represent a new concept in this kind of legislation.

Your Committee is in agreement with the representations made both by the National Hockey League and by the Players' Association to the effect that the criminal approach typical of the *Combines Investigation Act* is an inappropriate way of dealing with problems of this kind that may exist in professional sports. The provisions are framed in such a way that a criminal complaint would be laid against one or more clubs in the league and possibly against the league itself which could result in the imposition of fines or imprisonment. The wide ranging nature of the inquiry which the court would be required to conduct if the accused invoked one or other of the defences provided by subsection 32.3(2) demonstrates, in your Committee's submission, that attempts to regulate this sphere of activity in what is essentially a criminal law statute are inappropriate.

Your Committee is not aware of any evidence that the matters referred to in proposed new section 32.3 have reached such proportions in Canada that they should be dealt with as criminal law. Civil remedies are available to aggrieved players under the common law doctrine of restraint of trade. The fact that most of the few cases of this kind that there have been in Canada have supported the position of the team or the league as being reasonable merely tends to confirm that this is not a subject matter for criminal law.

Your Committee therefore recommends that both professional sport and amateur sport be exempted from the purview of the Act. In any event, if the provision affecting professional sport are to remain, your Committee recommends that such provisions be transferred from that part of the Act dealing with *per se* offences to the "Reviewable Practices" Part of the Act which Bill C-2 would create. It appears to your Committee that the procedure to be followed by the Commission in dealing with matters under that Part of the Act is more suitable than the kind of inquiry which a criminal court judge would be

directed to make under the provisions of proposed section 32.3.

MISLEADING REPRESENTATIONS AND ADVERTISING (Section 36)

Your Committee considers that the strengthening of these provisions which would result from the amendments proposed by Bill C-2 is commendable; nevertheless the provisions are so widely drawn that it is possible that they could catch contractual representations between sophisticated parties whereas the intention surely is to protect the consumer.

Your Committee therefore recommends that new paragraph 36(2)(b) be amended to provide that a representation that is relied on solely in connection with the operation of a business shall not be deemed to be made to the public.

DEFENCE OF DUE DILIGENCE

The Act as amended by the Bill would contain a number of strict liability offences, that is to say, offences in which it is unnecessary for the Crown to establish any guilty intent on the part of the accused. The mere fact that certain things have been done constitutes the elements necessary for conviction.

The briefs submitted to your Committee have been virtually unanimous in recommending that a person should not be convicted of certain offences if he is able to establish that he exercised due diligence to ensure that what was done did not violate the provisions of the Act.

The Toronto *Star* in an editorial on February 14, 1975, speaking of the amendments to the Act proposed by Bill C-2, said as follows:

> ". . . . . They allow too much discretion in some cases and none at all in others.
>
> "In the latter category fall several offences in the amended act which could send a man to jail even though he had no criminal knowledge or intent, and even though he had made every reasonable effort to be sure he was acting legally. In law, such statutory rigidity is called 'strict liability.'
>
> "The House of Commons Finance Committee, which is currently studying the proposed amendments, should remove the strict liability provisions and allow the courts more discretion in deciding whether a businessman was trying to trick the public or whether he himself was duped by someone else."

Your Committee recommends that a new section be added to the Act similar to that contained in Section 25 of the English *Fair Trading Act,* Statutes 1973, Chap. 41, the gist of which would be that in proceedings for certain offences it would be a defence for the person charged to prove that commission of the offence was due to reliance on information supplied or some cause beyond his control and that due diligence to avoid commission of the offence was exercised. Where the accused invokes the defence that he relied on information supplied, he must notify the prosecutor before trial of the name of the person who supplied the information. A newspaper publisher who published a misleading advertisement in good faith would also have a defence.

It is recommended that such new section apply to the offences created in the following sections of the Act as amended:

Promotional allowances—subsection 35(2)

Misleading advertising and representations—subsection 36(6)

Representations as to reasonable tests and testimonials—subsection 36.1(2)

Double ticketing—subsection 36.2(2)

Sale above advertised price—subsection 37.1(2)

Promotional contests—subsection 37.2(2)

Resale price maintenance—subsection 38(8)

RESALE PRICE MAINTENANCE (Section 38)

Subsection 38(3) of the Act provides in effect that where a supplier has been supplying a customer and subsequently refuses to supply him because the customer refuses to sell or has resold goods at a price lower than that specified by the supplier, the supplier is guilty of an offence. This offence would be retained under the Bill in new paragraph 38(1)(b).

However, under paragraph 38(5) of the Act a defence was provided where the supplier could establish that his refusal to sell was based on the supplier's reasonable belief that his customer was using the product as a loss leader or for bait-and-switch selling practices or that the customer had engaged in misleading advertising in respect of the products or that he had not provided the proper level of servicing. These defences would be removed by Bill C-2.

In the departmental explanatory booklet at page 16, it is stated as follows:

> "These defences are withdrawn by the amending Bill. Those concerning bait and switch advertising and misleading advertising are no longer necessary in view of the new provisions making these practices offences under the Act. The defence concerning the provision of servicing is no longer of importance. It was placed in the Act at a time when servicing was the function of the retailer of appliances, but this function has largely passed to firms specializing in the servicing of appliances in general. The Economic Council of Canada recommended that these three defences be dropped. It was not favourable to the continuation of the loss leader defence, but felt that a separate inquiry should be undertaken and consideration given to the prohibition of the practice of 'loss leaders'. In the meantime, the defence would be retained. However, in the preparation of the present Bill, it was felt that the Countil did not take sufficient account of the thorough inquiry into loss leaders which the Restrictive Trade Practices Commission had already made."

Your Committee considers that the fact that certain practices are proposed to be made offences under the Act is not a sufficient reason for withdrawing the defences to the supplier who refuses to continue to sell. Prosecution of the offender may be delayed or may never take place. Your Committee considers it illogical that a supplier should, in effect, be required to aid and abet a retailer in the commission of an offence.

As to the servicing requirement, it may have application in respect of goods other than appliances and there may still be cases where the retailer is expected to provide servicing.

The explanation for removing the defence in relation to loss leader selling does not appear convincing to your Committee.

On balance, your Committee considers that there is likely to be more harm in removing the defences than in retaining them and it is therefore your Committee's recommendation that present subsection 38(5) be retained.

INTERIM INJUNCTION (Section 29.1)

Bill C-2 would add provisions to the Act permitting the Crown to obtain an interim injunction (even without notice in certain cases) against a person who appears to the court to have done or to be about to do something toward the commission of an offence under the Act.

Your Committee received many representations that these provisions should be deleted on the grounds that (1) the commission of a crime should not be prejudged and (2) that grave injustice could result where someone was so restrained only to be acquitted later.

In private law matters, injunctions can be obtained but the applicant runs the risk that, if he cannot ultimately prove his case on the merits, he may be liable in damages to the person against whom the injunction was directed. So important is the preservation of this right to claim damages that in some jurisdictions interim or interlocutory injunctions will only be granted upon condition that the applicant put up security in an amount sufficient to satisfy such a damage claim by the other party.

While your Committee does not suggest that the Crown need be obliged to put up security, it does consider that the Act should clearly provide that a person against whom an injunction is directed and who is later acquitted has a right of action against the Crown for any damages suffered as a result of the injunction.

INDICTMENT/SUMMARY CONVICTION

The Act provides that enforcement proceedings may be taken by way of summary conviction or indictment in many instances. The penalty which may be inflicted in a case where the summary conviction proceeding is used is less severe than where proceedings are by way of indictment. However, the Criminal Code provides that proceedings by way of summary conviction must be instituted within six months from the date of the offence. It does not seem reasonable that the degree of punishment should be dependent upon matters as uncontrollable as the date of institution of the proceedings. in other words, there could be cases where the Crown felt that imprisonment was not warranted yet because the delays for instituting proceedings by way of summary conviction had expired they were bound to proceed by way of indictment with the inevitable result that there would be imprisonment if the accused were convicted. This anomaly has been recognized by the Minister in his proposed amendment in which by new subsection 44(5) he would extend the delay for institution of summary conviction proceedings from six months to one year.

In the opinion of your Committee any distinction based upon delays for institution of proceedings should be eliminated altogether so that the Crown may retain complete flexibility with respect to all cases.

JURISDICTION OF FEDERAL COURT (Section 46)

The Act provides that prosecutions shall be brought in the ordinary criminal courts in the provinces but that, with the consent of the accused, most offences may be prosecuted in the Federal Court—Trial Division. Bill C-2 would amend the relevant provisions so that a prosecution could be brought against a corporation in the Federal Court—Trial Division without obtaining its consent. A prosecution against an individual in that court would still require his consent.

This is of doubtful constitutional validity since, although Parliament has jurisdiction in relation to criminal law, the provinces have jurisdiction in relation to the administration of justice and the creation of criminal courts. Doubtless this was the reason for making the jurisdiction of the Federal Court under the Act conditional upon the accused's consent.

Quite apart from the constitutional issue, your Committee agrees with the concern expressed in many of the submissions made to it that the accused, even if it is a corporation, should have the right to be tried in the ordinary criminal courts by a judge familiar with the well settled rules as to burden of proof and other matters which distinguish criminal from civil trials. Your Committee accordingly recommends that the proposed amendments in this connection to subsection 46(4) be deleted.

CONCLUSIONS

The foregoing presents the recommendations of your Committee on Bill C-2 based on the representations made and its study of the Bill to date. Consideration of the Bill by your Committee will be continuing and, if necessary, additional recommendations made in a further report or reports.

Your Committee's staff is presently drafting the text of actual amendments to the Bill that would be required to express its recommendations. It is expected that these amendments will be available shortly for discussion purposes.

Respectfully submitted,

Salter A. Hayden,
Chairman

March 18, 1975

SCHEDULE "A"

2nd Session—29th Parliament
1974

List of Briefs submitted with regard to Combines Investigation legislation

Submissions Received	*Appeared*
1. Board of Trade of Metropolitan Toronto.	
2. The Canadian Chamber of Commerce.	May 8, 1974
3. Dominion Foundries and Steel Limited.	
4. Federation of Automobile Dealer Associations of Canada.	
5. Imperial Oil Limited.	
6. International Harvester Company of Canada Limited.	
7. Investment Dealers Association of Canada.	
8. The Canadian Manufacturers' Association	May 1, 1974
9. The Canadian Real Estate Association	May 8, 1974
10. Tre Honourable Robert Welch, Q.C., Ontario Provincial Secretary for Justice.	
11. Canadian Lumbermen's Association.	
12. Ontario Lumber Manufacturers' Association	
13. Union Oil Company of Canada Limited.	

1st Session—30th Parliament
1974-75

1. Association of Canadian Advertisers Incorporated	December 18, 1974
2. Allied Beauty Assoc.	November 27, 1974
3. Canadian Institute of Chartered Accountants.	December 18, 1974
4. National Automotive Trades Association of Canada.	February 12, 1975
5. Blake, Cassels & Graydon.	November 13, 1974
6. The Board of Trade of Metropolitan Toronto.	
7. The Canadian Chamber of Commerce.	
8. Coca-Cola Ltd.	February 26, 1975
9. The Canadian Bar Association	
10. Canadian Construction Association.	
11. Consumers' Association of Canada.	December 18, 1974
12. Canadian Amateur Hockey Association.	November 20, 1974
13. Canadian Lacrosse Association.	November 20, 1974
14. Dominion Dairies Limited.	February 26, 1975
15. Dominion Foundries and Steel, Limited.	
16. The Federation of Automobile Dealers Associations of Canada.	
17. National Hockey League Players' Assoc.	December 11, 1974
18. Canadian Federation of Insurance Agents & Brokers Associations.	December 11, 1974
19. The Institute of Canadian Advertising	December 11, 1974
20. Imperial Oil Limited.	
21. Insurance Bureau of Canada.	
22. International Harvester Company.	
23. The Investment Dealers Association of Canada.	November 27, 1974
24. Canadian Manufacturers' Association.	
25. Ontario Road Builders' Association.	
26. Patent and Trademark Institute of Canada	February 5, 1975
27. The Canadian Petroleum Association.	November 27, 1974
28. The Canadian Real Estate Association	November 20, 1974
29. Sun Oil Company Limited.	
30. Canadian Trucking Assoc.	February 5, 1975
31. Union Oil Company of Canada Limited.	
32. Grocery Products Manufacturers' of Canada.	
33. The Toronto Stock Exchange.	
34. Canadian Institute of Plumbing & Heating.	

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*

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Issue No. 34

WEDNESDAY, APRIL 16, 1975

Fourteenth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

28842—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker-(19)
Haig	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purposes of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, April 16, 1975
(47)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: "The advance of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

Present: The Honourable Senators Hayden (*Chairman*), Beaubien, Buckwold, Connolly, (*Ottawa West*), Cook, Desruisseaux, Everett, Flynn, Haig, Laird, Lang, Macdonald (*Cape Breton*), Macnaughton, Molson, Sullivan and Walker. (16)

In Attendance: Mr. R. J. Cowling, C.A., Mr. John F. Lewis, C.A., Advisors.

WITNESSES:

DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS;

Bureau of Competition Policy:

Mr. Robert J. Bertrand, Assistant Deputy Minister and Director of Investigation and Research;

Mr. R. M. Davidson, Senior Deputy Director of Investigation and Research; and

Mr. G. D. Orr, Director, Services Branch.

The Committee, together with the witnesses, proceeded to the discussion of the Interim Report of the Committee dated March 19, 1975, during which such discussion, the advisory staff read several proposed amendments in legal form.

At 12:30 p.m., the Committee adjourned further consideration of the above matter until 9:30 a.m., Wednesday, April 23, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, April 16, 1975.

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9.30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, we have with us this morning Mr. R. J. Bertrand, Assistant Deputy Minister and Director of Investigation and Research in the Bureau of Competition Policy, Department of Consumer and Corporate Affairs, and he is going to deal with the subject matter of our inquiry, or refer it to his panel. So I shall call upon him to introduce his panel, and then, Mr. Bertrand, if you have any preliminary statement that you want to make, we shall be glad to hear it.

Mr. Robert J. Bertrand, Assistant Deputy Minister and Director of Investigation and Research, Bureau of Competition Policy, Department of Consumer and Corporate Affairs: Thank you very much, Mr. Chairman. Is it permissible for me to express myself in French at times as well as in English, because there are some points with which I am more at ease in French?

The Chairman: Yes; the instantaneous translation system is working.

Mr. Bertrand: Thank you, Mr. Chairman.

I would like to take a few minutes to thank you for inviting me here and giving me the opportunity to discuss with you some of my views, as well as yours, on this legislation. I would like also to take this opportunity to explain why, when your chairman invited me here in November or December, it was very difficult, if not impossible, for me to be here. As you will remember, it was in November that the minister was in the process of revising the bill and preparing the amendments he was planning to introduce on December 3. This series of amendments you have discussed in your meetings. I would have been in a difficult position if I had been called to discuss with you the bill as it was presented, knowing that the minister intended to have some specific amendments put forward that might have met a number of criticisms that could have been raised at that time, but it could have put me in the situation where I might have had to argue against the position that I knew the minister would be taking a few days later, and so you would have had a conflicting report.

The Chairman: There is no reason to apologize, Mr. Bertrand. We invited you first, to use my favourite expression, "to kick off the football", since this was your legislation. You were not available at that time, and we understand why, and so we invited you again. I think that is the best proof that we wanted to have you here and to hear your views.

Mr. Bertrand: Thank you very much, Mr. Chairman. I would like to take a few minutes to explain the basic attitude and philosophy of the competition bill. First of all, it must be remembered that it is the first part of a two-phase approach, the second part to be introduced at the end of this year, or in a few months' time. The first part dates back to the original Bill C-256, of 1971 and since then has been revised two or three times. We are fortunate in the department, on behalf of my minister, to have the opportunity of reaping the benefit of an interim report of your committee. At present we are considering every one of those recommendations. As you are aware, the minister last week suggested three amendments, which in some respects, would deal with some of your criticism or remarks. The minister is presently considering your views and other remarks of all aspects and those of the committee of the House of Commons, which will be most welcome and helpful to him in deliberating the best legislation.

I would like to deal, one by one, with some of the points which you raised in your committee's report. The first subject pertains to regulated trades, industries and professions. You come to the conclusion that the jurisprudence, or case law, notably the Farm Products Marketing Act, established a principle according to which if an organization is regulated by a parliamentary agency or a government it is immune from the Combines Investigation Act. You suggest that this principle should be embodied in the legislation itself. I would like to discuss with you some of the possible advantages and disadvantages of your suggestions.

Senator Connolly: Would you say to where in our report you make reference now?

Mr. Bertrand: Yes, it is page 676, "Regulated Trades, Industries and Professions."

Senator Connolly: Which copy of the report are you using? Is it issue No. 33 of this committee?

Mr. Bertrand: It is dated March 19.

Mr. R. J. Cowling, Special Counsel to the Committee: It would be page 6 of issue 33. I believe Mr. Bertrand has before him the Senate *Hansard*.

Senator Connolly: I am sorry; thank you. Most of us, I believe, have the interim report of this committee of March 18 before us, but once you get started we will know.

Mr. Bertrand: Yes, it is issue 33, page 6. This problem of attempting to crystallize the principle in the legislation was wrestled with at the time Bill C-256 was under study. We endeavoured to establish some form of formulation in Bill C-256, and in view of the criticism addressed to the drafting of the bill it proved to be a very difficult task. We

do have difficulty in drafting precise legislation which will cover the case law.

Another point to remember is that law is a living institution. It changes and it is supposed to be changed. Therefore, the only means by which society can adjust and adapt to new situations and an easier means would be to carry out an evaluation of the law when it is jurisprudence, rather than when it is contained in the statute law. Therefore it might be easier to retain flexibility in the legal framework by not embodying the principle in the act. Another reason is that to make it workable and adequate, the legislation might have to curtail the effect of the jurisprudence on the subject. The basic approach of the decision in competition policy should be the protection of the public interest, the consumer interest, in free competition and efficiency of the economic system for which there are only two ways: either we have effective competition, with the result that costs are kept down and the best distribution of resources is ensured at the lowest possible cost; or in the absence of effective competition the only recourse for the government is to regulate the activity. When an activity escapes effective competition, then it should be regulated by the government. However, now you can see that the regulation approach is carving something out of the general competition policy. If we adopt the attitude of the carving out approach, then we have the following principle. It is only to the extent that it is effectively regulated, assuming the power to regulate and effective regulation, that we have that carving out. Another aspect must be borne in mind—

The Chairman: Right here, Mr. Bertrand, if you do not mind an interruption, I believe you have almost repeated the remarks of Mr. Justice McRuer in the Canadian Breweries case. In other words, he said there, where the question involved was that of monopoly, that in his judgment in that case the industry was definitely and substantially regulated within the province. Therefore, in view of that regulation it could not be said that there was anything detrimental to the public interest. So he had made a finding of fact on the basis of the evidence which was before him.

Now, in effect what do you propose in the way of dealing with what we call regulated trades, industries and professions? Short of having a trial and having a judge make a decision on the facts, who is going to say whether the regulation to which the trade, industry or profession is subjected is definite and substantial regulation? Who is going to say?

Mr. Bertrand: The only choice we have is that the tribunal would have to say that, looking at the facts of the situation, looking at the special way that the regulating body is acting, and asking itself the question, "Is that regulating body effectively regulating? Is it doing the job according to what the statute requires?" If it does that, it would lead to the regulation of the tariff.

Senator Connolly: Does that mean that the federal jurisdiction would assume that it had the prior right to regulate, even when there is jurisdiction within the province?

Mr. Bertrand: I do not think there is any assumption of that sort. The only assumption, in terms of competition policy, is that it was in the public interest to have competition.

Mr. Cowling: Would the assumption, in fact, be the reverse? If there were effective provincial regulation, that has priority over the Combines Investigation Act.

Mr. Bertrand: For the same reason that the carving-up principle could be done through a federal or provincial agency.

Senator Connolly: I understood you to say that with the competition act before it, the court would look at whether or not there was effective regulation by the province in one of these regulated trades, industries or professions; and if there was not, the federal jurisdiction or the federal statute would apply as a superior regulating authority.

The Chairman: Only, as I see it, on the basis of the authority which the federal government has, because the Combines Investigation Act has been held to be valid legislation on the basis that it is criminal law. Regarding the kind of regulation proposed in connection with professions, whereas we have said in our report that the courts in Ontario, so far as litigation is concerned, set the scale of fees, there is a taxing officer to whom the client, if he feels the bill is exhorbitant can go. If a lawyer feels that the taxing officer has not dealt fairly with him, he can appeal. In those circumstances, frankly it seems impossible to be able to say, "That is not effective regulation."

Where do we begin and where do we stop in arriving at the question of effective legislation so as to leave anything for the federal authority to do?

Mr. Bertrand: Let me give you one example. In some provinces the transport industry is totally regulated. For entry into the transport business you require a permit and are assigned a route. A tariff is also established or sanctioned by the province. In other provinces you have none of this. There is no doubt that if a number of transport enterprises in a highly regulated province get together and try to establish rules or fees, combining, but still under the authority or subject to effective review by the provincial authority, then the Combines Investigation Act will not apply, because it is assumed that the competent authority for transport in the province is taking care of the public interest, making sure that it is not against the public interest.

The Chairman: All we have said in our report, after reviewing the situation, is that on balance, we have stipulated that there should be an exemption of these activities of a trade, industry or profession which are regulated by some other law, and that they should be exempt from the scope of Bill C-2. It is not an answer to say that there are some provinces where they do not have any regulation.

Mr. Bertrand: I will go one step further. The point I was leading up to is that I think it is in the public interest to retain the effect of the Combines Investigation Act, even in industries which are regulated, if they are not effectively regulated.

Senator Lang: In whose opinion?

Mr. Bertrand: That of a judge; a court will decide on the basis of the facts.

Senator Connolly: That comes back to my point, that you are then establishing some kind of regulating authority superior to the regulating authority within the province, under the authority which you have to legislate in respect of combines.

Mr. Bertrand: May I ask Mr. Davidson to comment?

Mr. R. M. Davidson, Senior Deputy Director of Investigation and Research, Bureau of Competition Policy, Department of Consumer and Corporate Affairs: It seems to me there are a couple of relevant points which are being overlooked here. One is that in many industries the whole industry is not regulated. Only some activities are regulated. It is important to recognize that in most areas, for example, advertising is not regulated, and most people would accept the idea that those activities which are not regulated in an industry—which we ordinarily refer to as a regulated industry—should nevertheless remain subject to the provisions of the Combines Investigation Act.

The second point is that—

The Chairman: Mr. Davidson, while you are on the first point, it would appear, from what Mr. Bertrand has said and from what you are saying, that you have three categories which you think, in the interests of the public, we should deal with on this subject of regulation. One is in cases where there is no regulation; the second is where there is partial but not full regulation; and the third is where there is full regulation. Are you ready to eliminate any one of those your statutory provisions?

Mr. Davidson: The third one is probably an animal that does not exist. It is difficult to point to any industry all of whose activities are completely regulated.

The Chairman: I would be inclined to say that in the Canadian Breweries case—this was a question of monopoly—the judge decided that the regulation which existed in the province was such, and went to such an extent, that it could not be said there was anything detrimental to the public.

Mr. Davidson: I quite agree that is the finding of Mr. Justice McRuer.

The Chairman: I stated that because you said we would not find any cases where there was full regulation.

Mr. Davidson: That also fits my description, because Mr. Justice McRuer said that to the extent that companies were free to compete in the realm of advertising, they did so. So there was not, in fact, a limit placed, for example, on the amount of advertising the brevery companies could do. Even if there are one or two examples—and I do not think there are—of any industries which are completely regulated, it is important to recognized that the Combines Investigation Act does not represent regulation of the ordinary sort. The Combines Investigation Act attempts to ensure that private restraints are not placed in the way of competition regulating the industry.

Where the Combines Investigation Act applies, it is not the act which constrains what competitors do; it is competition which constrains what competitors do. The purpose of the Combines Investigation Act is to ensure that private restraints are not imposed so as to preclude competition from regulating the industry.

If we go back to the brewery case, Canadian Breweries made some 30-odd acquisitions of brewering companies. Ordinarily, the Combines Investigation Act, in an industry where acquisitions and prices were not regulated, would apply, but the courts held that the regulation of the industry was such that even though this whole series of mergers took place, it was not possible for that series of mergers to be detrimental to the public interest, because the Liquor Control Board of Ontario ensured that the effect of these mergers was not detrimental.

I think it is important to keep in mind that there is no conflict between provincial regulations, on the one hand, and federal regulations, represented by the Combines Investigation Act, on the other. What the Combines Investigation Act seeks to do, simply, is to prevent private restraints on competition from precluding regulations on industry by competition.

The Chairman: You say "better regulation" by the Combines Investigation Act. Are you referring to the criminal prosecution aspect of the administration of the Act?

Mr. Davidson: I did not intend to use the word "better".

The Chairman: You did use the word.

Mr. Davidson: I do not remember the context. I did not intend to use it.

Mr. Cowling: Mr. Chairman, I agree with Mr. Bertrand that it is difficult to draft an amendment which would exclude regulated industries, trades and professions. We have made an attempt to do so, and perhaps we can show it to Mr. Bertrand and his colleagues later.

The difficulty I have with it is a technical one, perhaps. The jurisprudence that you referred to was developed at the time the act applied only to articles. With this bill, however, the act will be extended to services. I am wondering whether a court faced with the issue we have just been discussing in relation to a service industry might not conclude that since there was a specific exemption in the act now, it was the intention of the legislature to override, in effect, the earlier court decisions, at least insofar as service industries are concerned. I do not know whether my fear in that respect goes too far.

The Chairman: I do not think your fear goes too far. We have had bills before us in the past in which the obvious intent was to override the effect of legal decisions. That has been the case in a number of bills we have had before us.

Mr. Cowling: I might just add, Mr. Chairman, that I think my difficulty is perhaps increased if the amendment which the minister suggested before the committee of the other place is passed. That amendment reads as follows:

> In a prosecution under subsection 1—-

And he was referring to section 32 of the act.

> —the court shall not convict the accused if it finds that the conspiracy, . . .relates only to a service and to standards of competence and integrity—

As I understand it, the purpose of that amendment is to make it clear that even though there were no regulations in one or more provinces, those matters would be outside the purview of the Combines Investigation Act. I think that is a good amendment, but I am concerned that if it is passed without other exempting provisions, it might lead a court all the more to conclude that because other matters have not been specifically exempted it was the intention to override the farm products case and the breweries case.

Mr. Bertrand: You must also realize that a court could be persuaded that, since Parliament aware of the farm marketing and breweries cases and decided not to do anything specific about them, it accepted those decisions as representing the law.

Mr. Cowling: I understand that, but I think that argument would be stronger if there was no amendment along the line of the one which the minister suggested the other night. As I said, I think it is a good amendment, but to make the situation clear we then have to think in terms of codifying, as it were, the jurisprudence.

Senator Walker: To get back to the beer case, it should never have been brought, should it?

Mr. Davidson: Why not?

Senator Walker: Well, there were no grounds for it.

The Chairman: Of course, a large element of service is excluded from the bill, labour unions being one example.

Mr. Bertrand: Yes.

Senator Molson: Mr. Chairman, in listening to that exposé of the philosophy under which this legislation operates, I wonder if I might, in my ignorance, ask a question. Why does this effort to protect the public always exclude any matters relating to labour? What is the reasoning behind that? We talk about the protection of the public, yet we always exclude labour. It is always glossed over, and I have yet to hear any explanation of that philosophy. The post office is one example where we talk about the public convenience, as is the airline industry.

The Chairman: What public interest are they talking about?

Senator Molson: Yes. Why is that never mentioned? Why is it always left out?

Mr. Davidson: In Canada, senator, and in all other countries of which I am aware where there is a serious policy on competition, the economic power of organized labour is not included. The usual explanation given for that is that it is generally believed that abuse of economic power by labour unions is better handled by labour law than it is by competition law.

Senator Flynn: That is the hope, anyway.

Mr. Davidson: That is the usual explanation given.

Senator Walker: It is a pity, isn't it?

The Chairman: Whereas the economic power that might be used by those who do not fit into the labour area is regulated by the threat of criminal prosecution.

Mr. Davidson: I think this bill tries to get away from the criminal aspect, Mr. Chairman.

The Chairman: You mean, because of the reviewable practices section?

Mr. Davidson: Yes.

The Chairman: That is only a part of the bill.

Senator Everett: Mr. Chairman, I am having some difficulty trying to follow the discussion. Under the heading of "Regulated Trades, Industries and Professions" the last paragraph starts out as follows:

> Neither of the amendments recommended by your Committee—

Can you tell me where I find those amendments?

Mr. Cowling: In the Interim Report, Senator Everett, we imply discussed the amendments in a general way; there was no specific drafting of amendments at that time. Since that time, however, as I mentioned earlier, we have developed some draft amendments.

Senator Everett: One of the amendments, presumably, is to exclude professional services from the operation of the act. Presumably, another is that regulated industries would also be excluded.

Mr. Cowling: That is right.

Senator Everett: It is rather difficult to discuss what the committee intends if we do not know what the amendments mean.

The Chairman: Mr. Cowling will read the draft which we have prepared.

Mr. Cowling: The first type of amendment we are talking about, Senator Everett, is to codify the exemptions in respect of regulated trades and professions, and the second type of amendment is to make it clear that the provisions of new Part IV.1 would not apply to the professions, because they seemed inappropriate.

If you like, Mr. Chairman, I could read this specific amendment; it is not too long. It would go in as new section 4.3. Subsection (1) would read as follows:

> For greater certainty, this Act does not apply to the activities of any trade, industry or profession contemplated by or pursuant to any enactment of Parliament or of the legislature of a province.

Subsection (2) would read:

> Notwithstanding the absence of an enactment referred to in subsection (1)

Here I have tried to take account of the amendments suggested by the minister the other night, Mr. Bertrand. Subparagraph (a) would read:

> Subsection 32(1) does not apply where the combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public in the practice of a trade or profession or in the collection and dissemination of information.

Subparagraph (b) would read:

> Part IV.1 does not apply to the provision of professional services.

Senator Everett: Let us apply what Mr. Bertrand and Mr. Davidson have been talking about. Suppose we have a situation where an industry is regulated in part.

The Chairman: Is it a regulated industry then?

Senator Everett: That is what I am asking. Suppose it is regulated in part. Let us take, for example, the real estate industry, which I think requires a provincial licence, but the regulations with respect to that licence are rather narrow; most of the regulating of the industry goes on at the real estate board level, which is not part of provincial government or any other government regulation; it is merely an association of real estate dealers getting together.

Mr. Cowling: They would be exempt from the Combines Investigation Act only to the extent that they were regulated, as found by a court, perhaps, if necessary.

Senator Everett: Could we hear the comments of the officials on that point?

Mr. Bertrand: You suggest saying:

> ... this Act does not apply to the activities of any trade, industry or profession contemplated by ... any enactment of Parliament or the legislature of a province.

There is a close relationship between the activities and the regulations?

Mr. Cowling: That is right. I do not think it is possible to go further than that.

Mr. Bertrand: Assume a profession, industry, trade or business is regulated, and there is an act saying that its fees will be filed, for instance, and could, by the authority of an agency, be disapproved or rejected. Suppose all the members of that industry or trade get together and decide to increase the fees by 25 per cent.

Senator Walker: 33⅓ per cent!

Mr. Bertrand: Suppose the agreed rates are filed and nothing is done with them. Under your wording, how would that situation be dealt with? If I read your proposed amendment correctly, taking the words "activities ... pursuant to any enactment," you say that the the combines legislation does not apply.

The Chairman: The proposed amendment Mr. Cowling read says:

> ... the activities of any trade, industry or profession contemplated by or pursuant to any enactment of Parliament or the legislature of a province.

It must be an activity of any trade, industry or profession contemplated by or pursuant to an enactment. If there are areas in which the activities extend beyond what is contemplated by or pursuant to any enactment of the Parliament of Canada or a legislature of a province, then there is no benefit of this protection that you are proposing.

Mr. Bertrand: A distinction should be made. Suppose there are the activities I have just described with rate filing, then there is an effective examination by the agency and a decision that it is in the public interest to have those rates. Then the federal government combines legislation should not apply, because the competent authority, having conducted an examination, has decided that in the public interest the rate is right. If there is no examination at all, the rates are filed and that is it; there is no examination. Assume the agency has the authority to conduct an examination but does not do so. Do you make a distinction in that case, whether combines should apply or not?

The Chairman: If it is capable of distinction I would expect combines would do it in their study.

Mr. Cowling: This is in effect saying that perhaps that particular provincial agency is not doing its job. It involves a value judgment on the part of the combines department to that effect.

Mr. Bertrand: Would you not prefer to leave that to the courts to decide?

Mr. Cowling: I do not think the thrust of our amendment is to take that away from the courts.

The Chairman: If you would prefer that we leave it to the courts, maybe we could do that. Would you accept that?

Mr. Bertrand: I am not the minister.

The Chairman: But you have raised the question. If you think we should prefer leaving it to the court, we will look at it on that basis.

Mr. Bertrand: If we are looking in that direction the court would have a right to look over the activities of regulating agencies, to look at the statute by which they are regulated, and then decide whether they are effectively conducting their regulating activities.

The Chairman: Does not the court now, in relation to any industry, trade or profession that is subject to regulation in the province, have an overriding authority to decide whether those operations are within or without that provincial statute?

Mr. Bertrand: I think so, yes.

The Chairman: They have that now?

Mr. Bertrand: Yes.

The Chairman: Then what is it you want beyond that in the hands of the combines law?

Mr. Davidson: I think the point is that if there is an agreement among the firms in an industry or trade to fix prices and it is undue, that is prohibited by the Combines Investigation Act. The provincial legislation could exempt that otherwise criminal agreement from the application of the act if the fixing of the price were subject to review by an appropriately constituted body.

Senator Connolly: A provincial body?

Mr. Davidson: A provincial body, right. We are discussing the question of exemption. The Combines Investigation Act generally applies to price fixing, to monopolization, to misleading advertising. If, however, a properly constituted provincial federal body that effectively regulates an activity exists, that provincial or federal legislation can exempt what would otherwise be an offence from the application of the Combines Investigation Act. It is only that kind of review that we are discussing. If the regulatory agency fails to meet the test of natural justice in its dealings, that has nothing to do with the Combines Investigation Act. It is quite true that the courts already deal with that.

The Chairman: I think we have got your point of view.

Senator Everett: Can I ask counsel one question? What do you mean by "contemplated by"?

Mr. Cowling: It is a broad term.

Senator Everett: Does it have legal implications or is it the dictionary meaning of the word? I would think you would want to confine it to that which is actually regulated rather than "contemplated by," if I am using the dictionary term. You may have some special legal meaning.

The Chairman: Suppose we have the word "intended" instead of "contemplated."

Senator Everett: I guess that is the word I am concerned about, because intentions draw that net pretty wide. I would think you would want to put in the amendment that which is actually regulated rather than that which is intended, as the chairman says. I wondered if there was any significance in putting in that word.

The Chairman: This is favourite phrasing in various clauses of this bill, where they say "is likely to." Can we fit in that expression?

Senator Everett: You are not really talking about intent, are you?

Mr. Cowling: No. I think the point is, has the provincial government considered that the particular activity should be dealt with in some way? Has it come to its attention that this ought to be dealt with in a statute? If it is, then it is contemplated by that statute. It is contemplated pursuant to it, if under the statute there is a regulation, for example, which deals with further matters. I think it is necessary to have a fairly broad term, because of the different ways in which the activity may be dealt with by the statute.

Senator Everett: If you went to the extent the chairman goes to, where by the word "contemplation" you mean "intention," I think you would run into vagueness which would make it very hard to exercise that exclusion. However, I just raised this point, and it is something you can consider.

The Chairman: This is the place to develop those ideas. Can we move to the next point, Mr. Bertrand?

Mr. Bertrand: You have mentioned in your report the question of affiliates. It is on page 6. You state that the act as it stands does not specifically discriminate as between affiliates and companies. However, the practice in Europe, we believe, and the legal advice we have had was, that combination did not exist between a parent company and its wholly-owned subsidiary. Now, from the jurisprudence and case law on this point, it does not apply. For that reason, it was not thought necessary to spell it out. However, there is no danger and no problem in spelling it out, if the committee is agreeable. You must realize that there is nothing much added by spelling it out.

Senator Buckwold: You used the word "wholly-owned." One that is controlled, rather than owned 100 per cent, is that not wholly-owned as well?

Mr. Cowling: I do not believe the bill refers to "wholly-owned". It refers to a subsidiary, leaving open the question whether it must be wholly-owned or controlled.

Mr. Bertrand: On the statute, very strictly, according to legal advice we have, we are told that with the 100 per cent there is no problem. It may be that one judge would convict and another would not. When you get down to the percentage ownership, you might reach a point where a court might decide, where you know pretty well it is below 50 per cent ownership, the court would look at it as a different per cent. At what point will it change? Presumably, we might assume, by following the legislation, that if it is over 50 per cent there is legal control.

Senator Laird: Mr. Bertrand, you state that the practice of the department is not to proceed in cases like that. Is that what I understand you to say?

Mr. Bertrand: I know that was the legal practice.

Senator Laird: Is it not preferable to get as great certainty into the legislation as we possibly can, for the sake of the business community?

The Chairman: It is interesting to know that maybe this is the practice.

Senator Laird: That is right.

The Chairman: But, after all, we are dealing with a bill and, if that is the practice, there should be no objection to incorporating it in the bill.

Senator Laird: That is precisely what I was saying.

The Chairman: And there can be no change without action by Parliament.

Mr. Cowling: It is particularly important because the bill would put in specifically with respect to certain sections of the act an exemption for dealings between, say, affiliates when we have them in certain sections but not others; and it raises an implication again. I think it is particularly important in the case of the price discrimination section, where there is no question of conspiracy or arrangement but a question of the allowance or the granting of a special advantage as between companies that might be in the same stable, so to speak.

Senator Connolly: To become very specific, Mr. Cowling, have you any amendments drafted to cover the last clause of this section of our report with reference to conspiracy provisions, bid rigging and price discrimination, on the one hand, and on the definition of affiliates?

Mr. Cowling: Yes, sir, we have.

Senator Connolly: Has Mr. Bertrand seen them.

Mr. Cowling: I have just given them to him.

Senator Connolly: Could we have them on the record? Mr. Chairman, I do not want to interfere with your plan of procedure, but we have not got them yet, I take it.

The Chairman: No, they have not been distributed. They were only finally done last night.

Senator Connolly: Perhaps you are not ready yet to put them on the record?

The Chairman: In due course, which means as soon as this meeting is over and we can proceed with the photocopying. They will be distributed not only to members of the committee. As a matter of fact, one copy has already been given to Mr. Bertrand.

Senator Connolly: I just wonder whether it would be easier for us, knowing what the amendments are that we will be faced with, to discuss them here with Mr. Bertrand. Do it your way, Mr. Chairman.

The Chairman: We have a shortage of copies at the moment. While we are debating, it may be that our clerk, Mr. Jackson, can have some copies run off, and then you will have them.

What we we were talking about, as I understand it, before Senator Connolly came in with his point, was the question of affiliation. The affiliation, we say, should be broad enough to include that a company is affiliated with another company if one is a subsidiary of the other company or, we say, if both are subsidiaries of the same company or, we say, if both are controlled by the same person and each is affiliated with the same company. We are covering the possible range of affiliation, and we say where that affiliation exists obviously there cannot be a conspiracy. That is a principle which is recognized in certain areas in your bill, Mr. Bertrand. We simply want to clarify the scope and extent of what affiliation consists of. That is the form of the amendment which we have drafted.

I have just read that portion of it to you. Then we have dealt with partnership, and the minister dealt with it too.

Mr. Cowling: Essentially what our suggestion would be is to take the definition which was already in the bill in certain sections and simply make it general. I am not saying that perhaps that could not be improved upon a little, with all due respect. There seem to be difficulties with certain parts of the definition.

Mr. Bertrand: Mr. Chairman, your point is very well taken about the combination, section 32, bid rigging. I think your suggestion is to make it clear, to make the law what it is. Our best advice and legal opinion that we have in the Department of Justice, and from the Attorney General, is as we have shown.

The Chairman: We are not saying to you that this, in this form, is what you must take. We are presenting it to you now and inviting you to offer whatever criticism or suggestions you might have. You may say that you do not want it at all, although I do not know how you could take that position, because in the bill itself you have gone quite a distance on affiliation. But you tell us.

Mr. Davidson: Mr. Chairman, first of all, price discrimination is not really being addressed in Bill C-2, but is left to stage two. In December the minister tabled an amendment which would limit the application of the main price discrimination provision to articles; it would not be extended to services at this time.

The Chairman: Mr. Davidson, we find we have enough work to cover in the bill before us without covering some future thing we have not seen.

Mr. Davidson: I assumed that you had received copies of the amendments which the minister tabled in December.

Mr. Cowling: We did, indeed, Mr. Davidson, but that is not really an answer for saying that these—

Mr. Davidson: I am coming to that. The second part of my comment is that in the case of price discrimination you want to consider at least whether you should adopt the same rule relating to affiliation as you do in the case of conspiracy, because clearly if a supplying company discriminated in price against its affiliate, in which it held substantially less than 50 per cent of the shares, then the other shareholders in that affiliate might well suffer. I think you would want to consider whether the rule respecting affiliates should be different in the case of price discrimination when that subject is dealt with.

The Chairman: In the amendments the minister proposed, he dealt with affiliation in relation to price maintenance.

Mr. Davidson: That is right.

The Chairman: We are addressing ourselves to that in the sense that we are clarifying the scope and the extent of affiliations.

Mr. Davidson: That is right. That has to do with conspiracy and with price maintenance.

Mr. Cowling: It has to do with a number of sections.

Mr. Davidson: Right. I am simply suggesting that there are reasons why it may be desirable to treat affiliation differently when you are looking at price discrimination.

The Chairman: The minister has treated it in one way.

Mr. Davidson: He has not dealt with price discrimination and affiliation.

Mr. Bertrand: Mr. Chairman, when you refer to price discrimination in its application to affiliates, you have to consider the situation of the fully vertically integrated industry through its affiliates, as compared to independent persons who are not affiliates but who provide competition in the same products or services. In that situation the question does arise that the fully integrated company could at some stage be exempt from price discrimination with respect to one of its subsidiaries as compared to when selling to an independent, and that might mean that at any point in time the fully integrated company could wipe out the independent sector.

Mr. Cowling: Is that not covered by the predatory pricing section of the act?

Mr. Bertrand: If you exempt the rule of affiliates, how could you apply that in the same way? The company could sell to its subsidiary at any price and that would not be applicable.

Mr. Cowling: I see your point. I would have thought that the predatory pricing provisions of the act would apply notwithstanding the exemptions, if the situation was sufficiently serious to warrant the application of those other sections, but perhaps that could be covered in the drafting of the exemptions. However, I see your point.

Mr. Bertrand: Mr. Chairman, in your report you dealt with certain aspects of the constitutional issue. I am not a constitutional expert, but we have received a number of legal opinions according to which the approach undertaken in Bill C-2 would fit into a dynamic interpretation of the jurisprudence in constitutional matters. As such, it could be justified or it could stand on the basis of a trend analysis of the decision. As opposed to the more conservative and historical interpretation, a static approach to constitutional law might give some weight to saying that the bill or the approach is not constitutional, while a dynamic approach or interpretation of the court decisions would lead us to believe that the bill is constitutional. That is it in a nutshell.

Mr. Cowling: The committee acknowledged that in its report, Mr. Bertrand. The difficulty is that we just do not know until the court decides. Representations have been made to the committee suggesting that this question should be settled before the bill is enacted so that a private litigant would not be left with the burden of testing the provisions all the way to the Supreme Court, which could be quite costly and perhaps even ruinous for that individual.

The Chairman: Moreover, in practice, when an issue is referred to the Supreme Court for determination of its validity, it is dealt with in an abstract way rather than as a set of facts such as might arise when a private litigant challenges the constitutionality of the law. Therefore, there is more likely to be a solid base for interpretation if it is left to the individual to make the contest.

At any rate, whichever way it goes, we have suggested that, where the constitutionality issue has been raised, the operation of the sections should be suspended until such time as a determination is made. We are not saying that we think this bill is unconstitutional in certain of its aspects.

We simply point out the areas in which there is doubtful constitutional validity—so doubtful that we think they should not come into law until that doubt has been resolved.

Let us consider the example of civil damages under this bill. If a person can establish that he has been directly hurt by the action of some individual or incorporation in violation of the criminal sections of this bill and of the Combines Investigation Act, then such a person is entitled to obtain an action for the damages which he has suffered. Now, the bill says not only where there has been a conviction, but also where the civil judge who may be trying this claim as to damages interprets Part V, in terms of what these people who are being sued have done, and makes the determination as to whether this has constituted a violation of Part V of the bill, with no determination of criminal responsibility by any court. We have said that the only basis of a right to sue for damages should be if you have been directly hurt by the action of some person who has not only violated the criminal sections of the Combines Investigation Act, and this bill, but who has been convicted of that offence. They also say that where the Restrictive Trade Practices Commission, in the reviewable practices which they are given, has the authority to review certain transactions and make an order in the interests of a person who may be refused supplies, then the commission makes an order.

In the civil damages section any person who has been hurt by the failure of a person to obey that order is subject to a civil suit for damages. We do not raise any objection to that, but we do say that there must be a conviction before you can proceed under the authority of the civil damages section. We also say that in the matter of proof this bill proposes that the record of proceedings—and I do not know what the record of proceedings is—may be produced where there has been a conviction.

Our counsel tells me I am running ahead of the play, but we do have a civil damages section, and in the civil damages section we do talk about the possible constitutionality, so that what I have said is simply in anticipation, and if I may conclude what I wanted to say, I will do so this way. In the matter of proof which the person who is suing for civil damages may offer under this bill, he may produce the record of proceedings where there has been a conviction.

In that case, with regard to that record of proceedings, we say: No. The person who is claiming damages must prove damages. You cannot make the assumption that he has been convicted, and that everything that was adduced in evidence against him on his conviction including every document and every exhibit, can be dumped into this civil action for damages and be proof against this person who has been convicted.

We say that the trial has to proceed as an ordinary damage action. The plaintiff must prove that there was a conviction, because that is the threshold of entry to this right of claim; but we say, further, that you must follow the ordinary rules of proof. This is why we have struck out the provision where you can claim civil damages, even though there has been no conviction.

Now, Mr. Cowling, having violated your order of procedure, can you get it back on the rails?

Mr. Cowling: I have to apologize, Mr. Chairman, because I see that civil damages was indeed the very next item, so we are already well into that. I do not know if Mr. Bertrand would like to comment on it.

Senator Flynn: Before Mr. Bertrand replies, Mr. Chairman, may I remind you that I have approached this problem differently from the report, because it is my view that you do not need this provision at all—anyway as far as Quebec law is concerned. I have no objection to a civil action in damages being sustained, or maintained, even if there is no conviction, as long as you prove that what has taken place is illegal. To me, anything you do which is illegal is a fault which generates the right to claim damages.

The Chairman: You mean, that is the law of the province of Quebec.

Senator Flynn: Of Quebec. I do not know whether it is the same in the common law provinces, but I think in Quebec this is the law, and I would be surprised if it were not the same in common law provinces.

The Chairman: Senator, the only risk, so far, on this, as far as the common law is concerned—and I think has been the judicial view for some time—is that where there are sanctions for the offence which has been committed, those sanctions are the punishment.

Senator Flynn: Well, yes, of course. Let us say, for instance, that I am charged with a criminal offence, having killed someone. I may be sent to jail for the rest of my days, but at the same time the family of the deceased could take action against me.

Senator Everett: In the case of assault that could certainly be the case.

Senator Flynn: Any criminal offence.

Mr. Cowling: There would be a civil fault there as well.

Senator Flynn: There is a civil fault in any illegality, in my view.

Mr. Cowling: I think this is where there has been a distinction made between the civil law and common law, and I think it was the Direct Lumber case, which occurred in one of the common law provinces. Somebody tried to bring an action against somebody else for, in effect, breach of the Combines Investigation Act. There had been no prosecution under the act, let alone any conviction, and I believe the Supreme Court held that under the common law there was no action in tort based on the statutory breach, and that the only sanctions which had been contemplated were those stated in the act itself, namely, a fine or imprisonment; but the position is quite different under the civil law.

Senator Flynn: You may be right. Mind you, I would not want to pose as an expert in the common law, but I did want to put on the record that in my view, if the situation were the same in the common law provinces as it is in Quebec, we would not need this provision and we would avoid the problem of constitutionality.

The Chairman: I do not think we can say that with assurance.

Senator Flynn: It might be up to the common law provinces to do something about that.

The Chairman: I think Mr. Bertrand might very well say that we should put this in the bill so as to make

assurance doubly sure that a person who has been hurt by the tortious act of some other person, in violating any of the provisions of Part V, can maintain an action for damages and, even though that may be a duplication as far as the civil law of Quebec is concerned, it may or may not be a duplication as far as the common law provinces are concerned, so you want to be sure, in any event.

Mr. Bertrand: Yes. Mr. Chairman, may I dwell a little on the rationale of civil damages? To enforce competition and to ensure that effective competition will exist, you can either entrust the enforcement to a government agency such as my bureau, under the act, and the Attorney General of Canada, and provide that agency with very large resources, or you can pass a new bill into law which with provide that enforcement will be in the hands of aggrieved individuals.

Senator Connolly: Through the courts.

Mr. Bertrand: Through the courts. In such a case, you do not need a very large government agency. The aggrieved parties will apply to the courts and get redress. The law will be followed as a result. I think the choice in this case, in the light of competition as we have it in Canada, is mixed. We have it both ways. Instead of expanding my agency, to ensure effective competition, we could say that the aggrieved party may go ahead and prove his case before the courts. It is a balance between strengthening or expanding government intervention in the private sector or leaving the private sector to settle its own affairs.

The Chairman: That is not the question we have been discussing. I think in our interim report we agree with the statement in the bill, that where a person who has been hurt or damaged by reason of a violation of Part V of the bill—the criminal sections—and where the person who has caused the hurt has been convicted, then the person who has been hurt should have a right of action. We have agreed with that. So it is not a case of balance of convenience. We are only talking about a case where in the absence of conviction—in other words, that the department has not seen fit to prosecute this person—you are going to let an individual make a claim, and try to prove that there has been a violation of the act, before a civil court as part of the basis of a claim for civil damages; and we say that the necessary prerequisite must be a conviction.

Mr. Bertrand: Therefore, you are saying that the primary responsibility for enforcing the act should rest with government agencies because you must have the conviction first.

The Chairman: That is right.

Senator Everett: One of the things that the business community has said for some time is that the act should not be based solely on criminality, that in fact there ought to be civil redress; and it seems to me that that is what the act is saying here, that the option is open to seek your redress in civil terms.

The Chairman: It is not an option here, senator; there could still be a prosecution.

Senator Everett: But there also could be a situation in which there would be nothing more than a civil claim.

Mr. Cowling: I think part of the concern too was the constitutional issue, that the whole civil damage provision in this bill would be on firmer ground if a prosectuion was a prerequisite.

Senator Everett: But here we come back to the question of the evidence. If a person is charged with assault and is convicted, if the injured party then brings an action for damages as a result of that assault, what evidence of the criminal trial is admissible in the civil trial?

The Chairman: Only the conviction, as such.

Mr. Cowling: I am not sure that it is allowed at all. It has to be kept right out.

Senator Everett: I am not talking about the conviction itself; I am talking about the evidence adduced at trial.

Senator Flynn: You can present the same evidence.

Senator Connolly: I think you have to bring in the evidence again on which to base your claim for damages.

Senator Flynn: That is why I do not like the approach of requiring a conviction under this act as the basis for such an action, even though it was a recommendation in the committee. It seems to me that you have to prove the facts, and then prove they are illegal and then from there prove your damages.

Mr. Cowling: The position taken in the report was a sort of middle course. One interpretation of what was suggested in the bill was that the enitre record of the proceedings, including the transcript of evidence, documents and exhibits from the criminal case, could be dumped into the civil case, and the recommendation of the committee in the report was that some of the record of proceedings could be used—that is to say, the bill of charges and the judgment itself, so that you could see what exactly the person had been convicted of; and that would be evidence that the accused—the defendant in this civil case—had done these things. But from there on it would be up to the plaintiff to show a connection between the damages he had suffered and the actions complained of; and, furthermore, it would be necessary to re-hear the witnesses and to re-produce the documents.

Mr. Bertrand: May I ask why you feel there should be a re-hearing of all those witnesses? Are you not complicating the procedure unnecessarily?

Mr. Cowling: I would suggest that one reason would be that the defendant in the civil action would not necessarily be a party to the criminal action and would have had no opportunity to cross-examine witnesses and so forth.

Senator Everett: So what you are doing in effect is imposing a criminal onus on a civil action. That is the only aspect of it that bothers me. Let us follow that through. The condition precedent to bringing a civil action is a criminal conviction, and therefore it follows that the onus of proof now in the civil action has become the criminal onus, and that seems to me to be a basic inconsistency.

The Chairman: That is one of the elements; there is no doubt about that.

Mr. Cowling: But I think we are agreeing that the plaintiff in a civil action should have this assist, and it is quite an important assist, of being able to use certain parts of the criminal proceedings to help prove his case. That is more than he would get in the assault case you mentioned.

Senator Everett: I do not find any trouble in that, but the problem I have is this inconsistency in requiring a

criminal onus; and this is effectively what the two amendments, taken together, amount to.

The Chairman: In fact, what you are determining under the bill, senator, is a criminal onus in a civil action—that is, if you do not make a conviction the threshhold that admits you to the civil action—and that is basically wrong.

Senator Everett: Maybe I misinterpret you, but I think I agree with you that that is an inconsistency in the amendment and not in the act.

Senator Walker: It is completely wrong because it is enforcing the law of proving beyond a reasonable doubt, which is the antithesis of that required in a civil action.

Senator Lang: Mr. Chairman, you have made reference to the committee recommendations that certain actions be held in abeyance until their constitutionality is determined. How would you contemplate that constitutionality being determined?

The Chairman: By providing—and we have done this before—that certain sections shall not be proclaimed until such time as their validity has been determined by the Supreme Court of Canada.

Senator Lang: On a reference?

The Chairman: Yes. I do not like the reference, but we cannot finance private litigants to start action.

Senator Connolly: Could we come back to the point we were discussing before, Mr. Chairman? Can I postulate this situation, where it was thought that there was a criminal conspiracy under this act, but the department or the agency did not proceed with a criminal action, but nonetheless a competitor felt that he had been damaged because of pricing policies, let us say. Then, if there had been no criminal proceedings, his action still lies and he can still take an action for damages in the civil courts.

The Chairman: Well, it is doubtful under case law.

Senator Flynn: I would like to have an opinion on that.

Senator Connolly: Why would it be doubtful if he felt that he had been discriminated against because of certain pricing policies? Could he not say, "I have been damaged here; I have lost business because of what they have done to me and, therefore, I want civil damages," as provided for in this bill, as we have it now? But he does not have the leg-up for his case that would flow if there had been a charge and a conviction, and he might very well have to prove a course of conduct which might be illegal under this legislation, depending on the evidence.

The Chairman: I would like to ask Mr. Bertrand: Under the Combines Investigation Act may not an individual swear out an information for a violation of its provisions?

Mr. Bertrand: I think so.

The Chairman: So, if this person felt so keenly and wished to maintain his rights, he could swear an information and take the criminal proceedings himself.

Senator Connolly: Yes, but he would simply be buying himself two lawsuits, rather than one.

Mr. Bertrand: In my opinion, in practice he would not proceed with it, because he might not have all the resources available to him to effectively conduct the proceedings. So it is a practical matter.

The Chairman: We have run this one down as far as we can and, unless Mr. Bertrand has anything further to say on these points, we will go to the next item.

Mr. Bertrand: The next item is the heading "Practices Reviewable by the Commission."

Mr. Cowling: May I make a suggestion which might be acceptable to Mr. Bertrand and the members of the committee? "Reviewable practices" is a rather long item, and I had hoped that we could proceed to some of the others, so as to dispose of some of the shorter subject matters and then return to this.

The Chairman: I might say that, subject to the wishes of the committee, we will sit until 12.30 p.m. today and not sit this afternoon, for several reasons. I believe Mr. Bertrand has a duty to appear before a committee of the House of Commons this afternoon and we must respect that. However, we could cover the reviewable practices part of it next time, which will be next Wednesday, when we could devote the whole morning to its consideration. This brings in all the "due diligence" provisions and so forth.

Mr. Cowling: It is a lengthy item. The next item would be "Amateur and Professional Sport," on page 10 of the report.

The Chairman: Mr. Bertrand, the minister's amendment excluded amateur sport, but then a definition of "amateur sport" was written, which included anyone who could, for the purposes of this bill, be termed an amateur. They receive remuneration, but there is some custom of the trade, shall I call it, under which if remuneration is received in certain ways the amateur standing is not lost. Our main concern is that we believe the definition of who is an amateur should be left to, what I call, the custom of the trade and we should not attempt to define it. Secondly, we thought that professional sports should be in the same category as amateur sports. What have you to say with respect to those points?

Mr. Bertrand: In my opinion, there is need for specific provision for sport. The fact that services would be brought under the act does mean that as a result, section 32, "Restraint of Trade," would be applicable to services and, therefore, to sports. It was necessary for the good conduct of sports, professional sports for a start, that they should be carved out of the general combines legislation. That is why there are provisions that in order to maintain the balance among teams they can agree as to the restraint. It is an exempting provision. As you know, the objection is narrowly defined. It must provide for a balance of teams playing in the same league. The general principle will still apply in terms of competition among leagues, where agreement should be permitted. We do not wish to have an individual deprived of freedom as a result of constraint established by groups or other individuals as to his choice of team for which he will play and so forth. In my opinion, there is a need for a provision so far as professional sport is concerned. This is really an economic activity and the distinction between professional and amateur is really the profit-making motive, or profit-seeking.

Senator Connolly: On the part of players, owners, or both?

Mr. Bertrand: In my opinion, both.

Senator Molson: On the part of whom, Mr. Bertrand?

Mr. Bertrand: Both the players and the owners.

Senator Molson: What about the public?

Senator Laird: The public is the important aspect of it.

Mr. Bertrand: I should say for the enjoyment of the public, but the public pays.

The Chairman: Who is the consumer?

Mr. Bertrand: The public.

The Chairman: Who consequently become awfully interested in the players.

Mr. Bertrand: Because a restraint on the players could affect the level of services provided.

Mr. Cowling: But not the price which the spectator pays to see the hockey or baseball game.

Mr. Bertrand: I am not sure of that. In the case of a losing team, there would be empty seats.

The Chairman: Quite true. However, I have been unable to find anything in the newspapers which would suggest to me that the dominant position today in professional sport is not the position of the players. It is not that of the club owners. You only need to look at the contracts and how players can jump from one league to another.

Mr. Bertrand: I am glad you raised that example, Mr. Chairman, because that is a result of competition. You will remember the level of the contracts before the competition between leagues.

Senator Molson: Let us ask Mr. Bertrand what he means by that. The level of what contracts? Do you mean the players receiving only $40,000 rather than $150,000?

Mr. Bertrand: For instance.

Senator Molson: For instance?

Mr. Bertrand: For instance.

Senator Molson: And do you believe that as a result of the competition it has all greatly improved?

Mr. Bertrand: As a result of competition there is better allocation of resources—in this case, the players.

Senator Molson: That is not true; it is a completely false premise. The players are receiving salaries much greater than those of the Prime Minister, the Governor General and you, as a result of these developments.

Mr. Bertrand: That is the economic forces at play.

The Chairman: Do you contend that these things that are going on are as a result of competition?

Mr. Bertrand: that is right.

The Chairman: So, there is competition.

Mr. Bertrand: Now there is.

The Chairman: Yes, now.

Senator Molson: And the prices are double those of a few years ago.

The Chairman: And you want to legislate so as to ensure more effective competition?

Mr. Bertrand: I want to make sure that we maintain the competition and not allow the two leagues to come together.

The Chairman: You mean preventive law.

Mr. Bertrand: No, it is exactly the same law as applies to all.

Senator Molson: Why in this case are you interfering with the rights of the unions? Mr. Davidson stated that labour legislation deals with labour.

Mr. Bertrand: That is right.

Senator Molson: In this case you have a couple of hundred people and are introducing special legislation under the criminal law which deals with this small group who are unionized.

The Chairman: Using economic power.

Mr. Bertrand: Using economic power, if you will. I am not quarrelling with the principle of professional and amateur sports.

Senator Molson: I do quarrel with the way things and groups are picked out. The law I always understood, not being a lawyer, was the same for everyone. We get into the argument about capital punishment, and one of the things raised by abolitionists is that a rich person never gets hanged; they get better opportunities. Here we are dealing with a very small group of people who have become economically powerful and wealthy, and are in the general context of the labour situation which you said is best regulated by a labour law. But why this one little group?

Mr. Bertrand: If they fall under the exceptions of section 4, the regulations concerning unions, they would not be applicable.

Senator Laird: The Players Association which appeared before us, is against this. They were witnesses here.

Mr. Cowling: If I remember correctly, they agreed that this was not the proper kind of legislation to deal with the problem, in so far as there was a problem, because this legislation, if it is enacted would put everyone under the law. The leagues and clubs will, as soon as this act is proclaimed, be committing an offence, but they could exculpate themselves in a criminal trial by successfully invoking one or more of the defences which has been given in the bill. We have had difficulty with the fact that here is an area where perhaps things have not reached the proportion that there is criminality, but in some cases the bill would go even further than the Criminal Code approach in saying that everything is illegal unless you can bring yourself out of it.

Mr. Davidson: As I read the proceedings, Alan Eagleson said that this was far from ideal legislation but that they were very much in favour of it in the absence of anything else.

Senator Laird: Yes, but not in this act.

Senator Molson: If there was nothing else to help them, he was in favour of it. That is Alan Eagleson. But that still does not explain to us why this very select group has been singled out for special treatment, when the philosophy we had explained to us was that presumably they should come under the usual exclusions.

Mr. Davidson: I think all entertainment services would fall under the act, if Bill C-2 is passed.

The Chairman: When you say entertainment services, would you include professional sport?

Mr. Davidson: Yes.

The Chairman: When I go to a theatre to look at a show, would you say that is professional sport?

Mr. Davidson: It is a kind of entertainment service. The theatre, like professional sport, is an entertainment service.

Senator Molson: I hope you won't say that in connection with some company I can think of.

Mr. Cowling: It would mean the Forum and the Maurice Richard Arena in Montreal getting together and saying, "We are going to agree that no seat will be sold under $10." I can understand in a case like that, the act should apply.

Mr. Davidson: It is the same in an industry. A boycott of suppliers of articles by a group who control the industry would be illegal. Similarly, a boycott of people providing their services to a group which controlled the industry would ordinarily be illegal. This provision is an exempting provision which says there are special considerations applying to professional sport. A boycott agreement, for example, that would otherwise be illegal, by this exempting provision is modified.

The Chairman: In exempting the unions, you are recognizing as being legal the boycott they have by withholding their services.

Mr. Davidson: There is no doubt about that.

The Chairman: Mr. Bertrand said that at the present time, yes, there is a level of competition in relation to the players which is to the advantage of the players, and competitively the forces of competition are working well. So that is why he wants to bring them under the Combines Investigation Act, to be sure that the position remains the way it is. This is something I cannot follow.

Senator Molson: I have to point out, Mr. Chairman, that having had some years' association with that particular entertainment, as these gentlemen call it, I might say that someone like Lou Fontinato might have taken a dim view of that.

With the present competition, this particular entertainment has never been in worse shape. The thing has got out of balance. The public is paying too much money for seats, the players are getting too much money, and the cost of franchise is getting too high. In fact, I think that most things are not in very good shape. I would be the first to agree that anything which improved these things would be good, but to bring—

Senator Connolly: One thing you did not mention was the quality of hockey—

Senator Molson: And the quality of hockey has fallen off. To bring that into the criminal law, the way it is suggested, it applies to a very small segment of the country; it is picking out a very small group. Whether you take the owner, the players or anyone involved, it is a small group. Even if you take the public, it is a small group. Add up the season's subscribers in all rinks in Canada and compare the number with the Canadian population, and the number is nothing; it is negligible. Some say it is 100,000, but it is very small. I think they are paying too much. But you are not doing anything to cure this.

This, in effect, is a form of discrimination. It is picking on one small group, to whom by other standards which have been explained to us—such as, if they are organized—it would not apply and is putting them into this act. These players are organized. This whole thing will do nothing to protect the public. The public can stay away in droves and they can kill hockey. As a matter of fact, the attendance is off a little bit. This will not improve the public's position vis-à-vis hockey, but it will give more strength to a group that is already, at the moment, a little bit overpaid and overprivileged. That is all it will accomplish. That is why I ask why there has been this effort, in this great big act—which deals with a lot of evil practices, such as monopolies and restraints in trade, to bring in this little group out of a clear blue sky.

Mr. Bertrand: If I understand you correctly, senator, you are saying that this act brings professional sport under its ambit. It brings in all services. Section 32.3 removes professional sport under certain conditions.

Senator Molson: Not many condition. I have read the thing.

The Chairman: When you say "it removes," the general statement is that everyone who conspires, et cetera, is guilty of an indictable offence, and there are limitations which apply to professional sport. There are matters which must be considered in determining whether an agreement violates subsection 1. But the general law is aimed against professional and amateur sport.

Mr. Bertrand: I would not say that. Under the rule of interpretation of statutes, when you have a particular section which deals with a specific point, that is the one which takes precedence over the general section. Therefore if we remove section 32.3 all professional sport would be subject exactly as under section 32.

Senator Molson: I do not know what you mean by that.

Mr. Cowling: What provision of section 32 had you in mind?

Mr. Bertrand: The general one. If I had a number of clubs which together agree to limit unduly the selection of players, that would be a criminal offence.

Mr. Cowling: As I understand it, they do not limit the supply of players. On the contrary, they are anxious that the level of supply be kept up. They may affect the mobility of those players, but is that limiting the supply?

Mr. Davidson: It is the same situation as though the meat packers all got together and decided on the price they would pay farmers for their cattle. It is a conspiracy amongst buyers, as opposed to the general conspiracy amongst sellers.

Senator Molson: Looking at the other end of it, what about the Players' Association? What about their agreement with regard to their services? How do you take half and not all?

Mr. Bertrand: The other half would be taken.

Senator Molson: I do not think so. These provisions do not apply to organized labour, and the Players' Association is organized labour.

Mr. Bertrand: It is a case of recognition. Are they recognized as an organized labour association under valid law? It might be that it is a loose association.

Senator Molson: You are arguing semantics. You have not answered my question as to why you single out this one small group. The original proposal singled out all forms of sport. Thank God that at least the thousands of people who devote so much effort to the advancement of sports are given some relief from that original proposal. However, you have retained professional sport because it has been the happy whipping boy for so many years and, of course, it is always getting a lot of publicity and is a very popular subject. The group that you have singled out to specifically include under the act is a small one, and I am asking you why it was singled out. I do not understand it.

Mr. Bertrand: Because if we do not single them out, they will be covered by the act generally. What is done is an exempting provision. What you might feel is that the exemption is not wide enough.

Senator Connolly: Clause 1(4) of the bill on page 2 defines "product" as including a service, and subclause (5) defines "service" as a service of any description.

Mr. Bertrand: That is correct.

Senator Connolly: What you are saying to Senator Molson is that it is going to apply to sports of all kinds. We then come to clause 32.3, on page 27 of the bill, which deals with sport in particular, and what you are saying is that that is going to apply to professional sport, but you will be introducing an amendment to eliminate amateur sport.

Mr. Bertrand: That is correct, senator.

Senator Connolly: Therefore, you are not applying this to the small group in the WHA or the National Hockey League specifically; they would be caught, in any event.

I am not putting this forward as an argument against Senator Molson. I am simply trying to clarify your position in relation to Senator Molson's objection.

The Chairman: First of all, Senator Connolly, the bill does not deal with consumers, unless you call the player the consumer. I would have thought the public was the consumer.

Mr. Bertrand: But players are suppliers of services.

The Chairman: If they are suppliers, why should they not be included in the reviewable practices section?

Mr. Bertrand: Because the general law, I think, would be that players cannot agree amongst themselves to restrain the supply of services or to fix prices. Conversely, the law is that the buyers of services shall not agree amongst themselves to eliminate competition.

The Chairman: You are asking us to approve legislation in an area where competition exists and in an area where the proposed legislation does not deal specifically with consumers. The public are the consumers, but the public gets no benefit from this legislation. The price of tickets is going up all the time.

Senator Molson: Nor do they get any protection.

Mr. Bertrand: It depends on how you define "benefit".

The Chairman: In dollars.

Mr. Bertrand: I suggest to you one benefit might be the opportunity of attending hockey games. Looking back in history, it was not possible in a number of cities to attend games. As a result of increased competition, this possibility has been extended. Is that not right, Senator Molson?

Senator Molson: To some extent, yes. Unfortunately, some of the smaller cities are having their troubles economically in spite of everything.

Mr. Bertrand: The end result will be that the public will decide whether or not they want to see games in their own cities. It will not be a small group of people who will decide not to provide this service in certain areas. You leave the economic forces at play.

Senator Molson: The economic forces have been there all along.

The Chairman: I think we have given this subject a pretty good shaking. There are some anomalies, it seems to me, in what Mr. Bertrand has said. This is an area where it is acknowledged there is competition, so the players are not being penalized. They wield quite an economic power, which is the basis stated for exempting unions, but it is not the theory that such will apply to the exemption of professional sport.

I am completely and hopelessly lost in trying to rationalize any basis on which you can justify extending this legislation to professional and amateur sport, Mr. Bertrand.

Senator Molson: That is my worry, Mr. Chairman. I am not terribly opposed to many of the provisions of this bill, including this one, except that I do not understand it. I do not think that the people who inserted it have any real understanding of sport.

It is true that there is some profit motive, but if you look back over the history of the National Hockey League, many owners suffered enormous losses in order to keep the sport going. Perhaps you have forgotten that owners did suffer losses. The owners of the Chicago team suffered an average loss of $250,000 a year for four years. The owners of the Boston Bruins could not afford to send that team to training camp one year. The league had to step in and provide the funds to send the famous Boston Bruins to their pre-season training camp because the owners did not feel they could afford it.

There has always been a tremendous element of support in practically all sport, and in all good professional sport. The aid given to the sport itself has nearly always outweighed the profit motive.

I cannot speak for the National Hockey League now because I am not closely associated with it, but the element of support always took precedence in the National Hockey League in the years I was involved in it, and that went for all the teams I knew. There were dozens and dozens of examples of it.

I am afraid that element may have changed somewhat. I am afraid that today—and I have said so publicly—the almighty dollar seems to take precedence, and that is highly undesirable.

The Chairman: If you look at section 32.3, Senator Molson, specifically the nature of the offence, it leans on the side of the players and what happens to the players in negotiations. Yet we are told here, and it is acknowledged, that the players at the present time are an economic power

and there is real competition for their services. Perhaps I am not intelligent enough to understand it—although I will not make that admission publicly!

Senator Macnaughton: You had better strike it from the record right now.

The Chairman: I cannot rationalize the so-called explanation. With all due respect, Mr. Bertrand, I think you are struggling with a bad case, from my point of view; and I am only speaking for myself.

Senator Connolly: Mr. Chairman, I wonder whether there is anything to be gained from taking the following view: We have been talking about the economic power that unions might have. I am not too sure where the power is here. Perhaps I had better have it explained to me. It seems to me that with the competition provided now by various leagues and many teams, the players' right to contract is perhaps the powerful element in the process, and it is not a matter of concentrating the power in the players' organization. Just how much power that organization wields, I do not know.

The Chairman: You have only to look at the prices they demand and get for their services.

Senator Molson: Or look at the constitution of Team Canada.

Senator Connolly: But that power is exercised by the individual player and not by the association.

The Chairman: It is exercised by the association as well, because they support the individual players.

Senator Connolly: I don't know. Do they?

The Chairman: We had before us as a witness a representative of the association who represents a lot of the individual players as well. Whether or not that is a conflict of interest, I do not know.

Senator Connolly: Perhaps it is fruitless trying to pursue this point. I think this is an unusual situation. It seems to me that the individual exercises a more effective kind of power than any power exercised by an association of players.

Mr. Davidson: The association does not bargain collectively.

Senator Connolly: Certainly it does not come within the definition of a union here.

Mr. Cowling: Except with regard to pensions and things like that, possibly.

Mr. Davidson: Possibly with respect to pensions, but not with respect to salaries.

Senator Connolly: There may be an anomaly here. We could throw some light on it if we knew more about it.

Senator Lang: I think probably we are forcing our witness a little unduly on a policy issue, for which we cannot really hold him responsible.

Mr. Bertrand: The next item is "Misleading Representation and Advertising."

Mr. Cowling: Would it be helpful, Mr. Chairman, if I started on that one? The concern was that, as the bill is drafted, making misleading representations a criminal offence might apply, to take an extreme case, to an individual contract between, say, an aircraft manufacturer and an airline, where there had been a lengthy and detailed written contract between the parties and certain representations made about the quality of the product, in this case an aircraft, and it was thought that the civil remedies that the purchaser had were sufficient and it was unnecessary to bring that kind of thing within the scope of the bill. I have taken an extreme case, but there would be others too.

Mr. Bertrand: On the subject of misleading representation and advertising, I would like to turn to Mr. George Orr, who is the head of our Trade Practices Branch and primarily responsible for the administration of the act in this area.

Mr. G. D. Orr, Director, Trade Practices Branch, Department of Consumer and Corporate Affairs: In this connection, may I ask why you consider such a representation would be a representation to the public within the language of the proposed clause?

Mr. Cowling: This was the fear expressed by several parties who have appeared before the committee.

Senator Everett: Could I ask Mr. Orr if he is dealing now with the actual amendment?

Mr. Cowling: I do not think so.

Senator Everett: There is an amendment, which perhaps you should look at, Mr. Orr, and then we can discuss the other aspect. It is clause 18.

The Chairman: You have the proposed amendment before you.

Senator Connolly: The same conclusion is reached in the last sentence of the report under "Misleading Representation," which says that contractual provisions need not be considered as being representations to the public.

Mr. Orr: This is really a question for legal experts, but I am wondering whether such a clause would bring within the scope of the act other kinds of inter-business representations which, in the absence of such a provision, would not have been considered to have been made to the public.

Senator Connolly: I do not know what you mean.

Mr. Orr: Here you take a particular kind of representation, which is between businessmen, a written agreement. Up to the present time, in no case has there been an issue concerning representations between businessmen.

The Chairman: Would you stop right there. You say up to the present time. You mean that the department has not seen fit to take any action.

Mr. Orr: There has been no case that has come before the courts, yes.

The Chairman: That means that the department has not seen fit to take any action.

Mr. Bertrand: Or we have not received any complaints on the subject.

M. Orr: I really cannot think of a case where this has been a consideration.

The Chairman: But we are talking about the wording of the bill.

Mr. Orr: True, but I only want to say that in our experience to date this has not appeared to be a problem.

The Chairman: Then you should have no objection to making assurance doubly sure. A little while ago Mr. Bertrand wanted that in connection with another point that we were discussing.

Mr. Orr: As the law now stands, we have generally been concerned with the ordinary representation to the public, not with those made in private. We have taken the decision that "to the public" means something, and does not necessarily include the kind of private business conversations or private business representations that would be in issue here.

The Chairman: These representations may be contractual. If you take that position, why should you be opposed to clarification?

Mr. Orr: If you say the law now contemplates that were it not for this particular clause a written agreement made in connection with the business would have come within the scope of the act, could a court then assume that other kinds of representations, not written representations, would then come within the act?

Senator Lang: Take out the word "written."

Mr. Orr: By including the specific do you then encompass other things?

Mr. Cowling: That is a worry I often have, I agree.

Senator Everett: Suppose there were a case in which goods were sold and the written agreement between the purchaser and vendor included a warranty covered by section 36(1), and suppose that warranty related to the product that was to be used in the business of the purchaser. Let us assume for a moment that the purchaser was a corner store grocer who wanted to use an automobile for the delivery of his goods. Ordinarily, if he bought it as a citizen it would be covered by the act. However, would this not exclude it if he bought it in his capacity as a grocer? In other words, I do not think you would mean to exclude that kind of transaction.

Mr. Cowling: It is very difficult to draw the line.

Senator Everett: I suppose it is.

Mr. Cowling: If you take out the written contract I think it makes it even more difficult.

Senator Everett: But most of those warranty representations are made in written agreements, are they not?

Mr. Cowling: Yes, or in catalogues, I suppose, or in other material that the supplier may make available.

Senator Everett: Or stated in the invoice or agreement between the parties.

Mr. Cowling: There are certain products used by both consumer and business, and certainly the intention is not to exclude those from the application of the act. To try to answer your question, Mr. Orr, what we had in mind was this. You raised the question of why is it "to the public". I refer you to the brief submitted by a group of companies represented by Mr. A. J. MacIntosh which is reproduced in the Commons committee hearings, Issue No. 22, at page 82. I will read a few lines. He says:

> The provisions of section 36(1) as to misleading representations are directed towards representations made "to the public." Although the term "to the public" has not been defined, the effect of the amendment proposed by the Minister to section 36(2) would probably be to make the section applicable to representations made to one individual or company which are intended to be made to one person and were never intended to be made to the public or any segment of it.

He is referring to the minister's proposed amendment to the section. That is an interpretation that we have had. Perhaps a court would not reach that interpretation, but somebody has expressed the fear that it might.

Senator Everett: It may be something that is beyond the competence of the witness to deal with at this stage without getting legal opinion.

The Chairman: They say they have never dealt with it.

Senator Everett: I say, until they have had their legal opinion on it.

The Chairman: The minister's proposed amendment does not go far enough, does it?

Mr. Cowling: The minister's proposed amendment says, in part, as follows. It is an amendment to paragraphs (d) and (e) of section 36(2). Paragraph (e) would read:

> contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatever made available to a member of the public, shall be deemed to be made to the public only by the person who caused the representation to be so expressed, made or contained, and where that person is outside Canada—

That is what Mr. MacIntosh had in mind.

Mr. Orr: I am taking this on the likelihood that something made in a part of a business agreement would be reproduced to the public. The amendment dealt with something "on an article," et cetera.

Mr. Cowling: I agree that if I were a judge, Mr. Orr, I would say that it was not made to the public. But apparently some people felt that it was not clear and that it should be clarified.

Senator Everett: You are seeking greater certainty of the definition of the word "public"?

The Chairman: I think we understand it, Mr. Bertrand, and that you understand our point. What is the next point?

Senator Everett: May I ask two questions on misleading advertising? I think it is section 36(1)(d) regarding the price at which products have been, are or will ordinarily be sold. I note that some of the catalogue companies advertise the manufacturer's suggested list price. Could you tell me whether in your judgment that would contravene the provisions of this section, if they clearly stated it was the manufacturer's list price?

Mr. Orr: Provided that the manufacturer's list price was one put forward in good faith as the price at which if was expected the goods could be sold. There was the case that is dealt with in *R.v. Allied Towers*, where it concerned the quotation of a price or reference to a list price. Notwithstanding that none of the goods had been sold in the area at the manufacturer's list price, it was held that that was not a representation as to the price at which the goods

were ordinarily sold. So that so long as that was the manufacturer's price and not just a put on price, that would not come in conflict with the section.

It was also stated in the reasons for judgment in that case, that where a false suggested price and been put up simply to make it appear that the saving would be greater than was actually the case, this would be another thing. But where it is put forward realistically and simply referred to as the suggested list price, with no qualifying language suggesting a saving of a specific amount based on that price, it would not be in conflict.

Senator Everett: Thank you. I am a little concerned about subsection (5). It is page 32, section 36(5). It says that "the literal meaning thereof shall be taken into account". Of course it is there. But it says also the "general impression." Will be taken into account my goodness, that is vague in law, is it not?

Mr. Orr: I think this is capable of being used both ways. For example, the same fear has been expressed in the past in the form of the wording of the act, that the prosecution could take some language out of context that was not literally true and wrap a case around it or build a case on it. Here, with the "general impression" test, the courts could look not only at the literal wording but could also look at the general impression, and given the total contents of the advertisement, if you wish, it really would not come to this conclusion. It also could be put forward that the wording might be very careful, but if you look at the total impression created you would come to a different conclusion. Let us say, for example, that I advertise my house and say it is only two miles from the airport but I do not say that there is a bridge in between which is five miles downstream and that you have to drive ten miles to get to the airport.

The Chairman: Mr. Orr, the sum total of this subsection makes the "general impression" conveyed by the representation the key to whether it is against the bill or not. Why do you bring the "literal meaning" into that at all?

Mr. Orr: It merely, as I understand it, directs the court to take into consideration both the "literal meaning" and the "general impression" created.

The Chairman: Why? If the general impression conveyed by whatever the representation is the governing factor, why do you have to talk about the literal meaning?

Mr. Orr: I feel, Mr. Chairman, that it is there so as to free the court to look at all aspects of the case.

The Chairman: In order to ascertain the general impression, you look at the whole representation.

Mr. Orr: At the moment, section 37, for example, deals with a statement in an advertisement, purporting to be a statement of fact, that is untrue, deceptive or misleading. So that on a finding that a statement purporting to be a statement of fact was untrue, there could be a finding of guilt.

The Chairman: Yes, but I am not discussing that; I am discussing subsection (5).

Mr. Orr: Going back to subsection (1) it refers to a representation to the public, (1)(b), in the form of a statement or a representation to the public that is false or misleading in a material respect or it could be a statement of warranty, et cetera, that is not based on that interpretation, or the general contents of these statements. My suggestion would be that this clarifies the effect of those provisions by saying that the court will realistically look at the advertisement and not be bound simply by one particular part of it.

The Chairman: But the moment you say, "general impression," you are talking about the whole representation or article or advertisement, or whatever it might be. You are talking about the whole thing, not about a particular phrase. What is the general impression of the whole representation? That is the question you must ask. Why, therefore, is it necessary to talk about literal meaning at all?

Mr. Orr: Because the court should not be barred from looking at any particular aspect of the advertisement.

The Chairman: But the court is looking at the whole advertisement. The judge must ask himself what is the sum total of the impression from the whole article, including every word in the article.

Senator Everett: If I were defending myself against a charge under that section, I would want the right to bring in the literal meaning as part of my evidence and not be held just to the general impression.

The Chairman: The essence of the offence is the general impression conveyed by the article. That includes everything in the article.

Senator Lang: Literal or otherwise.

The Chairman: I think "literal" simply adds confusion.

Mr. Cowling: Perhaps the witnesses could deal now with resale price maintenance and the retention of the defences.

Mr. Davidson: Mr. Chairman, your report recommended that the defences for resale price maintenance which exist in the act now, and which Bill C-2 proposes to remove, be reintroduced. Those relate to bait and switch selling, misleading advertising, loss leader selling and servicing.

It is significant that your conclusion was that, on balance, you felt that there is likely to be more harm in removing the defences than in retaining them. Up to now the department's position has been that, on balance, enforcement problems suggest that it is better to drop them than to retrain them.

The Chairman: What are the enforcement problems?

Mr. Davidson: The difficulties encountered in proving that the reason a supplier discontinues selling to an outlet is that the outlet has been failing to observe a specified price. If there are these other possibilities, these defences, it makes it easier for the supplier to camouflage his real intention in cutting off the outlet.

Loss leader selling, bait and switch selling and misleading advertising are being made offences, or are offences under Bill C-2, and they can be dealt with as such. However, loss leader selling is not made an offence, for the good reason that an extensive inquiry into the subject of loss leader selling, conducted a number of years ago under the Combines Investigation Act, reached the conclusion that loss leader selling was not widespread and was not a seriously detrimental practice even from the standpoint of the businessman. Certainly, from the consumer's standpoint, loss leader selling may be a more desirable form of sales promotion than some other kinds, because at least the

consumer has the opportunity of buying a product he wants.

The Chairman: More cheaply.

Mr. Davidson: Yes. In that way he is not badgered by radio jingles which he does not want to hear. Loss leader selling as a sales promotion device is not necessarily against the interests of the consumer, therefore.

The Chairman: Why not? You are not looking at the point of view of the supplier of the goods at all, are you?

Mr. Cowling: It may damage the reputation of the product.

The Chairman: Its reputation or its appreciation.

Mr. Davidson: That was one of the arguments carefully analysed in the course of the inquiry to which I have referred. The evidence was quite to the contrary: when a well-known product such as the Sunbeam Toastmaster was used as a loss leader, for example, it simply spurred on the sales of the product. Although the possibility certainly exists that it would discourage sales, the evidence at that time was that it had not had that effect.

Mr. Cowling: But does it not hurt other retailers who are selling the same product and who are not in a position to loss-leader it? Does it not disrupt the whole distribution segment of the economy with respect to that product?

Mr. Davidson: No, it does not. There was no evidence of a disruption of the distribution sector of the economy.

Mr. Cowling: In other words, if Simpsons is loss-leadering a particular type of toaster, everyone goes to Simpsons to buy it, and none of the other stores carrying that toaster can sell it because they are not in a position to take the same loss as Simpsons.

Mr. Davidson: In theory, that is a possible outcome, but the facts were quite against that. The practice, I might add, was common only in a limited number of areas. Electrical appliances was one and tobacco products was another, but those were really the two main areas.

Mr. Cowling: Mr. Davidson, bait and switch selling has now been made an offence. Is it not an anomaly to say that one party should continue supplying another party with the very product he is using to commit an offence with under the act?

Mr. Davidson: I don't know whether it is anomalous or not. The question is one of balance, as you have rightly suggested in your conclusion: Is more harm than good done by the retention of those defences? The judgment so far reached by the minister on the question has been that, owing to enforcement difficulties, on balance it would be better to rely upon the fact that those practices are now prohibited than to use them as defences.

Senator Everett: The original act did not contain these sections. The defences were not available under the original act.

Mr. Cowling: They were.

Senator Everett: They were not; they were not available under the original act.

Mr. Davidson: They were introduced in 1960.

Mr. Cowling: You mean, going away back.

Senator Everett: It was somewhere around 1951, 1952, when the act was introduced, and it was introduced in substantially the same form as the act we are now considering.

The Chairman: That is right.

Senator Everett: I remember, when it came in, being terribly concerned about what would happen. I thought that there would be chaos in the market, and I remember saying that. In fact, however, the act worked very well. In somewhere around 1960 the government of the day, acting under extreme pressure from suppliers, introduced these defences. What they really did was to put on the suppliers' shoulders the obligation to enforce the law in respect to offences. That is essentially what they did, and it may have been reasonable—I do not think it was, but it may have been reasonable—if those offences did not exist under the act; but it is not the obligation of a supplier to enforce these offences. If bait-and-switch selling is wrong, then the act should provide, as it does, a bait-and-switch section. If misleading advertising is wrong, the act should provide for it, and it should not be used as a defence. The very act of enforcing resale price maintenance should be taken by itself, as that is an offence, and in fact it is dealt with under the act.

Now, I happen to disagree with the witness on loss leader selling. I think there should be a provision about loss leader selling, but for entirely different reasons. I think the public does benefit from loss leader selling in situations such as took place in regard to shotgun shells; but in the long run I think there is a feedback from that to the distribution system. In the long run it can result in higher prices to the public. That, however, is a separate item.

If I disagree with some of the provisions of this report—which, as you know, I do, and I mentioned this in the house at the time you tabled the report—my main disagreement is with the recommendation under resale price maintenance. I think we are absolutely wrong to get involved in that, and I do not think these practices, which may be illegal under the act, should be used as defences. If they are illegal under the act, let them be prosecuted under the act.

Mr. Cowling: Is there not a danger with bait-and-switch selling—I am not talking about loss leader selling now, but with bait-and-switch selling—that the product could come into disrepute? As I understand bait-and-switch selling, this is a situation in which the retailer lures somebody into the store by saying that he has product "X" available, and then, when people come to the store, they cannot find product "X" and they are encouraged to buy other things. Does that not create, in the mind of the consumer who comes into the store, a bad impression of product "X", which would be detrimental to it generally, and could ultimately work against the public interest?

Senator Everett: It may very well be so, but that is not a reason for allowing the supplier to exercise resale price maintenance. I am not against the idea of a provision being included in the act to the effect that bait-and-switch advertising is illegal. I would like to see a provision of the act that dealt with loss leaders, but that happens to be a situation that does not exist in the act.

However, let us go back to bait-and-switch selling, which does exist in the act. I am happy to see a provision there on bait-and-switch selling, because I think it is an unsound

practice; but let it stand on its own feet. Let us not use it as a reason for refusal to supply.

The Chairman: Why not?

Senator Everett: Because you are asking the supplier to enforce the act. He becomes the policeman, since he refuses to supply on the basis that the person who is taking the supply is indulging in an offence that is precluded by the act.

Mr. Cowling: Is there not an element of self-protection there, though, in so far as the supplier is concerned—

Senator Everett: Surely. The same way as there was in the American middle west of the 1880's. There is an element of self-protection, all right, but I do not think it is good law.

Mr. Cowling: —which he might want to exercise pending a prosecution being taken, which might take some time.

Senator Everett: Well, that is an interesting point. I do not know whether he would get an injunction against the person whom he supplies. Again, under the separate act, that is another matter. I think that resale price maintenance should be viewed as a separate item and left alone, the way it was, as I say, from somewhere in the early fifties, or for ten years—about a decade—and which worked very well.

Mr. Orr: Mr. Chairman, our experience is that the bait-and-switch operator, if he cannot get the goods directly from the manufacturer, is likely to get them from an indirect source, so that a cut-off by the manufacturer is not really going to help him in the face of a bait-and-switch practice.

The Chairman: So, in order to benefit the manufacturer you are saying you would make it an offence for him to cut off the trade.

Mr. Orr: In order to benefit the manufacturer in this, I think you have to make the prohibition direct, in the act, as has been done.

The Chairman: I find it hard to accept, Mr. Orr. You mean you are reaching out to confer a benefit by making it an offence. You are reaching out to confer a benefit on the manufacturer.

Mr. Orr: As I understand it, the prime purpose was to protect the public, but I do not think protecting the public in this case excludes protecting the manufacturer, at all.

The Chairman: It is an interesting theory, Mr. Orr. It is about the first time to date, in our discussions, that I have heard it put forward. Everything we have been talking about with regard to competition has been for the benefit of the public; now we hear something for the benefit of the manufacturer—that is, the supplier.

Mr. Orr: Mr. Chairman, throughout, the integrity of the marketplace is in the interests of both suppliers and consumers.

The Chairman: Yes, but if you make it an offence for the merchant to engage in bait-and-switch selling, then why should not the supplier be in a position to say, "If you indulge in an illegal practice I am not going to sell to you"?

Mr. Davidson: He is acting as judge and jury. The supplier, in that event, is making a determination, or reaching a conclusion, which may not be valid, for one thing.

Mr. Cowling: But if he is wrong, he can be prosecuted.

Mr. Bertrand: But also, if his assessment is right, I believe, under the act, he must have recourse in damages, because he would be saying to somebody, "Because you have indulged in a bait-and-switch operation you have affected the reputation of my product, and my own operation. I have suffered damages, therefore I am suing you for damages."

The Chairman: You think the civil damages remedy under this bill would be available to the manufacturer.

Mr. Bertrand: I think so, because under section 31.1 you could say that everyone who suffered damages as a result of the violation of the act by someone else can have recourse in damages.

Mr. Cowling: Of course, whether the retailer would be financially responsible to satisfy the judgment or not would be another matter. I think we are talking, possibly—indeed, probably—of fairly small retail operations.

The Chairman: There just seems to me to be something contradictory in the position where you make bait-and-switch selling illegal, and at the same time make it illegal for the supplier to refuse to sell because the man is indulging in bait-and-switch selling. I find it difficult to reconcile those two positions. Senator Everett apparently does not find that difficulty.

Senator Everett: No, I do not find it irreconcilable at all. There are other offences under the act, too, but we are not asking the recommendations of the committee to include those offences as defences. The resale price maintenance stands on its own feet as an offence. Let it stand on its own feet and, if you want to get at those other practices, then have those practices illegal under the act. All the resale price maintenance section says is that you shall not refuse to supply on the grounds that the retailer or the person being supplied refused to sell goods at a price lower than that specified by the manufacturer. Let it stand on its own feet. It is an offence. I think you can go almost anywhere in the world and you will find that provision, and over a period of time—and I think I am right in this, but if I am not I can be corrected by the experts—you will find that these defences have been used; they have thrown them out in the United Kingdom and they have thrown them out wherever they have had them and said: Resale price maintenance goes to the very heart of the distribution of goods to the public, so let it stand on its own feet. If there are other offences, then bring them into the act wherever you want.

The Chairman: What has resale price maintenance to do with the matter of bait-and-switch selling and the refusal of a manufacturer to supply a person engaged in that practice?

Senator Everett: Absolutely nothing at all. That is where you and I agree.

The Chairman: But we are talking about two different things.

Senator Everett: I think we are, and two entirely different things, and therefore I think these defences should be left out of the act and dealt with in other areas.

The Chairman: Well, you just cannot have a situation where a retailer engages in bait-and-switch operations and make that an offence, and then make it an offence for the supplier to refuse to sell on the basis that he is indulging in that practice.

Mr. Orr: Mr. Chairman, under section 38(3) it is necessary for the prosecution to show that the firm was cut off because they had not sold at a price satisfactory to the supplier. Notwithstanding that the crown showed that the person was cut off because he had sold at a price not satisfactory to the supplier, the defence was that the person was engaged in bait and switch. That is the reason for separating those two issues so that the two things can be dealt with separately rather than confusing them.

The Chairman: Is there anything more on this issue?

I am concerned about one remark that you made, Senator Everett. I can assure you that we had reasonable representation on the committee when we considered this report. I am sorry you were not there.

Senator Everett: I am not sure what remark I made, Mr. Chairman.

The Chairman: The remark you made that this was not a unanimous report of the committee. You made that remark in the Senate.

Senator Everett: No, I rose in the Senate when a member of the Senate asked if the report was unanimous.

The Chairman: Yes, Senator Benidickson asked that.

Senator Everett: I rose at that time and said that I disagreed with certain portions of the report. As you know, I am chairman of the Standing Senate Committee on National Finance, and we undertake two meetings per week which last all morning, and on that occasion, as on other occasions, I was not able to be here by virtue of having to chair that meeting.

The Chairman: I am not challenging it, senator.

Senator Everett: I am just saying that for the record.

The Chairman: But there can be only one report of the committee.

Senator Everett: But I did not request a minority report. A senator does not have the right to ask for a minority report and in the report of the committee itself he is not entitled to have his disagreement made known. However, he does have the right to rise in the house when the report is tabled and say that he disagrees with certain portions of it. Indeed, that has happened in the case of my committee on many occasions.

The Chairman: I am not attempting to restrict your freedom of speech, Senator Everett. I was explaining, with leave of the Senate, this bill which was tabled, and the ordinary practice is that there is no debate when a report is tabled. The only manner in which a debate can be provoked is by putting a motion on the Order Paper calling the attention of the Senate to the report tabled. I was simply explaining to the Senate certain features of the bill. Senator Benidickson then said:

> May I ask Senator Hayden two questions? First, was the report unanimously approved by the members of the STanding Senate Committee on Banking, Trade and Commerce?

You answered and, apparently, I did not answer. After explaining that you had attended some meetings, but not all, which was not necessary, you, being a good member of the committee—and I always ask you if you intend to attend a meeting—said:

> Honourable senators, in reply to Senator Benidickson's question as to the unanimity of this report, I would say that I attended some of the meetings on the competition policy—but not all, due to meetings of the National Finance Committee—and, after looking over the report, I find myself in disagreement with some of its provisions.

Senator Everett: That is correct.

The Chairman: That may be your view, but I wonder whether it was a challenge to the report of the committee.

Senator Everett: No, I do not think so. I would have said nothing; under the circumstances I would have waited until the report was debated. However, Senator Benidickson did rise and ask whether the report was unanimous. I then considered it incumbent upon me to say that I disagreed with certain sections of the report at that time. Had he not risen I would have said nothing and contented myself with explaining my position at the time the report was debated. I believe you are correct in that respect.

The Chairman: I did not make any statement that the report of the committee was unanimous.

Senator Everett: I did not say you did, but you were asked by Senator Benidickson whether the report was unanimous.

The Chairman: Yes.

Senator Everett: I thought you said earlier that you answered it was unanimous.

The Chairman: No, it was the report of the committee.

Senator Everett: When we started this exchange you said you answered that the report was unanimous.

The Chairman: No, I did not.

Senator Everett: My impression also was that you had, and I did not wish to let it pass at that point, which was the honest thing to do. Otherwise I felt I would have been misleading the house. However, that is not to say that there is any position I can take asking for a minority report, or disagreement with the report. I do believe I have the right to make a speech in the house indicating that I disagree with certain stances of a report.

The Chairman: In any event, that is not the subject matter before the committee at this time.

Mr. Cowling: Before leaving the resale price maintenance section, we discussed the level of servicing as being one of the defences that should be retained. Is there any comment in that respect?

Mr. Davidson: The only comment in that regard is that it is something which is easily used as a smoke screen if the supplier wishes to cut the dealer off.

Mr. Cowling: But it must be legitimate.

The Chairman: The point that bothers me, Mr. Davidson, is that the potential for using smoke screens, I suppose, exists in most cases. We must assume there are

intelligent people around. That would be discernible. If it were being used as a smoke screen and only discernible to you, it would not necessarily follow that you should not have this protection in the bill. To say that it could be used as a smoke screen is not a satisfactory answer to the question.

Mr. Davidson: All I am suggesting is that it is a trade-off. We are talking about a trade-off, it seems to me. It is a question of balance, where the existence of those defences, or the removal of them, creates more harm than good. From the enforcement standpoint, it is clear that they cause difficulty. Thus far the minister has taken the position that the balance is in favour of leaving the defences out and returning to the original provisions of the law.

Senator Everett: Could I ask whether there have been any successful defences on the ground of service?

Mr. Davidson: There have not been that many prosecutions of resale price maintenance. One of the reasons is that it is very difficult to get a clear case, that is not—

Senator Everett: Where a prosecution had taken place, was it successfully defended by virtue of using the "proper level of service" argument?

Mr. Davidson: Not to my knowledge.

Senator Everett: That is one of the problems we have. It is almost impossible to prove what is a proper level of service. To my knowledge, it has never been successfully used as a defence, because it is so vague.

Mr. Cowling: What about the Coutts Card case? It was successfully invoked there. But there have been other cases where it was not successful.

Mr. Orr: In one of the Phillips cases it was not successful.

Senator Lang: Mr. Chairman, I would like to ask one general question. Is there any evidence of practices in Canada in the service area, particularly in the professional area, which would lead one to believe that the public was being harmed through pricing or a combination of pricing? I am getting at the philosophical base for bringing services within the scope of the act.

Mr. Davidson: It is significant to recognize that among the NATO countries, the United States, Japan, Western Europe, Britain, Canada and Australia, et cetera, Canada and Ireland are the only countries which do not apply competition policy for services. Everyone else applies the competition law to services. Up until now we and Ireland were the only exception.

Senator Connolly: At least you are on the side of the angels!

Mr. Davidson: The second point is, there is evidence of harmful restrictive practices in the service area. Whether that applies to professions depends on how professions are defined. The definition of a profession is a difficult thing to determine. We found, in attempting to draft Bill C-256, that was one of the major difficulties with section 92—trying to capture a definition of "profession" which was not too wide or too narrow. There certainly has been a lot of evidence of restrictive practices in the service sector.

Senator Connolly: Not very many of those countries are federal states. Some of the big ones are, such as the United States.

Mr. Davidson: Germany and Australia are.

The Chairman: There are two major items left in the report which we can deal with at the next meeting, those being the defence of "due diligence" and the "reviewable practices" section. The defence of "due diligence" is not available to an individual under the proposed legislation where the bill provides for strict liability. The committee has made certain recommendations on that, and we can discuss if further with Mr. Bertrand and his colleagues at the next meeting. There are also many aspects of the "reviewable practices" section which in the view of the committee require amendment.

Section 31.2 starts off as follows:

> Where, on application by the Director, the Commission finds that—

The minister introduced an amendment to make the order correct. Before the commission finds anything, certain conditions have to be met, and there is an opportunity on the part of the supplier refusing to supply goods to adduce evidence. I am wondering how this comes about. Does the director use the investigatory powers of the statute to decide whether there is merit in the application, or does he simply get a complaint and pass it on? That is the question I should like you to think about, Mr. Bertrand. I do not expect you to answer it now. I would hate to think he is just a conduit type.

Mr. Bertrand: On application before the commission, the normal rule of law says that the applicant has the burden of proof. If I were the applicant, I would have to substantiate my allegations. I would have to convince the commission that it should intervene and issue an order.

The Chairman: That is not the way it reads.

Mr. Bertrand: I do not think it is spelled out as such, but the normal rule of law is that the person making the application has to prove his case.

The Chairman: It says: "Where, on application by the Director, the Commission finds . . ."

I am not attacking the commission on this. I am just wondering how the director informs himself. Does he use all of the investigatory powers of the statute in order to decide whether there is merit in the application, before he sends it on to the commission?

Mr. Bertrand: Yes.

The Chairman: It does not say so. I should like you to look at that and be ready to discuss it at the next meeting.

The committee will now adjourn until next Wednesday.

The committee adjourned.

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PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*



Issue No. 35

WEDNESDAY, APRIL 23, 1975

Fifteenth Proceedings on:

"The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto."

(Witnesses: See Minutes of Proceedings)

28844—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker—(19)
Haig	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of The Senate, October 16, 1974:

"With leave of the Senate,

The Honourable Senator Hayden moved, seconded by the Honourable Senator McDonald:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon any bill relating to competition in Canada or to the *Combines Investigation Act*, in advance of the said bill coming before the Senate, or any matter relating thereto;

That the Committee have power to engage the services of such counsel, staff and technical advisers as may be necessary for the purpose of the said examination; and

That the papers and evidence received and taken on the subject in the preceding session be referred to the Committee.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, April 23, 1975
(48)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade & Commerce met this day at 9:30 a.m.

Subject: "The advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto".

Present: The Honourable Senators Hayden *(Chairman)*, Beaubien, Buckwold, Connolly (*Ottawa West*), Cook, Everett, Flynn, Haig, Macdonald (*Cape Breton*), Macnaughton and Molson. (11)

Present, not of the Committee: The Honourable Senator Heath. (1)

In Attendance: Mr. R. J. Cowling and Mr. John F. Lewis, C.A., Advisors.

WITNESSES:

DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS:

Bureau of Competition Policy:

Mr. Robert J. Bertrand, Assistant Deputy Minister and Director of Investigation and Research;

Mr. R. M. Davidson, Senior Deputy Director of Investigation and Research;

Mr. G. D. Orr, Director, Services Branch; and

Mr. W. P. McKeown, Deputy-Director, Legal.

The Committee, together with the witnesses, proceeded to further discuss the Interim Report of the Committee dated March 19, 1975, together with certain proposed amendments as prepared by the Advisory Staff.

At 12:30 p.m. the Committee adjourned to the call of the Chairman.

ATTEST

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, April 23, 1975

The Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to examine and consider the advance study of proposed legislation respecting the Combines Investigation Act, competition in Canada or any matter relating thereto.

Senator Salter A. Hayden (*Chairman*) in the Chair.

The Chairman: Honourable senators, on the last occasion there were a number of items which were not dealt with. We omitted to deal with one. I thought we would consider that first. It concerns bid-rigging. The other items are due diligence, as a matter of defence, and reviewable practices. There are several short items such as interim injunction, indictment vis-à-vis summary conviction, and jurisdiction of Federal Court.

Senator Connolly: What was the last item?

The Chairman: Jurisdiction of Federal Court. Let us start with bid-rigging.

Mr. R. J. Cowling, Special Counsel to the Committee: I assume our witnesses have read what the report says about that. It is on page 10. It is brief. The committee's recommendation is quite simple. It is based on the minister's proposed amendments tabled in December. It would simply eliminate the necessity of getting the advance acceptance of the person calling for the tenders—in effect, a joint venture type of bid. It seemed to the committee that the requirement to obtain this acceptance would be confusing and time-consuming. Have you any comment to make on that?

Mr. Robert J. Bertrand, Assistant Deputy Minister and Director of Investigation and Research, Bureau of Competition Policy, Department of Consumer and Corporate Affairs: I think it is a valid point and a valid observation which the committee has made. There might be some incidental effect that could be beneficial—

Senator Connolly: I am afraid we are not hearing you back here. What point are you discussing?

Mr. Bertrand: Section 32.2, bid-rigging. The amendments which the minister proposed in December call for acceptance by the person calling the bid for a joint venture to be exempt, not to covered. Your committee has recommended that the acceptance requirement be dropped.

I said it was a valid point, and we have outlined that the acceptance would only cause inconvenience. There are also other aspects. Acceptance could create difficulty, in that we are leaving it to the discretion of the person calling the bid to say whether an activity is or is not an offence.

Another aspect that could be considered is that if someone, or two parties, agree among themselves in advance, they might at that point have committed an offence, although they rely on future acceptance, and there might be nothing they can do about it if it is not accepted afterwards.

I understand this acceptance provision is causing concern, and my minister has been reviewing the report of your committee. He has not yet reached a conclusion on whether or not to follow your recommendation.

So far as I am concerned, personally, I would say that the acceptance requirement is not essential to the proper functioning of the section and it could probably be dropped without making that section less effective.

Senator Connolly: Where is our recommendation on that point?

Mr. Cowling: It appears at page 33:10 of the Interim Report, about the middle of the page in the left-hand column.

The Chairman: As I understand what you have said, Mr. Bertrand, you are satisfied that the amendment as proposed is fair and does not take away from the purpose that the department was seeking in the original draft.

Mr. Bertrand: That is correct, Mr. Chairman.

The Chairman: The next item is due diligence.

Mr. Cowling: I think we dealt with sport last time.

Senator Molson: Somewhat, yes.

The Chairman: Perhaps we should review the question of sport today for a few moments, or are you so satisfied with the result last night, Senator Molson, that you have nothing to add today?

Senator Molson: I thought there was a certain amount of restraint of trade between those two teams last night, Mr. Chairman. It went on a little too long, but the end result, I thought, was acceptable. It was a result of free competition, I think.

The Chairman: You think there was a good level of competition?

Senator Molson: I thought there was a very good level of competition, Mr. Chairman.

The Chairman: So, there is no assistance that you think could be given by any amendment to this bill that would add to the level of competition?

Senator Molson: Not this morning.

The Chairman: Perhaps there is some in relation to the consumers, the persons who attend the games.

Senator Molson: Just as a matter of interest, the announced attendance at last night's game was 16,400, which is about 2,000 down for the Forum. It holds 18,500.

Mr. Cowling: I might add that during the debate on this clause in the Commons committee last night the debate was interrupted several times in order to announce the scores of the games that were played last evening.

Senator Cook: I thought perhaps the debate was interrupted to announce the lack of a quorum.

The Chairman: Well, that is a legitimate interest, a public interest.

The next item is due diligence. The committee has discussed the question of due diligence at some length and has made some recommendations in that respect. I would invite you now, Mr. Bertrand, to comment on the proposals which the committee has made.

Mr. Bertrand: The matter of due diligence in respect of an honest error was raised by a number of associations, Mr. Chairman. Taking as an example the misleading advertising provisions, let us assume that an advertisement, because of a clerical error, is misleading, and further assuming that the company responsible for that advertisement exercised due diligence, and as a result of that advertisement the consumer is misled and suffers a loss or damages there are two alternatives: we must decide whether the "damages" should be borne by the consumer, or by the company that put out the advertisement. The consumer, of course, had nothing to do with putting out the advertisement. Consumers are innocent parties. If we choose the due diligence approach, we are saying that the consumer should suffer the loss or damages; if we choose the strict liability provisions, we are saying that the company making the mistake should pay.

Senator Connolly: Then you have a third case involving an intermediary between the consumer and the producer, such as the newspaper publishing the advertisement. We deal with this in our Interim Report.

Mr. Bertrand: In the case of a newspaper, there is a defence under section 37.3, which appears on page 37 of the bill.

Senator Connolly: In that case, then, we should have referred to section 37.3 of the bill in our Interim Report as it relates to newspaper publishers. At page 33:11 of the Interim Report, at the bottom of the left-hand column, we say:

> A newspaper publisher who published a misleading advertisement in good faith would also have a defence.

Mr. Bertrand: Yes. The only thing we ask of the newspaper publisher is that he maintains on record the name and address of the other party and that he accepted the representations for the advertisement in good faith.

Senator Connolly: That is the defence we refer to at the bottom of page 33:11.

The Chairman: Yes.

Senator Cook: I am a little confused, Mr. Chairman. I can quite see that in the case of a mistake the consumer should be reimbursed. However, I thought we were talking about an offence—

Mr. Bertrand: I am just laying the groundwork. Let us assume that the consumer should be indemnified in some manner. That indemnification could be achieved in different ways. The consumer could be given the right of action to recover damages or to have the contract rescinded. However, in most instances the amount of damages suffered by each consumer might be very small. It might not be worth proceeding with an action for recovery. In such cases, could we not say that the state could recover for the benefit of the state and all consumers in Canada the damages suffered by a number of consumers, bearing in mind that the damages would be very minimal in respect of each individual consumer? If we follow that assumption, we are saying we should opt for the strict liability provisions, and the fine or penalty imposed by the court should, in some respect, be a measure and correspond to the collective damages suffered by consumers. That is one ground on which we could justify the strict liability approach.

Senator Cook: It seems to me you have put forward an argument for the defence of due diligence. When there are only small damages suffered in each case, it is beyond me why somebody who has exercised due diligence, or can prove due diligence, should be fined.

Mr. Bertrand: If the damages amount to $1 in each case and one million consumers are affected, are the damages still small?

Senator Cook: There is still no *means rea.*

The Chairman: Mr. Bertrand, it seems to me that we are ranging pretty far afield. The whole question is the strict liability imposed by the provisions of the bill. I have read, as I am sure you and most members of the committee have, the working paper put out by the Law Reform Commission on the question of strict liability, and they have taken the pros and cons of both sides of this question, so we are not really getting into any new territory now. All we are saying is that a person who took reasonable care and applied himself with due diligence should be able to raise that as a defence. An employee may be the person who has violated some instruction and done the particular thing complained of, but then you charge the owner or the employer or the company. If the employer establishes he has exercised reasonable care to avoid this kind of situation, why should he be guilty in any event and left without any basis on which he can present his case? The only basis he has left is to offer his explanation in mitigation of sentence, and yet you are dealing with a person who is innocent of the offence. With strict liability you make him liable, you make him guilty, and he has no defence he can offer.

Mr. G.D. Orr, Director, Services Branch, Bureau of Competition Policy, Department of Consumer and Corporate Affairs: The Law Reform Commission stated explicitly that it is directed to personal liability and not corporate liability. This is explicitly stated.

The Chairman: I know that the Law Reform Commission deals with the individual. There is still a volume to come on corporations, but there is no reason why we cannot anticipate that principle.

Mr. Cowling: And, of course, individuals are liable under the Combines Investigation Act as well as corporations.

Mr. Orr: But the major difficulty that arises with a large corporation is that it is quite capable of having a paper

system that will reflect due diligence. At the same time, the performance will not match the paper system.

Senator Molson: What does that mean, if I may ask? What is a paper system?

Mr. Orr: You may issue instructions to all your employees, and they may even have to sign a book that they have read all the rules, but at the same time the performance, the delivery of what is promised in their advertisements, does not in fact take place.

The Chairman: Mr. Orr, is this what you are saying? You are drawing a line between the individual and the corporation. Let us deal with it on that basis. Do I assume from what you have said that as far as the individual is concerned this doctrine of due diligence as a matter of defence is a proper thing to provide?

Mr. Orr: May I put it another way? With a small, individual enterprise, when a man does something in his store it is he who does it.

The Chairman: But if he is the one who does it, how can he raise a defence of due diligence?

Mr. Orr: Quite. The proposed defence probably is not likely to do him very much good.

The Chairman: No, but it may do a lot of people a lot of good if they apply themselves diligently to comply with the law and because, through no fault of their own, the event they are trying to guard against still happens and they are charged, but they have no defence even though they apply themselves. I am not trying to put you in a corner, Mr. Orr, but I want to know where we start. You were the one who was attempting to differentiate between individuals and corporations.

Mr. Orr: I have raised the point that there is a difficulty in the case of very large corporations.

The Chairman: Let us take the individuals first. Do you not think the individual who can establish due diligence, that he acted with reasonable care, should not be subject to strict liability, but should have the opportunity to defend himself? If he does not succeed he will be convicted.

Mr. Orr: May I suggest that the defence for the individual person who acts with due diligence is already there in the provision that says if his supplier gives him some false information it is the supplier who is subject to the penalty.

The Chairman: I don't follow that, Mr. Orr. You will have to point out to me where that is, because it is a strict liability offence under Part V.

Mr. Orr: True, but I believe it is in section 36(3) of the bill, the provision we were discussing last week.

The Chairman: Section 36(3) deals with pyramid selling, does it not?

Mr. Orr: This is subsection (3) on page 31. This protects the man who receives information from another person, and it is the other person who is deemed to have made the representation to the public.

The Chairman: Which subsection do you say does that?

Mr. Bertrand: Subsection (3) says:

> Every one who . . . supplies to a . . . retailer . . . any material . . . that contains a representation—
>
> That is misleading representation—
>
> —shall be deemed to have made that representation to the public.

We are looking at the person who has supplied misleading material.

The Chairman: But that does not cover the situation we are talking about. We are talking about the situation where an individual is operating a business, he has a staff, and the regulations and instructions and so on clearly show, as the witness can establish, that he has established due diligence and care. Notwithstanding that, somebody does something, makes a misrepresentation, or does some other thing in relation to the merchandise, which is an offence, but the owner, who may have had nothing to do with what has been done by the employee, is not able to raise that defence.

Mr. Orr: I believe that in the case of an unincorporated firm we can proceed only against the person who made the representation, unless we can show that he did it on the instructions of his employer.

The Chairman: You know, Mr. Orr, I have said this many times, but maybe I should repeat it again. I am not questioning what your practice may be.

Mr. Orr: This is what we can do in court.

The Chairman: As I have said to a lot of other people, if you can give me a guarantee that you will always be there and always in charge of the policy and the administration, that would be all right.

Mr. Orr: I apologize, Mr. Chairman, I did not make myself clear. I do not believe we could show that the person who is in charge of an unincorporated firm was guilty of the offence when it was not shown that he had directed the employee to make the representation.

The Chairman: I can't follow you. I understand the words you say but I can't follow you.

Senator Cook: It seems to me that there is a tendency more and more for the legislature to take things out of the hands of the judiciary. You have a case where there is a judge appointed, he has heard all the evidence, but the legislature says, when an accused man has the defence of due diligence, that the judge cannot consider it. Why? Why should not the legislature leave it to the judge, to the judiciary, to make a reasonable examination of the matter and say, "Yes, I do not think you have tricked me. I think in all the circumstances you have exercised due diligence"?

The Chairman: That is right, Senator Cook. I am not being too critical of the presentation you are making. You see, what is being assumed is that if you provide a defence of due diligence that is going to defeat the whole purpose of the act; everyone is going to be able to appear innocent and pure. Now, due diligence as a defence is not intended to do that. It is intended to distinguish between the person who is innocent and the person who is not. The defence of strict liability takes you to the case where, innocent or guilty, you are fined, you are convicted, you have no defence you can put forward.

Senator Cook: Due diligence does not protect the reckless man, the careless man, the indifferent man; he will not be acquitted under due diligence.

The Chairman: No, but he should have the opportunity.

Senator Cook: Sure.

Senator Everett: If there were no due diligence clause, what would happen in the case of, say, resale price maintenance, in obtaining redress?

Mr. Bertrand: Due diligence is not applicable to resale price maintenance. It applies just simply to misleading advertising.

Senator Everett: I asked the question because in our recommendation we think resale price maintenance should be taken out. Mr. Bertrand says that due diligence does not apply.

Mr. Cowling: I think Mr. Bertrand was expressing his own view there. What he was saying was that if there is to be a defence of due diligence, then in his opinion it should be limited to the misleading advertising type of offence. The committee has suggested in its report that it should also apply to certain other sections, including the resale price maintenance, but obviously I would personally concede that the misleading advertising provisions are the more important ones.

Senator Everett: I would like to settle that.

Mr. Bertrand: Once you prove or have a case on price maintenance, it is very difficult to see that due diligence was a defence.

Senator Everett: That is the point I was making. It would be very difficult for a supplier to move to maintain prices and then, say, use the defence of due diligence.

The Chairman: Then he could not succeed in his defence.

Senator Everett: I do not think he could, but it seems to me that that would be something to exclude from our recommendation.

The Chairman: Why? Even on the language you have used, you said it would be "difficult." So what? There is the possibility that some person who is charged, even on price misrepresentation or price fixing, would have a defence that he had proceeded with reasonable care.

Mr. Cowling: I think the reason it was suggested there, Senator Everett, was because there have been new amendments to the resale price maintenance section—you can suggest a price, but you must make it clear in the advertisement, or whatever, that it is only a suggested price, and so on—let us say, with that clarification.

Senator Everett: That is advertising.

Mr. Cowling: No.

Senator Everett: Is that resale price maintenance?

Mr. Cowling: That is in the resale price maintenance, too. Let us say that that clarification, somehow, by an honest error, was omitted, then the accused could rely on the due diligence defence in those circumstances.

Senator Everett: Could we hear Mr. Bertrand on that point, Mr. Chairman?

The Chairman: I thought we had, but I don't mind hearing him again.

Senator Everett: Maybe it did not permeate my skull.

Mr. R. M. Davidson, Senior Deputy Director of Investigation and Research; Bureau of Competition Policy, Department of Consumer and Corporate Affairs: Mr. Chairman, I think that in making that suggestion, if the supplier knows the law and he makes a suggestion as to the resale price to the customer, it is very difficult to see how he could—in fact, in my view, it is impossible to say that he could have exercised due diligence and not taken steps in that simple act to make it clear that it was only a suggested price. It does not demand any effort on his part, really, at all. If he makes the suggestion, he knows the law and he has to make clear the suggestion.

Senator Connolly: How do you make it clear? We hear advertisements, we see advertisements.

Senator Everett: Senator, we are dealing with a narrow part of the proposal at the moment—that is, resale price maintenance; because once you exclude the problem of resale price maintenance, then I think you are dealing for the most part with misleading advertising.

Senator Connolly: What you want to do is exclude the advertising?

Senator Everett: No. I can identify with the committee's recommendations on the due diligence matter in relation to everything but resale price maintenance. The resale price maintenance is the one that gives me trouble because under the other areas the injured consumer can proceed under the Sale of Goods Act, I suppose, or even under the common law, for redress.

The Chairman: It may be you would like to rephrase the original statement that you made. What you said was that it would be "difficult" to apply due diligence as a defence in a case of resale price maintenance. That surely is not the test. The test is whether a defence of due diligence should be available or not. If the party will have difficulty in proving it, it is no reason why it should not be there. Somebody may be able to provide such a defence. I do not think it is part of our job to speculate on all the possibilities or on the difficulties. Is it a reasonable thing that that provision should be made there?

Senator Everett: Reading the section on resale price maintenance, I think it is not reasonable.

The Chairman: That is your view.

Senator Everett: That is my view. On the other areas, so far as I can tell, the defence of due diligence is reasonable. That is the only area in which I cannot see it applying.

Mr. Cowling: It was represented to us by somebody who appeared before the committee—and in looking over the brief just now, they make a case for several or the other sections, but I notice that the brief seems to be a little bit silent on the resale price maintenance provisions, although in their summary they suggest that it should apply.

Mr. Davidson: There is a famous case in the United States in which a judgment was given by Justice Learned Hand, which involved an aluminum company. He said in the judgment that nobody monopolizes by accident. It seems to me that that same opinion ought to apply here. Nobody price maintains by accident. It is very simple for the person, if he is suggesting a price, to say so.

Mr. Cowling: I would not want to be sidetracked, though, on the resale price maintenance point, because I think it is very important in the other sections that we

were talking about, especially on misleading advertising. For example, if we could go back to Mr. Orr's example of the individually owned store, let us take the "sale above advertised price" section, for example, which is the new section 37.1. I am referring to page 50E of the blue book. Let us say an individual storeowner himself, not through a clerk or employee but himself, went around putting the price on certain kinds of goods with a rubber stamp which had moveable rollers, and by a mistake put the figure 30 cents on instead of 90 cents, for example. Surely the consumer should not be entitled to take advantage of that. You were talking about the damage caused to the consumer. It seems to me that if there has been an honest error this simply should be pointed out to the consumer and he should not be entitled to take advantage of it.

For example, if parties agree to something and then in the written contract a mistake occurs, you can have the contract performed. The mistake is not held against the party against whose interests the mistake has been made. I think the same thing should apply here.

Senator Connolly: I am not clear on what Senator Everett is trying to get at. So far we have been talking about the defence of due diligence in cases where, through inadvertence, advertisements have in fact been misleading. We are talking about the case where there has been a mistake which results in a possible contract and, as Senator Everett suggested, there should be a defence of due diligence there. I think it would be helpful if Senator Everett could give us a concrete example of what he means in respect of price maintenance and the defence of due diligence.

Senator Everett: What I am referring to is the recommendation of the committee that the defence of due diligence be available in seven areas: promotional allowances; misleading advertising; representations as to reasonable tests; double ticketing; sale above advertised price; promotional content; and resale price maintenance. Our recommendation should exclude the defence of due diligence in the case of resale price maintenance, because it is difficult for a supplier—I might even go so far as to say impossible for a supplier—

The Chairman: Haven't you?

Senator Everett: I haven't but I might amend it. If we are going to start splitting hairs then I would go so far as to say that it is impossible for a supplier to maintain retail prices and have available to him the defence of due diligence.

That aside for the moment, when we move to the other six recommendations I am of the opinion that the defence of due diligence should be available for the reason that, if someone is offended or is damaged in these six areas, he does have the redress in the civil courts. He can get a recision of the contract or he can get damages. I do not think in that case that it is good law to say that the defence of due diligence is not available.

The Chairman: Now that we have your point clearly stated, may I point out to you that we are not settling our final report now? This is an interim report. Therefore, what the committee may ultimately come up with is a matter for the committee to decide. I know what your view is, but I should point out to you that the language of this particular section does not permit, as I read it, a mistake as a defence. What it says is this:

> —in the absence of any evidence that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion—

This is a particular defence by which he could escape a liability if this could be established. But suppose the explanation the man has is that it was an honest mistake. Why should he not have the opportunity of asserting that?

Senator Cook: Perhaps the easy way to settle this would be if the minister would agree to use due diligence for the first six and we could give him the last one.

Mr. John F. Lewis, C.A., Advisor to the Committee: Mr. Chairman, in several of the representations to this committee a very important point was brought up in connection with imported articles in the various sections. The importer, according to the sections, is the man who is liable. It is not the manufacturer in the foreign country. Quite often the importer uses due diligence to ascertain that representations in warranties and so on are acceptable and reasonable. Perhaps he even makes tests. If he takes reasonable steps to ensure that the representations are fair and acceptable and then at a later date finds that the representations were overstated and were wrong, nevertheless, he would be liable.

Similarly, in connection with price maintenance, many of the imported articles contain advertising material, brochures, which mention or suggest the retail price. You can see that regularly on television programs from the United States. The Canadian wholesaler might and would take reasonable steps to make sure that that was taken out or was changed or was overprinted. However, an employee might have been given instructions to do certain things.

Senator Everett: That would not result in an offence under the resale price maintenance sections.

Mr. Lewis: I think the point that is being discussed is that he would not have the defence of due diligence in a case like that. If his employee did not expunge the suggested retail price on every piece of advertising material, it would be the employer who would be responsible.

Senator Everett: The case you have given would never become a case.

The Chairman: Why?

Ssenator Everett: Because the section is not offended. Perhaps we could ask Mr. Bertrand to comment.

Mr. Bertrand: The section would say that if you have a suggested retail price there is nothing wrong with it. It starts to be wrong when you say to a person, "You either obey that suggested retail price or you are cut off".

Mr. Davidson: In the case of important articles, if the inscription bears a price but does not say "suggested price only", all the importer has to do is send a letter to the retailer saying that this is simply a suggested price. He does not have to have his employees overprint the thing. He simply sends a letter to the customer saying that these goods can bear a marked price, but that it is a suggested price only.

The Chairman: Mr. Davidson, if I were giving advice to people in those circumstances, I would advise them to overprint and not to take any chances.

Mr. Davidson: That would do no harm, but it certainly would not be required if you could prove that the letter

had been sent to the retailer saying, "It is a suggested price only".

The Chairman: But some particular articles which have been advertised may have suggested prices on them when they are imported. Those suggested prices may be higher than the suggested prices at which they are being offered in Canada, or they may be lower. Now, inadvertently, or by mistake, some of these might get out to the trade without any correction being made. Do you suggest that in those circumstances there would not be any prosecution?

Mr. Cowling: Let us suggest that the overprinter ran out of ink for a period while these things were being put through, and a few got out in that way.

Mr. Davidson: If you are only talking about a suggested price, there is nothing wrong.

Mr. Cowling: I am talking about the warning which he is obliged to put on the imported product. The imported product comes with a suggested retail price. Under the act, as amended, he is also obliged to point out clearly that that is only a suggested price, so that it might require some additional wording on the wrapper, or whatever. As I say, let us assume that the printing machine failed to print on a number of these things. Would that not be an honest mistake?

Mr. Davidson: He only has to point out to the retailer that it is merely a suggested price only. It does not have to appear on the article.

The Chairman: Supposing he honestly fails to catch the error in the facts as I stated them to you. It is all very well for you to say that all he has to do is send a letter, but supposing he does not catch the mistake.

Mr. Davidson: The mistake does not matter. He does not offend the law.

The Chairman: If the suggested retail price is either higher or lower, on the imported article, than the price at which that article is selling in Canada?

Mr. Davidson: It does not matter. It is not the price at which the retailer is selling, necessarily. It is only a suggested price.

Senator Macnaughton: What happens in the case where the letters are not delivered?

Senator Beaubien: That is every day now.

Senator Macnaughton: He is automatically guilty.

The Chairman: Well, I think we have Mr. Davidson's viewpoint, and also that of Mr. Orr, Mr. Bertrand, Senator Everett, Senator Connolly, Senator Cook, Senator Macnaughton, our counsel and myself. I think we could talk a lot more, but we might not advance the situation any, because most individuals, even including myself, appear to have a firm view as to the need or the lack of it. I think we will have to let it stand at that, and when we finally get the bill and we are studying it in committee on second reading, we can review the situation at that time; but as of now I would say the various members of the committee that I have named, and the panel appearing before us, have expressed their viewpoints, and those who disagree have a right to disagree.

Mr. Bertrand: Mr. Chairman, for the record, may we draw your attention to subsection (5) of section 38, in the bill, which says:

> (5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

With regard to the problem that you mentioned, namely, that the person making the suggestion must make it clear, that little part does not apply, and then you follow under the general rule.

Mr. Cowling: That still does not answer Senator Macnaughton's suggestion that the letter, or whatever it is, for example, got lost in the mail, or failed to be delivered. That may sound unimportant, but it is really what we are talking about when we are dealing with the whole field of due diligence. We are talking about these seemingly little things which could cause a great liability.

Mr. Bertrand: Senator Macnaughton's point is taken care of by the Post Office Act, which says that once a letter is mailed it is deemed to be received.

Senator Macnaughton: But then you would come along and say that knowing that I faced this difficulty, during the midnight I burned the oil and prepared all these letters and put them in my files, and I have no receipt, I have nothing. It is a matter of my own good faith. I sent the letters out, and but it is a question of a strike at the post office.

Mr. Bertrand: It is a question of evidence. Can you prove you mailed those letters? Your secretary can at least come over and say, "Yes, I mailed them".

The Chairman: I would take a witness with me to the mail box. Would one witness be enough? Or would I have to take two, or three, or six to the mail box with me to show them what it was, ans let them read the letter, and then put it in the mail box, so as to establish what I did?

Mr. Bertrand: Senator, you were a practising lawyer—you still are—and you know the practice in law firms. Your secretary could be a very good witness, saying that the letter has been mailed. It is exactly the same. It is just a question of the credibility of the witness.

Senator Molson: I can think of a lot of difficulties with regard to that, though, Mr. Chairman. Your secretary very often does not do all the mailing. In most big offices the mail is thrown in a basket, is picked up, goes to a mailing room, goes through a number of steps, and finally ends up in a bag, when it is taken and put out in the street, is picked up by the postal department, and in due course it disappears. However, there is nobody, as far as I am concerned, in many cases, who can actually say that the letter was mailed.

The Chairman: That is right. I can speak for the practice in large offices. I know there is a mailing department. There are people there who are responsible for it. All the secretary has to do is to type the letter; the boss man then has to read it and sign it, or sometimes the secretary is authorized to sign it. It is then put into a certain place in the office, the mailing staff collect it, and it becomes completely impersonal after that. I see this in the building where we are located. I see men toting large canvas bags, dragging them along the floor somewhere, to the nearest post office. You are asking us to lean on a very weak reed when you say that the secretary can testify. I would say

that unless it is a very small office that is not the way it goes.

I am wondering whether, even in your own division the secretary goes out and mails every letter. I am sure you have a mailing department and a mailing service. I know in a lot of government departments they do, because when you say to them, "Well, can you recover this letter which you have addressed to me, because I am here, and give it to me here?" the reply is, "Well, it is in the chain of the mailing service, and we cannot get it back. It has to go through."

While I appreciate what you have said by way of explanation, I do not think it adds anything to the situation.

However, is there anything more on due diligence, Mr. Cowling?

Mr. Cowling: I do not think so, Mr. Chairman.

The Chairman: Well, there is certainly nothing more from Senator Everett, because he has agreed with the application of due diligence as an offence to all the other items we have listed.

Senator Everett: That is correct.

The Chairman: And that is a pretty high percentage of achievement.

Mr. Cowling: I think the next item would be interim injunctions, because I believe we dealt with the resale price maintenance defences on the last day.

The Chairman: Yes.

Mr. Cowling: Interim injunctions are dealt with on page 33:12 of the interim report. The thrust of the committee's recommendation is to retain interim injunctions, since they may be necessary in certain cases, but provide a liability on the Crown if it turns out that the interim injunction was not warranted, and caused somebody damage. That is the rule that would apply to an ordinary citizen who sought and obtained an interim injunction against somebody. I think the thrust of the committee's recommendation was that there was no reason for the same rule not to apply to the Crown.

The Chairman: There is no reason why the Crown should not pay, just like anybody else. That is clause 29(1) of the bill, is it not?

Mr. Bertrand: Page 11.

Mr. Cowling: We have prepared a specific amendment with respect to that point, which is in the bundle of amendments which was distributed last day.

Senator Connolly: It was in that bundle?

Mr. Cowling: That is right, senator. Unfortunately, the pages of that bundle are not numbered, but it is the fourth page from the end. It simply reads as follows:

> The Crown is liable for the damage caused to any person by the issue of an injunction under subsection (1) unless such person is convicted or condemned, as the case may be, pursuant to the proceedings referred to in subsection (6).

Senator Connolly: That is the drift of the recommendation in the report.

The Chairman: What is your comment, Mr. Bertrand?

Mr. Bertrand: You must realize that in some circumstances it might be desirable to have an interim injunction in order to prevent the commission of an act, or an offence if the offence were committed under that act, which would cause such an injury that no adequate remedy under any section of the act could be provided. With respect to the need for the interim injunction, you must realize that when an application is about—

The Chairman: I do not wish to interrupt you, but we are not discussing the need for an interim injunction.

Mr. Cowling: We have acknowledged that.

The Chairman: We have acknowledged that, but we are discussing the question of the failure of the ground or basis for the application for an interim injunction in the subsequent proceedings, as a consequence of which the person against whom the interim injunction was obtained was damaged. To the extent he can prove that damage, he should have a right to recourse. I know that in an individual case that right is available.

Mr. Bertrand: Yes. In my opinion that would be a precedent in terms of the liability of the Crown in such respect.

Mr. Cowling: That is why we provide a specific amendment, because in my opinion at any rate it would not fall under the Crown Liability Act. Therefore it would require a special provision. However, it seemed to me that it was an eminently fair provision. The suggestion would not interfere in any way with the administration of the act. It is simply giving someone who has been wronged by the use of an interim injunction a recourse.

Senator Cook: Would they have the defence of due diligence?

The Chairman: Do you mean, would the Crown have that defence?

Senator Connolly: I would give the Crown the due diligence defence, sure.

Mr. Bertrand: May we ask the counsel for the committee if there is not a possibility under the ordinary rules of procedure in the Federal Court Act that the court can make it a condition of granting the injunction that the Crown take responsibility for any damage suffered? Would it not be within the power of the court under that act?

Mr. Cowling: That would mean that a representative of the Crown would have to enter into an undertaking in favour of the respondent in the injunction proceedings. I wonder whether a representative of the Crown can do so without specific statutory authorization? I do not know that the court could authorize him to do so.

Mr. Bertrand: No, but could the court not make it a condition, saying it will grant the injunction, but on certain conditions?

Mr. Cowling: We are still faced with the question of Crown liability and in view of the principle that the Sovereign can do no wrong I would have grave doubts that a court without any statutory authorization could do anything of that nature.

Mr. Bertrand: Could the court not also make a condition of appeal?

Senator Cook: You are not imposing responsibility on the Crown.

The Chairman: We have the provisions of the Crown Liability Act now. The manner in which to make sure that this provision would be legally effective, that is Crown liability in this case, is to deal with it by statute.

Senator Cook: To remove any possible doubt.

The Chairman: Yes. Is there anything more, Mr. Bertrand?

Mr. Bertrand: This is a constitutional question and I am not really familiar with the relationship between the Senate and the House of Commons in terms of any commitment on the fund and to what extent that amendment would be—

The Chairman: Do you mean as to whether the Senate has constitutional authority to do this?

Mr. Bertrand: It is just for my own information, Mr. Chairman.

Senator Cook: That does not impose payment of money, except if the Crown assumes the responsibility.

The Chairman: No, the House of Commons does not have to accept it. There is a certain peril in that, of course. If we insist and they do not wish to accept it, where do we end up?

Mr. Cowling: Almost eny legislation involves the expenditure of money by the Crown.

Senator Cook: You are thinking of our right to impose an obligation on the Crown to expend money?

Mr. Bertrand: Yes.

Senator Cook: It only has to expend money if it has done wrong.

The Chairman: Why should it not?

Mr. Cowling: It is an interesting diversion, anyway.

The Chairman: It is interesting to speculate, but there are a number of answers. One is that we believe we have the authority and, at least, we are in as good a position as is the House of Commons to decide whether we are right or wrong. The courts might be the ultimate place of decision, but it does seem to be a matter that should be decided ty the authorities rather than going to the Supreme Court of Canada on a reference.

Mr. Cowling: Perhaps, as Prince Charles is in the city today, we might ask him whether he would agree to accept this responsibility on behalf of the Crown!

Senator Macnaughton: He would certainly agree with us, because he is a member of the House of Lords.

Mr. Bertrand: In my opinion, your suggestion that the Crown should be liable for damage merits an in-depth study.

The Chairman: It certainly merits very serious consideration.

Mr. Bertrand: I would also suggest that in that case not only the Combines Investigation Act would have to be considered but all other legislation, in order to ensure some form of uniformity and to establish whether it would be government policy to maintain that uniformity throughout and not make an exception with respect to the combines legislation.

Senator Cook: We must start somewhere, so let us start with this legislation.

The Chairman: The courts have broken out in that direction and, while at a higher level the cause of action has not been maintained, as the court broke out in a direction of this type, ultimately the point will be successfully made. It has been done under the Income Tax Act on special investigations and, while in the particular case I believe the Court of Appeal in British Columbia set aside the judgment of the trial court, there is some very pertinent comment in the judgments which would be well worth while reading in the area of what would be tantamount to an abuse of the special authority given. Here we say there are perfectly proper cases in which interim injunctions are justified if the Crown subsequently succeeds in proving the allegations. However, if allegations are made by the Crown and in that sense are not supported in the subsequent trial they were not entitled to the interim injunction. We say they can have that authority, but on terms similar to those set for an individual in any proceedings who applies for an interlocutory injunction. If he does not succeed, he has exposed himself to damages that the other party may have suffered.

Senator Cook: And so he should if the other party suffered damages; why should it not recover?

Senator Connolly: Except that it is against the Crown. It has to be provided. The general rule is that the Crown is not responsible. Mr. Bertrand, you must have had some specific cases in mind when you drafted this section. What kind of situation did you envisage when you provided that the Crown could seek an interim injunction as outlined here?

Mr. Bertrand: It was mainly a merger provision, a merger between two corporations—where injury to competition might cause difficulty once a merger is consummated.

Senator Connolly: Perhaps it is invidious to use examples, but there is the present situation, which everyone knows, concerning the proposed take-over by Power Corporation of Argus. That is the kind of situation where a provision like this might be invoked.

The Chairman: There might be a case where a merger, if carried through, would lead to a monopoly.

Mr. Bertrand: Even less than a monopoly. There could be injury to competition.

The Chairman: Yes. That should be the basis. After the thing has been done, it would be too late. There have been cases where an application has been made for an injunction to stay proceedings until the question had been determined. We are not questioning the right to apply for an interim injunction. The Crown has to use its own judgment on that. But if it does not succeed in proving the circumstances on which it based its application, we say it should be accountable for the damages resulting, the same as an individual might be.

Mr. Cowling: There might be no damages, but if there were it should be accountable.

Senator Macnaughton: Could I make a suggestion that a copy of the judges' remarks in that B.C. case be circulated to the members here? It is extremely interesting. It involves a political and legal principle.

The Chairman: I think that is an excellent idea. I have had occasion recently to read those judgments. They are quite a commentary on the viewpoint of the judges in relation to this very aspect which we are now discussing.

Senator Macnaughton: We might even send copies to our witness.

The Chairman: We might even send a copy to Mr. Davidson. We would not like him to feel neglected.

Mr. Davidson: Mr. Chairman, there is one other major area where consideration should be given to the use of an interim injunction. That is the area of predatory practices, where, is some circumstances at least, unless you have some means to hold the status quo, the complainant may be dead before any remedy is available. If, for example, a powerful company sells at a very low price in only one area where it has a small rival—it discriminates, in other words, geographically and sells only in that one area—by the time the ordinary inquiry and court proceedings were completed—

Senator Connolly: On the injunction?

Mr. Davidson: No; in the ordinary way—the affected small company might be out of business.

The Chairman: Mr. Davidson, without intending to be overly facetious, for most people, if they had any guarantees in relation to what you said, by the Crown getting an interim injunction, their life would be extended. I am sure there are a lot of people who would be prompted, with an assurance of that kind of guarantee, to apply for an interim injunction. I think we have taken this one as far as we can go. Mr. Bertrand sees some value and merit, but he does not say, "Yes, we buy this particular phrasing." He feels rather that the court should attach a condition. Frankly, as a lawyer, I see difficulty in a court attaching a condition of liability that the Crown be subject to paying damages. In the face of the Crown Liability Act, even though you wrote that provision, did your idea go so far as to say we should write into this bill a provision that the judge, on issuing an interim injunction at the instance of the Crown, must provide as a condition that the Crown accepts responsibility for damages if it fails to make a case? That is merely saying in a little different way what we have said.

Mr. Bertrand: I would rather, as an alternative, consider your suggestion that the court may impose a condition. Not that it must.

The Chairman: Where would you put it—in this bill?

Mr. Bertrand: I think it could be subject to further study. My first impression would be that it could be put in that section.

The Chairman: You cannot make it effective unless you make some statutory provision.

Mr. Bertrand: That would have to be considered. Unless you assure me that it is essential, that due to the Crown's Liability Act, the court cannot impose that condition on its own, as a result of the Federal Court Act, I would have to do further research on this.

The Chairman: Well, we know your views. What is the next item?

Mr. Cowling: The next item is the indictment versus summary conviction question.

The Chairman: You have read that, Mr. Bertrand?

Mr. Bertrand: Yes.

The Chairman: It seems to make sense to me. Very often the Crown proceeds by way of indictment because the investigations have taken a length of time and the period limited in the Criminal Code for summary procedure has run out. We say there should be no limitation. There is no limitation on the time when you can prefer an indictment, and there should not be any limitation on the time, notwithstanding the Criminal Code, when you can proceed summarily.

Mr. Bertrand: I think so, except that you might find that a segment of the economy, a member of the public, might object to have the period extended over six months.

Mr. Cowling: I think I know what Mr. Bertrand is getting at. He is quite right. In the suggested statutory amendment which we provided, there should be added that it would not apply—

Senator Connolly: Where do you want to add that?

Mr. Cowling: Right at the end of the amendment to subsection 5. By new subsection 5 there would be a provision saying that the section of the Criminal Code, which says that summary conviction matters must be commenced within six months, does not apply to proceedings in respect of any offence that is declared by this act to be punishable on summary conviction.

What Mr. Bertrand is getting at is that there are certain offences under the Combines Act which are punishable only on summary conviction, and the proposed amendment would not apply to this. The intention was to make it apply to those offences where there was an alternative of indictment or summary conviction. Is that the point that you are getting at, Mr. Bertrand?

Mr. Bertrand: Yes.

The Chairman: It would only be applicable to the provisions of this bill.

Mr. Cowling: That is correct.

The Chairman: And would deal only with situations where there would be an alternative of indictment or summary proceedings under this bill.

Mr. Bertrand: You say in your report that the degree of punishment does not accord, practically speaking, as a choice, in the determination of the penalty—

Mr. Cowling: That is another point.

Mr. Bertrand: —and, as such, it does not make any difference. The only difference is the procedure in court.

Mr. Cowling: I think you are right. I have searched through the offences under the act, and I do not believe that there is provision for a longer prison term than five years. Am I right in that?

Senator Connolly: That is in respect of an indictable offence.

Mr. Cowling: Yes. Therefore, the Criminal Code provision which says that unless there is a mandatory prison sentence of at least five years—I have forgotten exactly what it is—the judge has the discretion to impose a lighter sentence, even a fine rather than imprisonment, notwith-

standing that the Combines Investigation Act says, that the individual is liable to two years' imprisonment.

It may be that the necessity of this kind of amendment is not so serious, but we perhaps have to look forward to the day when the act may be amended to increase the penalties. One can conceive of an amending bill coming along to increase the prison term from two years to five years.

Mr. Bertrand: The discretion will still lie with the court to impose a lesser sentence, unless there is a minimum penalty provided.

Mr. Cowling: That is what I mean.

The Chairman: We can achieve that at this stage. We can provide that the suggestion we are making would only be in cases where there are alternative procedures. In other words, if it is by indictment or by way of summary conviction, the punishments can be stipulated accordingly. An indictable proceeding is a more serious one and is supposed to be used in respect of more serious offences.

Mr. Cowling: Notwithstanding the fact that a judge might have the right under the Criminal Code to impose a less severe penalty, when a case comes before the court and is proceeded with by way of indictment rather than summary conviction, there is an entirely different atmosphere that pervades the entire trial, and it might be that the judge would feel that because the Crown had elected to proceed by way of indictment rather than summary conviction, that he ought not to use his discretion to impose a lesser penalty. I think Mr. Bertrand would agree with that.

Senator Connolly: You are saying that if the Crown decides to proceed by way of indictment, the judge is more or less constrained, in a general way, to impose the higher penalty.

Mr. Cowling: Not constrained in the legal sense.

Senator Connolly: I realize that, but the atmosphere is such that he is pushed in that direction. The whole affair is given the appearance of being much more serious than if it were proceeded with by way of summary conviction.

Mr. Cowling: That is what I understand from my friends who practice criminal law.

Senator Connolly: I think we have always understood that to be the case.

The Chairman: We have thrashed out the pros and cons of that particular item. The next item is the jurisdiction of the Federal Court, which is dealt with in section 46 of the bill.

Mr. Cowling: I do not know whether Mr. Bertrand wants us to lead off on this particular item. It is a fairly straightforward point. It is either acceptable or not acceptable. The point has been made quite strongly in practically all the briefs that have been submitted to this committee that an accused should retain the right to be tried in the ordinary criminal courts. The Federal Court of Canada, of course, is not an ordinary criminal court. As the act presently stands, it makes the jurisdiction of the Federal Court conditional upon the consent of the accused. That may have been for constitutional reasons. However, for some reason Bill C-2 would remove the necessity of obtaining the consent of the accused and simply leave it open to the Attorney General to proceed in the Federal Court without the necessity of obtaining the consent of the accused

The thrust of our recommendation is, in effect, to put it back the way it is in the act as it stands now.

Senator Connolly: I am wondering whether the purpose of drafting it in this way was, in effect, to get trials under this act away from the provincial court system and into the Federal Court because it is a specialized field and because the provincial court system is crowded with matters that do not involve a specialty of this kind.

The Chairman: All proceedings under this branch of the law up to now, Senator Connolly, have taken place in the provincial courts.

Senator Connolly: That is true, but what I am asking, Mr. Chairman, is whether or not this is an attempt to get them out of the provincial courts and into the Federal Court and making the judges of the Federal Court more expert in this field than might normally be the case in the provincial court system.

The Chairman: I do not think that is a very sound principle for moving these cases from the provincial courts to the Federal Court.

Senator Connolly: I am not enunciating it as such, Mr. Chairman. I am simply asking whether this was the reasoning behind it.

Mr. Bertrand: That is the main aspect of the proposal, Senator Connolly. The number of cases proceeded with under the Combines Investigation Act is, of course, dependent upon the number of offences which we can investigate and prepare for court. We have a relatively small staff, so the number of cases proceeded with every year is not very large. We feel that if those trials were concentrated in the hands of the Federal Court, the judges of that court would soon develop an expertise that would be unmatched in Canada, and one that would take years and years to build up in other court systems in Canada.

The only comment I can make about your committee's objection in respect of the well established rule as to burden of proof, and other matters which distinguish criminal trials from civil trials, is that those rules are not difficult to comprehend, bearing in mind the calibre of judges we have in the Federal Court of Canada. They are no more difficult to understand by Federal Court judges than they are by provincial court judges.

The Chairman: Mr. Bertrand, throughout the years the direction of the criminal work has been in the provincial courts, and they have inherited in the procedures of the provincial court system quite a know-how. Even new judges seem to pick up that know-how very quickly. What you are proposing is to embark on an education program in another court, the very name of which indicates it succeeded the Exchequer Court and was designed to deal with federal matters.

I am not prepared to offer any comment as to the constitutionality of giving the administration of the criminal law to the Federal Court. Whether that would, in effect, set up a court for the administration of the criminal law, I do not know. It seems to me that the provincial courts are the logical courts to handle these offences, and have been so recognized.

Why the sudden change? The only explanation we are given is, "Well, to educate another body of judges." I am sure the time of the Federal Court could be better spent on matters properly within its jurisdiction than in being edu-

cated in the processes of criminal law, especially when we have a court available that has been made use of for many, many years and is the basic court for the administration of the criminal law.

Mr. Bertrand: May I suggest, Mr. Chairman—and perhaps your experience will confirm this—that cases under the Combines Investigation Act are complex, lengthy, and require not only an understanding and deep knowledge of criminal law and the rules of evidence, but also a comprehensive understanding of the basic economics underlying each case. In proving a market to the court, it is not only a question of the burden of proof, but also a question of understanding the economics behind it and to be able to really appreciate the testimony of expert witnesses in the field. He should be able to understand and really appreciate an expert witness, on the basis of economic theory and analysis put forward of a certain definition of a market. Looking at past experience it will be found that provincial court judges may only once in their lifetime, maybe never, have to consider a case under the Combines Investigation Act. They very seldom would have to deal with that. I suggest there is a difference between a combines case and a merger case, and even the sophisticated combination cases that are developing.

The Chairman: Are you suggesting that the Federal Court is a better court, even though it has had no experience in the field, than the provincial courts which have had experience?

Mr. Bertrand: I am not saying it is a better court.

The Chairman: Is that not the only basis on which we should consider making a change?

Mr. Bertrand: I am saying that it would be as good a court, and that is what this bill provides. The attorney could come before the Federal Court and before a provincial court; it is a concurrent jurisdiction.

The Chairman: What you are saying is that the untested quality of the Federal Court is at least as good as the tested quality of the provincial court.

Mr. Bertrand: When you say it is untested, may I draw your attention to the fact that there have been cases under the Combines Investigation Act in the Federal Court, and from an analysis of those cases and the judgments it can be said that its decisions are as good as those of the provincial court.

Senator Flynn: I feel I must come to the rescue of the witness. I think what he is saying is that the experience of the provincial court is so diluted that it amounts to nothing, and what he wants is to have a court that will have only a certain number of judges, who will have more experience after a few years. I think there is an argument there. I am not discussing the constitutionality.

The Chairman: Or the merit.

Senator Flynn: Or the merit. I think there is a good point in the perspective the witness has been using. Diluted between, let us say, 350 judges all across Canada, what does it amount to?

The Chairman: What you are saying is that my question was a loaded question.

Senator Flynn: Possibly.

The Chairman: Mr. Bertrand understands that. I think we have gone as far as we can on this item.

Senator Buckwold: I have one question before we pass from that. Mr. Bertrand, why did you indicate that an individual had a right of choice but no one else had? What was the rationale behind that, following your previous argument?

Mr. Bertrand: I think in the case of an individual you would find that under the act it could be the misleading advertising provision and so on, where they are more likely to be individuals.

Senator Buckwold: I agree, but there are cases in which large businesses could possibly be involved.

Mr. Bertrand: I think in the case of an individual there is a jury choice; in the case of a corporation you do not have that choice.

Senator Buckwold: I am trying to relate that to your argument on the "superiority" of the Federal Court.

Mr. Bertrand: I did not say "superiority." I say it is at least concurrent.

Senator Buckwold: You still have not answered my question. I gather that the individual has this jury right and a corporation does not. However, I am still trying to reconcile that with your previous statements, and I find it difficult.

Senator Cook: I understand you mean an individual can have a jury, but you cannot have that in the Federal Court.

Mr. Cowling: Perhaps I should have made this clear in my opening remarks. Even under the bill the individual retains the right; or should we say that consent still has to be obtained from an individual to proceed in the Federal Court.

Senator Connolly: But you cannot have a jury in the Federal Court.

Mr. Cowling: No.

Mr. Bertrand: If you relate the Federal Court to my previous argument in respect of corporations, our experience, and what would be anticipated, is that important and large cases, under mainly the combines merger provisions, would involve corporations.

The Chairman: Perhaps we should reserve our look at this and our consideration of it until such time as you enlarge the scope of this bill when you are dealing with monopolies and mergers.

Mr. Bertrand: We are dealing with it now, Mr. Chairman. Phase 2 will provide for that.

The Chairman: I am talking about phase 2, which has been mentioned quite often but which we have not seen.

Mr. Bertrand: You will presumably see it in time.

Senator Cook: It is going to be worse than phase 1.

The Chairman: Maybe that will be the time to consider fully what the course should be. However, if there is no further comment we will pass to the next item, which is the reviewable practices.

Senator Alan A. Macnaughton (*Acting Chairman*) in the Chair.

Senator Connolly: Are we now having distributed to us amendments under the heading "Practices Reviewable by the Commission"?

Mr. Cowling: That is correct. These are specific drafting amendments that have been prepared. They are only suggested drafts.

Senator Connolly: This is reflected in the report on page 33.8 and so on?

Mr. Cowling: That is right.

The Acting Chairman: Have you something to say with regard to each one, Mr. Cowling?

Mr. Cowling: Looking at the specific amendments, the first one that you see, because it is an amendment that must be made to the definition section of the act in clause 1 of the bill, has to do with the definition of "product." Amongst the amendments tabled by the minister in December was a suggested amendment here. This goes back to the much discussed question of whether a brand name can be considered a product for the purposes, for example, of the refusal to deal provisions; in other words, whether a retailer's or somebody else's failure to get a supply of a specific brand name should give jurisdiction to the commission. The minister clarified that in his amendment by saying that it would only be where that particular brand name was so dominant in the field that the man could not carry on his business in that line of product. The principal difficulty the committee had with the minister's amendment was with the phrase "in that line of products," because section 31.2 talks about the effect on his business as a whole, so it seems. The minister's refinement of that would be to take it down to some part of his business; for example, the toothpaste shelf in a drug store as opposed to the effect failure to get a certain brand of toothpaste would have on his operations as a whole.

Mr. Davidson: I think it is important to keep in mind with respect to the refusal to deal provision that there are really four gateways or four tests that a complainant would have to satisfy before there was any possibility of a remedy. The first is that he has to be substantially affected in his business, so that rules out this issue about the toothpaste, because nobody is really selling mostly toothpaste. He has to meet, first, the test of being substantially affected in his business. Secondly, it must be proved that the reason he is unable to get supplies is because of insufficient competition among suppliers of the product in the market. Thirdly, that he is willing and able to meet the usual trade terms. And, fourthly, that the product is in ample supply. In order to meet all those conditions, he has quite a burden.

Senator Everett: I think the fourth is ample supplies of product. I think you mentioned ample supplies twice.

Mr. Davidson: The first is that he is substantially affected in his business; the second, that the reason he cannot obtain supplies is insufficient competition; the third, that he is willing and able to meet the trade terms; and the fourth is that there is ample supply.

Mr. Cowling: May I interrupt there, Mr. Davidson? On the first point, whether it is his business as a whole that must be affected or whether it is just the toothpaste shelf, I would have agreed with you except that the minister's proposed amendment reads as follows, in part, that he has affected "the ability of a person to carry on business in that class of articles", and that seemed to me to be cutting down quite substantially the provision in section 31.2.

Senator Everett: Is that 31.2(2) that you just read?

Senator Connolly: No, it is an amendment to it.

Mr. Cowling: That is correct, that is the minister's proposed new 31.2(2).

Senator Connolly: Is it too long to read that whole amendment, because we do not have it in our text?

Senator Salter **A. Hayden** *(Chairman)* in the Chair.

Mr. Cowling: It reads as follows:

> For the purposes of this section an article is not a separate product in a market only because it is differentiated from other articles in its class by a trademark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless he has access to the article so differentiated.

My point is that the words "in that class of articles" seem to me to be inconsistent with the words "a person is substantially affected in his business" which one finds in what would now become paragraph 31.2(1)(a).

Mr. Davidson: There are two questions there. One is the definition of the product, whether it is sufficiently important as to substantially affect the ability of a person to carry on business in that class of articles. Is the product we are talking about sufficiently important to affect his business, his ability to carry on in that class of articles? The second question is: Is that class of article so important to his business that, if he is not able to supply that class of product, then he is substantially affected in his business? Subsection (2) there is just a definition of the product, but he still has to meet the test of being substantially affected in his business.

The Chairman: We have spent a lot of time on this, Mr. Davidson, in considering it. There is a preliminary question that I left at the close of the last day's meeting for Mr. Bertrand to deal with, but we will come to that in a minute.

It seems to me that you have got two situations under section 31.2(a).

> Where on application by the Director, the Commission finds that
>
> (a) a person is adversely affected in his business.

That is one situation. I can understand it.

> Or is precluded from carrying on business.

That is not "his business" but "business," any business that he might want to go into,

> due to his inability to obtain adequate supplies of a product anywhere in a market on the usual trade terms.

So we just concentrated on that one paragraph. You are dealing with two situations. One is a situation where a man is engaged in business, carrying on business, and there are some supplies he feels he needs for his business. That brings me to the point that Senator Buckwold raised right at the beginning of our hearings—that is, a man may be in the camera business and the class of article that he does not carry may be a Kodak. He goes out and tries to

buy Kodak cameras and he cannot buy othem. Then he complains to the director and says he is adversely affected in his business. But what was "his business"? Was his business cameras? His business is not selling Kodak cameras, which is a specialty article—and it is not even called a camera; it is called a Kodak.

You recall, Senator Buckwold, you were the one who raised this point. Now, are we dealing with generic terms or what are we dealing with? Certainly, it is not clear. What we are trying to do is to make it clear.

Mr. Davidson: Mr. Chairman, that is the intention of that subsection (2). It is intended to encompass not just the situation of Kodak cameras, because there are a lot of competing cameras, and you can carry on a photographic business without Kodak cameras.

The Chairman: Certainly.

Mr. Davidson: But it is almost certainly impossible to carry on a photographic business without Kodak colour film, because Kodak colour film is overwhelmingly dominant. It is true that you can get something—I think, to use the expression which was proposed in one amendment—"functionally competitive." You could get Ilford film, Ilford colour film, but nobody buys Ilford colour film.

Mr. Cowling: It might be just as good.

Mr. Davidson: It might be.

Mr. Cowling: It might help the competition if the camera store had to buy Ilford.

Mr. Davidson: The camera store would not survive if it could not supply Kodak colour film, because the Canadian market demands something like that.

Mr. Cowling: But isn't it suggesting that Kodak will become bigger and bigger until it finally ends up as the only film supplier in the country? That is exactly what this bill is trying to avoid.

Mr. Davidson: It seems to me that there is a logical gap there. All this bill is doing is saying that if a man who has all the qualifications needs a particular product to survive in his business and if the reason he cannot get it is the lack of competition among suppliers, then there is a possible remedy for him in this legislation. It does not say that he cannot handle Ilford film or Fuji film. The point is that unless he can get Kodak colour film he cannot really be in the photographic business.

Senator Buckwold: To carry the point further, really what you are doing is creating Kodak as the monopoly film. There are companies who buy Agfa film because they cannot get Kodak and, therefore, Agfa is doing business. But you may rest assured that if those companies could get Kodak—because Kodak does not sell to their distributors—they could saturate the market, and therefore you are going to kill the competition and that is the very point that is being raised.

Mr. Davidson: In this legislation there is nothing stopping anybody handling these competing films.

Senator Buckwold: Why would they buy it if they could get Kodak? Under the law they can get Kodak.

Senator Everett: Because they do in fact buy competing films and most suppliers do handle more than just Kodak.

Senator Buckwold: But Kodak is the key. The others are there perhaps for esoteric reasons or personal preferences, but the film which people want is Kodak.

Mr. Davidson: With respect to the theory that you get more competition by denying remedies to people who cannot survive without Kodak, you are not going to get more competition if the guy cannot really survive. He is just not going to be available to distribute Agfa film.

Senator Buckwold: You are not talking about survival. You are talking about "substantially affected."

Mr. Cowling: In that class of articles.

Mr. Davidson: Well, retailers really cannot survive without Kodak colour film. Distributors could probably do so.

Senator Buckwold: Well, there is no retailer who would not be able to get Kodak film. Retailers can find it. It is the distributors who have the problem. It is the distributor who wants Kodak but cannot get it.

The Chairman: Kodak film is available.

Senator Buckwold: But they do not sell to every distributor.

Mr. Davidson: It would be unlikely that the distributor be able to prove, or that anyone on his behalf could prove, that he was substantially affected in his business or precluded from carrying on his business without the Kodak line of films. This is so because the distributor would have the alternative of selling the other films, for which there is a demand sufficient for at least a few distributors to survive carrying those lines without the Kodak lines.

The Chairman: Mr. Davidson, according to the first part of this subsection, you start out with the person who is in a business which is substantially affected because of his inability to obtain adequate supplies. Assume that he is in the camera business and his business is operating reasonably well. However, he wants to expand and enlarge. Therefore, he wants to obtain Kodak cameras because he figures that will help his business. How does that interfere in any way with distribution? Do you not have to go further and establish that there is inadequate distribution, that the public is not being served? This is the answer I have been getting from you and Mr. Bertrand and from Mr. Orr at various times about the public interest.

Mr. Davidson: Well, there is a clear public interest in the conditions of the entry of new competition into any line of business.

The Chairman: I am not talking about new competition now. I would just like you, if you would—you do not have to—I would just like you to keep to the point here, that the businessman is operating, apparently successfully, a camera business which does not handle Kodak cameras, but he sees an opportunity to expand his business if he can obtain Kodak cameras. Where is the public interest being served there, if there is an adequate distribution to the public of Kodak film?

Mr. Davidson: If we are talking about a distributor, it could probably not be shown that he was substantially affected in his business by not being able to get the Kodak supplies because he has alternatives. There are enough people who want these alternatives that he can continue to operate a profitable business. If we are talking, however, about a retailer, he cannot really expect to survive as a

retailer without being able to supply the public's demand for Kodak film. If he cannot obtain the Kodak film, then he is very likely going to have to close up shop.

The Chairman: Suppose as an incidental to his business a drug store retailer has cameras for sale. He says that if he could sell Kodak he could do much better.

Mr. Davidson: By virtue of the thousands of products he handles in his drug store, he would have a difficult time demonstrating that he was substantially affected in his business by being unable to get one line of cameras.

Mr. Cowling: That is why I wonder why the words "in that class of articles" were in the minister's amendment.

Mr. Davidson: First of all, you have to establish whether the product Kodak is dominant in the class of articles. Kodak is dominant in the film business. The second question is: Are you substantially affected in your business because you cannot get that and because that class of product is so important that, if you cannot get the dominant product in that class of business, you are in great difficulty? There are two aspects. Is the brand article dominant in its class? Is that class important to your business?

The Chairman: If he has never handled it—

Mr. Davidson: Then it is not important to his business.

Senator Everett: Surely it is not whether the class is important but whether the article is important.

The Chairman: The way you read the wording of it, a person is substantially affected in his business due to his inability to obtain adequate supplies of a product.

Mr. Cowling: Mr. Davidson, I think it says also, speaking about the concept of dominance, that that is related to the market and not to the class of articles which he is selling.

Mr. Davidson: Well, that is right, but in order for the denial of supply to substantially affect his business that product or class of product must be important to his business. If it is only one out of a thousand different products, it cannot substantially affect his business, even if the product he seeks is dominant in its class.

The Chairman: But if he has never handled that product

Mr. Davidson: Right.

The Chairman: The wording of this section would appear to entitle him to complain.

Mr. Davidson: Yes, but he would have even more difficulty proving that he was substantially affected in his business by being unable to get it if he never even handled it.

The Chairman: Therefore the language should be absolutely clear in this provision to make sure, and certainly it is not clear judging by the representations we have made, that one of the purposes they are afraid of is that if a man is in a business and handles cameras, then if he sees a line of Kodak, for example, which would enhance his business, he is entitled to complain and entitled to be heard by the Commission, and the Commission might make an order.

Mr. Davidson: In the case of the Kodak camera, it is unlikely that the Commission would make an order, because the Kodak camera is not dominant in its line in the same way that Kodak colour film is. There are alternatives to Kodak cameras which are very popular in this country, but that does not apply to the colour film.

The Chairman: You say it is unlikely. Frankly, I find those words irritating. In effect, you are really putting yourself on the judge's bench or on the commissioner's bench in deciding how they are going to interpret a set of facts. We have to read the words and see what the interpretation is.

Mr. Davidson: Mr. Chairman, the reason these things are not prohibitions is that the significance of the practice depends upon the context in which it is found. You have to rely, therefore, on bringing to bear the judgment of an expert body on the subject. The refusal to deal is not prohibited. There is a remedy for it available only under certain circumstances.

Mr. Cowling: But the Commission is obliged to follow the guidelines set forth in the act, and if it does not I suppose the department can appeal to the Federal Court.

Senator Everett: There is one area that bothers me in subsection (a). Let us take the case of the drug store that wanted the camera. You say that he probably could not pass the test of being substantially affected in his business, because this would not be a substantial part of his business; but if the same man were not in the drug store business and decided he wanted to handle cameras, he would be precluded from carrying on business. At least, it seems to me that that is an interpretation that could be made of that section. In other words, it would be easier to get through the eye of the needle if you were not in business than if you were. I wonder if that is the intention.

Mr. Davidson: I am not sure that I understood the factual situation, but if you are not in business, and you want to get into the camera business as a camera specialist, you probably could do so without the Kodak cameras. You could probably depend on Leica, and all the Japanese brands, and so on. I doubt that anyone could make the case that unavailability of Kodak cameras would stop him from conducting a photographic business.

Senator Connolly: It is a matter of fact.

Mr. Davidson: That is right.

Senator Everett: Let us take the situation of a restaurateur who wants to handle film at his cash counter. He would not be substantially affected in his business if he could not get the film, but if the same man says, "I would like to get a counter at a restaurant, a portion of which I will lease, with the purpose of selling Kodak film," would he not be precluded from carrying on business?

The Chairman: It looks as though you have a point there, Senator Everett.

Mr. Davidson: Would this be a separate business in the restaurant?

Senator Everett: Yes. Suppose the restaurateur cannot get in under that section because his business is not substantially affected, and so he says to his son, "Look, I will lease to you two feet of the counter and the shelving behind. You get the film." Because he would be precluded from carrying on business he could get around it that way.

Mr. Davidson: Well, it sounds as if the son is not really in business, though. It is still part of the restaurant business.

The Chairman: He does not have to be in business, though.

Senator Everett: Well, say he leases it to a third party, then.

Mr. Davidson: If he leases it to a third party, and it is a viable, independent business, I think the rules would apply, if he is precluded from carrying on that independent business because he cannot get supplies, for the reason that there is lack of competition among supplies, and because of those other three conditions.

The Chairman: But take Senator Everett's point. The language is, "he is precluded from carrying on business—" not any particular business, but "business" "—due to his inability to obtain adequate supplies of a product." That is any product. This is the kind of a case, as I understood it, that Senator Everett was putting up to you. I do not think the answers you have been giving so far deal with that. I do not think this part has any place in that paragraph, because what it appears to cover is the case where a man wants to establish a business, he looks around and says, "If I handle a Kodak camera, that will be a good, profitable business," and then goes to try and get supplies but cannot get any with which to start that business. The "precluded" part in this section does not deal with an existing business.

Mr. Davidson: But the conditions for the remedy still apply. He has to be precluded from being able to start business. If he cannot get supplies under those four conditions—

The Chairman: May I interrupt you at that point? Right there we are getting away from the purpose of this competition bill. Obviously, if he has an urge to start a business there may be enough businesses in that area already that you cannot support. Is the public interest suffering because this man cannot get into a business and sell Kodak cameras?

Senator Everett: I have nothing against that, Mr. Chairman, I am afraid, because that is what the competitive economy is all about. We are not attempting to exclude people from going into business.

The Chairman: No. I said, when he picks on a particular line, and I thought that was the extent to which your example went.

Senator Everett: My example was more to the point that it was easier to obtain supplies if you were not in business.

The Chairman: You mean under the provisions of this bill?

Senator Everett: Yes. That is the way it looks to me. If you were in business you might have difficulty, and if you were not in business it would be easier.

Senator Buckwold: Could I extend this a little further? I can foresee a tremendous problem, expecially in the franchise field. Say a fellow decides he wants to open up a Colonel Sanders' chicken establishment. He is not in business yet, but he would like to get this francise, because he sees two or three stores operating, they are very profitable, and there is not really much competition: they are the leaders in the field, with perhaps one other such dealer, but he wants a Colonel Sanders' franchise. Under this act you may say there was inadequate competition. That is quite possible. You are precluding him from going into business. He is being stopped because he cannot get that franchise. There is a whole series of such things. I can imagine that in the whole franchise field there could be a very serious problem.

Mr. Davidson: I think it would be impossible to prove that the reason he could not get the franchise was because there was inadequate competition among suppliers, because there is any number of fast food operators. The fact that he cannot get a Colonel Sanders' franchise does not satisfy, at all, in my view, the condition that the reason must be that there is inadequate or insufficient competition among suppliers in the market.

Senator Buckwold: You feel, then, that there would be no pressure on the company to give him that franchise.

Mr. Davidson: There are too many alternatives. That is what distinguishes the Kodak film industry.

Senator Buckwold: Let us go to the distributor level. Here I am perhaps opening up a field that is somewhat different. Manufacturers generally have distributors across the country unless they are selling the product themselves. They have people who distribute their line in a given geographical area. Very often this is a dominant line. I do not want to mention any particular names, although that would be easy enough. In that case, how could a manufacturer refuse to open another distributor?

Mr. Davidson: Maybe he could not, if it is really a dominant line. I am not sure what the factual situation is. It sounds like a case where, if it is really a dominant line, and all of these conditions are satisfied, the complainant might well have a serious case.

Senator Buckwold: What you are really leading to is a breakdown in the distributor system. Is that not quite possible?

Mr. Davidson: No, because there are not all that many sectors of the economy where one firm dominates.

Senator Buckwold: I think there are. You can name products that are such leaders in the field that new people, if they are aware of it, can move in and say, "I would like to get part of that franchise area." I can see a fair amount of problems there.

The Chairman: Senator Buckwold, may I interrupt? There is a point that might be dealt with now that I raised with Mr. Bertrand the other day. The opening words of this paragraph are, "Where, on application by the director, the commission finds that . . ." The question I left with Mr. Bertrand last day was, what motivates the director? Presumably there is a complaint from somebody who is not able to get supplies. What does the director do? It says, "Where, on the application by the director the commission finds . . .". Now, how is the complaint investigated? Is it simply that the director is in the position of being a conduit pipe? Somebody complains and he passes it on to the commission? I asked Mr. Bertrand if he could clarify that for me. Obviously it cannot be under the other provisions in the bill, where six people can get together and complain. That is in relation to another offence under Part V of the bill. Is there not something missing here?

Mr. Bertrand: Yes. Mr. Chairman, I would like to draw your attention to clauses 3 and 4 of the bill, at page 5, the

application for inquiry. Under section 7, regarding any six persons resident in Canada who are of the opinion that grounds exist for the making of an order by the Commission under Part IV.1, a citizen's complaint would be available to set this in motion.

The Chairman: That means, then, that one complaint by one supplier is not sufficient and he must get five others to join with him.

Mr. Bertrand: Whether it is insufficient is another question, because clause 4 amends paragraphs 8(b) and (c), providing that whenever the director has reason to believe that:

> grounds exist for the making of an order by the Commission under Part IV.1,—

That means that when the director has reason to believe that there is ground for application for an order it is put under inquiry. The mechanics of an inquiry under the Combines Investigation Act are then available and could start with a complaint by one individual and a preliminary investigation by my officers following that complaint to establish whether there are grounds and reasons to believe that.

The Chairman: Under the provision on page 5, to which you first made reference, a single complainant could not make application.

Mr. Bertrand: No, six are needed. A single complainant would have to communicate with me explaining the situation. I would then ask my officers to investigate and determine whether there was reason to believe there were grounds for an order under Part IV.1. That would be a preliminary investigation. If they determine there that the complaint was unfounded and there were no grounds for an application to the commission, that would close the inquiry.

The Chairman: Does this involve all the provisions of the act?

Mr. Bertrand: I believe so, but I do not expect it would be necessary in most instances. All the necessary information for an application could be provided through a return of information, or through hearings before the commission.

Mr. Cowling: I wonder if we could pass over some of the perhaps less important points. I am looking at the specific amendments which were distributed this morning and we have discussed some of the points on page 1. Perhaps the next most important item, Mr. Chairman, is the amendment that the committee would propose with regard to exclusive dealing, which is to be found on page 19 of the bill. It is suggested that a new subsection 3.1 be added making it clear that a legitimate franchise agreement would not be caught under the exclusive dealing powers of the commission.

Mr. Bertrand: May I ask some questions as to your approach? You are saying that the grantor of a franchise should be allowed to tell the franchisee that he will only deal with the grantor's product.

Mr. Cowling: Yes, it seems to me that in a legitimate franchise arrangement there must be some elements of exclusive dealing, market restriction and, possibly, tied selling. All three are not always necessarily present, but there is generally some degree of one or the other.

Mr. Bertrand: Yes, but for whose benefit?

Mr. Cowling: Probably for the benefit of both, including the franchisee, because if it is with respect to market restriction they say they will franchise the franchisee to operate, for instance, a restaurant and will guarantee that they will not establish another franchisee within a certain territory.

Mr. Bertrand: For whose benefit?

Mr. Cowling: For the benefit, I would say, of both parties.

The Chairman: Also for the benefit of the public.

Mr. Bertrand: I am interested in the benefit of the public in obtaining the best value and product possible.

Senator Cook: A person with a franchise trains staff and all the rest of it, so why should someone else come in and derive the benefits of that?

Mr. Bertrand: What would be wrong with it? He could put a charge on it.

Senator Cook: It does not seem very fair to those who have trained the franchisee and the staff.

Mr. Bertrand: Well, it is only if it is for their own benefit.

The Chairman: Why should it not be?

Mr. Bertrand: That is the assumption.

The Chairman: People do not engage in any activity unless they expect to come by a benefit. It has not been an offence so far as I know to operate a business for benefit. Maybe I should not be giving you ideas.

Mr. Bertrand: A franchise arrangement is devised to benefit both parties. The commission might look into such arrangements and decide they should be for the benefit of both parties, but it should also be for the safeguarding of the public.

Mr. Cowling: I would like to refer to the amendment proposed by the minister recently in the House of Commons committee with respect to this subject. That amendment seemed to relate only to one particular industry. It is not of record, except in the committee proceedings. Was that amendment tabled, Mr. Bertrand?

Mr. Bertrand: Yes, it was circulated.

Mr. Cowling: I am quoting the minister's statement at page 5, issue No. 34 of the proceedings of the House of Commons Finance, Trade and Economic Affairs Committee:

> For the purpose of subsection 4 in its application to market restriction, where there is an agreement whereby one person—the first person—supplies or causes to be supplied to another person—the second person—an ingredient or ingredients that the second person processed by the addition of labour and material into an article of food or drink, that he then sells, in association with a trade mark that the first person owns, or in respect of which the first person is a registered user, the first person and the second person are deemed in respect of such an agreement to be affiliated.

That ties in with the other provisions of the section, which say that an order cannot be made as between affili-

ates, but it seems to be aimed particularly at the soft drink situation, the bottlers.

The Chairman: But it does not deal with the franchise.

Mr. Cowling: This committee's recommendation was along the same lines, but a little broader, in that it would not confine the relief to the bottlers, but extending it to other legitimate franchise arrangements. This is why we say in the amendment that the agreement must not be one which was entered into for a purpose related to this act, so that people could not enter into franchise agreements in the hopes of evading the application of Part IV.

The Chairman: I suppose, Mr. Bertrand, it would be reasonable and fair for me to ask, having regard for the provisions of that amendment, who derives the benefits? Would you not think it would be the persons who entered into the agreement? And how would you relate those to the public interest?

Mr. Davidson: I think, Mr. Chairman, the Royal Commission on Farm Machinery, and the inquiry under the Combines Investigation Act into the tires, batteries and accessories business of service station operators—they were both major inquiries—have shown that where exclusive dealing is widespread in the industry it can have a very serious effect on the possibility of new suppliers getting into the market and getting distribution. I think perhaps Senator Everett will know about the Versatile Manufacturing Company in Winnipeg, which had a great deal of difficulty getting adequate distribution of its farm machinery because it was a short-line manufacturer—it supplied a limited number of lines. It had considerable difficulty in getting distribution, although everyone acknowledged that technically it was very innovative.

The Chairman: That was not the purpose of my question. I was referring only to the amendment which the minister tabled in the House.

Mr. Davidson: I thought you were asking about who gets the benefit.

The Chairman: Only in relation to these particular agreements, where the relationship is presumed to be that of affiliates. Now you have an agreement which obviously relates to bottlers—Coca-Cola, etc. That is the sort of thing this amendment will relieve against. I was merely twitting Mr. Bertrand for an answer he made earlier. He knows very well the answer he gave earlier. I wanted to know, in that situation, where there is what amounts to an exemption, where the benefits are distributed. Obviously there is a benefit to the parties to the agreement, and there must, in your promotion of the public interest, be a benefit to the public in order to provide this sort of exemption. Then I am simply saying, why limit it to bottlers—why not relate it to franchises?

Senator Everett: Is there anything in this section which requires a franchisor to grant a franchise?

Mr. Cowling: Perhaps under section 31.2—

Senator Everett: We are dealing with section 31.4, because that is what the amendment relates to. Can anyone come along and force the Kentucky Fried Chicken people, under 31.4 to give them a franchise? This, in fact, deals with exclusive dealing, tied selling and market restriction, which are requirements by the franchisor on the franchisee to deal with him or not to sell into another market, or to deal with someone else he designates.

Mr. Davidson: That is perfectly correct, senator. It is all imposed by the supplier. Market restriction, exclusive dealing, and tied selling are conditions imposed by the supplier. It does not work the other way; it is not the customer seeking to impose any restrictions on the supplier.

Senator Everett: I have to disclose an interest, because I do hold a franchise. I wanted to make the point for Senator Buckwold, who, I think, was concerned with the point that if someone held a franchise, under section 31.4, if the proposed amendment were not there, someone could come along and force the franchise. That is not the effect of 31.4. Whether or not it is the effect of 31.2, I do not know. The amendment which is proposed will not protect against that, because section 31.4 does not create that problem.

Mr. Cowling: That is not so important where you have a retail outlet, such as a restaurant, with the customers coming to the store. In that case, the franchisor could simply, as you say, refuse to grant another franchise within a certain area. However, where the franchisee is involved in some kind of distribution or selling, the contractual enforcement of the market restriction aspect comes into it.

Senator Everett: What the amendment would do, in effect, would be to allow the supplier to say, "You must buy your supplies from this person, and we get a kickback."

The Chairman: I do not think it has that effect.

Senator Everett: It does. That is what tied selling is.

Mr. Cowling: The only order the commission can make under section 31.4 is an order directed to all or any of such suppliers prohibiting them from engaging in such exclusive dealing or tied selling.

Senator Everett: Exactly. One of the things that section 31.4 seeks to prevent is a supplier being able to tell the franchise holder that he must buy his supplies of certain products from Mr. "X." Is that not so?

Mr. Davidson: That is correct.

Mr. Bertrand: Assuming all of the circumstances justifying the order are present.

Senator Everett: That is right. That is what it seeks to do. The effect of the amendment would be to allow, in the case of a franchise situation, the supplier or franchisor to do that very thing.

The Chairman: You have two categories. You have the franchise holder who may not be carrying on any business. He may simply grant a franchise to X, Y and Z under which they operate. That is how I understand franchise holders to operate. In other words, the franchise holder grants rights in certain territories on certain conditions.

Senator Everett: That is correct, and the bill says that under certain circumstances he will not be able to impose those "certain conditions." The three conditions are exclusive dealing, market restriction and tied selling. It does not mean that a person can come along and force him to expand his franchise operation.

The Chairman: No, he cannot be forced to grant franchises.

Senator Everett: That is, under section 31.4

The Chairman: I think it was Mr. Davidson who said that a supplier, under the penalty section, could demand from the franchise holder the right to have an assignment of the rights, and therefore avoid the exclusive feature.

Mr. Davidson: If I said anything like that, Mr. Chairman, it was unintended. That is not the case.

The Chairman: What is your specific answer, then, to Senator Everett's point that there is nothing in this bill—

Senator Everett: No, not in the bill; there is nothing in section 31.4 to force the supplier to grant additional franchises. Senator Buckwold was making the point that under section 31.4 somebody could come along and force the supplier to grant additional franchises, unless the proposed amendment was put into the bill. The point I am making is that section 31.4 deals only with market restriction, tied selling and exclusive dealing.

Mr. Cowling: I think that is correct.

Senator Buckwold: Yes, the point is well made.

Senator everett: That might be the case under section 31.2, if all the tests of section 31.2 are met, but that is another matter.

The Chairman: The illustration we received from many of the witnesses who appeared before the committee was as follows: "If we set up a dealership in the town of Port Hope and we decide on our assessment of the situation that that town, with its population and so on, and the adjoining territory could not afford a second dealership and provide all the necessary services required for a successful operation." Yet under section 31.2 they could have trouble if they refused to grant a dealership licence.

Senator Everett: They might very well, but your amendment does not affect section 31.2. Your amendment, excluding the franchise system, only excludes the operation of section 31.4.

The Chairman: If the amendment does not, it is intended to.

Senator Everett: Is it really?

Mr. Cowling: If market restriction is not allowed to some degree—and I am talking about a situation where there is plenty of competition with regard to the particular product—

Mr. Davidson: There would be an order made.

Mr. Cowling: I am not talking about a monopoly situation. If there is plenty of competition, is there not a danger that, if people are prevented from providing, to a certain extent, for market restriction in the franchise trademark area, it will certainly encourage manufacturers and suppliers to open their own outlets, or to buy up the independent distributors and carry on the business themselves? In that way they can do whatever they like. What they are doing now is something that falls in the middle, yet it allows a certain degree of decentralization and free enterprise to be maintained.

The Chairman: They could create subsidiary companies and then have the affiliation rule apply.

Mr. Cowling: That is right. I am suggesting that perhaps the bill will encourage that kind of thing to happen, and that would be a very bad thing. Senator Everett might want to comment on that.

The Chairman: If all these things we have been discussing have this effect the manufacturer may, instead of granting dealerships, decide that whatever entity is operating in a territory will be a subsidiary of his company. In that event, when you come under affiliation the rules that are in this bill would not apply.

Mr. Davidson: The manufacturer might indeed possibly do that, but it would require an enormous investment that he does not now have to put up. It would also be done only, presumably, because it was going to be a lot more economical for him to do it.

The Chairman: That is right.

Mr. Davidson: At the present time there is no restriction on the oil companies from employing exclusive dealing practices, and indeed they do use exclusive dealing practices, but they are moving into direct distribution; they do it for reasons that appear persuasive to them. It seems to me very unlikely that manufacturers will put up a large investment with no evident economies for them deriving from this new system. In fact, there is no evidence that manufacturers respond in this kind of way. The same argument was made when resale price maintenance was prohibited; the same argument was made, that if the manufacturer were not allowed to control the price he would simply open his own stores. In theory that is a possibility, but nobody did it.

The Chairman: I am talking here about a dealer who believes, like my illustration of Port Hope—this is not what I created; this is one that is stated here—that Port Hope will support only one dealership, having regard to the amount of competition in the area. Cobourg is not too far away, and other towns are not too far away. If somebody can come along and invoke the provisions of this bill another dealership could be forced in Port Hope.

Mr. Davidson: You could not force a dealership, Mr. Chairman. There is no possibility of forcing a dealership. There is a possibility that you might force the supply of a product, but there is no way you could force anybody to have a new dealership.

The Chairman: Let us talk about a Ford dealership in Port Hope. You assume that there is no room for two of them.

Mr. Davidson: You could not force Ford to give you a dealership. In very unlikely circumstances the manufacturers might be forced to give a supply of the product.

Mr. Cowling: Would not the commission's order be tantamount to a dealership agreement?

Mr. Davidson: First of all, there is not any possibility of an order being made unless all those four conditions are satisfied. If they are satisfied, then there would be the possibility of the product being supplied.

The Chairman: What condition do you say is not likely to be satisfied?

Mr. Davidson: I say it is unlikely that you could prove that the reason you cannot get supply is because of lack of competition in the market. You would have to show that not only General Motors, Ford, Volkswagen, and so on,

would not supply, but you would have to show that for some reason the Japanese would not supply you either. It is very unlikely you could show that you could not get supplied through lack of competition in the market. The reason is that the market is too small in your illustration. That is the reason you cannot get supplies. It is not because of lack of compatition among suppliers, because if you went to Toronto you probably could get a dealership.

Senator Everett: Could I ask counsel whether section 31.4 is a separate section?

Mr. Cowling: That is right.

Senator Everett: Therefore your amendment just applies to section 31.4?

Mr. Cowling: That is right.

Senator Everett: I gathered from the way you were talking that you were also intending that it would apply to section 31.2?

Mr. Cowling: No. Section 31.2 has been dragged into the discussion to answer the point you made where somebody is forcing somebody to grant a supply.

Senator Everett: You only intended it to extend to 31.2?

Mr. Cowling: That is right.

Senator Everett: Then all we are dealing with is the exclusive dealing, selling, and marketing restriction section?

Mr. Cowling: That is correct.

Senator Connolly: What amendment are you talking about when you are talking of this? Is this the minister's amendment that was moved in the other place? Have we got a specific amendment in the new sheets?

Mr. Cowling: Yes, we do, senator, it is on page 3 of the new sheets, down at the bottom of the page. It is 3.1.

Mr. Lewis: Mr. Chairman, I do not think we should overlook some of the comments which were made in the brief presented to us concerning the benefits which arise or result to consumers through franchise agreements. If I remember correctly, these were a standard of quality, which is very important, the availability of the product, the distribution system, and the price.

Senator Cook: And the reliability of the dealer.

Mr. Lewis: The reliability of the product.

Senator Cook: The reliability of the dealer.

Mr. Lewis: This whole distribution network is a very important factor in our country. We were proposing that such valid agreements should be exempted from this particular section—as affiliated companies are in the same line.

Senator Everett: If you want to be logical, you would have to exempt it from both sections, wouldn't you?

Mr. Lewis: That point was brought up in an earlier meeting, senator.

Mr. Davidson: As I mentioned, there were these two very thorough studies—on the distribution of farm machinery and on the distribution of service station products. The conclusions of both inquiries were that the competing manufacturers had a very difficult time getting into the market, getting distribution. Some dealers who wanted to buy elsewhere—because they thought they could buy on more favourable terms elsewhere—were precluded from buying other products than those designated by their suppliers. Particularly in the tires, batteries and accessories field in the service station business at the time, the oil companies would designate a tire manufacturer. Say "Imperial designated Goodyear," the Imperial dealers would have to buy Goodyear tires and they would pay what was called an overriding commission to Imperial Oil on the purchases made by the dealers. It was clearly in Imperial Oil's interest to have that arrangement. But the dealers sometimes saw opportunities to buy tires at better prices, but were precluded from doing so by their arrangements.

Senator Everett: There is nothing in this act which would preclude the franchiser from imposing standards of quality on those purchases.

Mr. Lewis: No, there is nothing in the act that would prevent that.

Senator Everett: So the franchise holder could go and get his supplies elsewhere, but he would still have to get them in accordance with the quality imposed under the terms of the franchise.

Mr. Lewis: I would believe so.

Senator Connolly: Mr. Chairman, are the witnesses resisting the amendment that we have at the bottom of page 3?

The Chairman: I understand that they are.

Mr. Davidson: Yes, because as I read the amendment that would exclude all franchise arrangements from the application of the market restriction, exclusive dealing and tied selling provisions.

Mr. Cowling: Bona fide franchise arrangements.

Mr. Davidson: The farm machinery people are bona fide franchise operators and so are the service station operators.

Senator Connolly: In substitution for this, are you urging the amendment proposed by the minister in the committee of the other place? Or have you dealt with the subject matter?

Mr. Cowling: The one dealing with food and the processing of food?

Mr. Davidson: The minister has tabled that and, as I understand it, the expectation is that that will be voted upon in the committee in the other place.

Senator Connolly: In other words, that agrees in part with the proposal made by this committee at the bottom of page 3.

Mr. Davidson: Yes, it does in the case of food and drink franchises.

The Chairman: The amendment on page 3, to which Senator Connolly refers, would enlarge the area of the amendment proposed by the minister.

Mr. Davidson: Yes, to cover all franchises.

Senator Connolly: Our proposed amendment covers all franchises. The minister's proposal is to restrict it to franchises in respect of food and drink.

Mr. Davidson: And only with respect to market restrictions, not with respect to exclusive dealing or tied selling.

Mr. Cowling: And there are other conditions, too. That is to say, the franchisee must contribute some element of labour and material to the processing of the product.

The Chairman: Would you continue, Mr. Cowling?

Mr. Cowling: On page 4 of the amendments which were distributed this morning, honourable senators, there is a new proposed section. Many of the briefs submitted were concerned about the procedure there would be on a hearing before the Commission. This was to some extent alleviated by one of the minister's proposed amendments in December, in which he did some rearranging of the wording and made it clear that the Commission could not make any finding until after the parties had been heard. The committee was in full agreement with that. However, if you look on page 1 of the amendments this morning, you see that those words with which the committee was in full agreement have been removed. The reason for that is that the committee has suggested a more comprehensive guideline on this whole subject of procedure before the committee, and the idea would be that you could remove those words in 31.2, if you had the provision that we find on page 4. I do not think that differs in principle at all with what the minister was suggesting. It just makes it a little clearer and, furthermore, it is in the act.

The Chairman: It spells it out.

Mr. Cowling: I am not suggesting that the wording of it could not be improved or polished up. It is just a suggestion.

Senator Cook: 31.2 would still read: "Where on application by the Director and upon proof by him."

Mr. Cowling: That is right. That would cover the burden of proof aspect. Then, on page 4 you would have other matters spelled out such as the right of the party against whom an order or recommendation is to be made to receive a copy of the application and a summary of the allegations in support thereof, the right to cross-examine any witnesses that the director produced at the hearing before the commission, and that he would himself have the right to produce witnesses and documents within a reasonable delay, if he needed a delay.

Subsection 2 on page 4 would give to the supplier, before the hearing, the right to have, for example, the subpoena powers which are given to the director under the act. This would give the supplier the right to use those powers in case he needed to subpoena somebody to the hearing.

Mr. Bertrand: Mr. Chairman, with regard to a lot of those suggestions—for instance, the burden of proof—I presume that before the commission any applicant, as before a court, has to prove his case. Perhaps it would be preferable to have that outlined and spelled out in the act. I do not think, though, that the fact of spelling it out will change what is already presumed to exist; but if, as a matter of convenience, you feel it is better that way, I would not have any objection, because that would simply concretize these things in the act.

Mr. Cowling: It would concretize what you intend to do anyway.

Mr. Bertrand: Not only what we intend to do, but what the normal reaction of the commission would be.

The other aspects, the right to be heard and to cross-examine witnesses, are just principles of natural justice, and I assume that if the commission were not to follow the principles of natural justice, that would provide an occasion for right of appeal, or right of review before the Federal Court and perhaps have the decision quashed. In any event, therefore, you are back to exactly where you were, that is, to the situation of a commission considering its own position.

Senator Connolly: Or the use of a prerogative writ, perhaps.

The Chairman: This makes it clear.

Mr. Cowling: The intention was not that these provisions would be substituted for all other rules of natural justice, if there are any. That is why it starts out saying, "For greater certainty."

Mr. Bertrand: And similarly, when you say, "To be furnished within two weeks prior to the hearings, with a written summary of the nature of the order—

Mr. Cowling: That is badly worded.

Mr. Bertrand: I would like just to draw your attention to the practice of the commission. When somebody is called for hearing purposes as a witness he will be presented always with about two weeks' notice of appearance before the inquiry. Secondly, at that time, when he comes before the commission to be heard as a witness, he can always apply for a stay, or a delay, and this was the case recently in one of our recent hearings before the commission. The person called as a witness applied and said he would like to have a delay of a number of weeks because he needed that length of time to study the documents and to be prepared for the hearing, and the commission granted him that delay. If the commission did not grant it that could also be interpreted as a denial of natural justice. I think what you are suggesting is that the commission's position with regard to this sort of thing be explicitly set out in the act. You are suggesting that the position the commission has taken and would undoubtedly take in any case should be made explicit.

The Chairman: Many members of the public derive comfort and confidence when things are stated explicitly, so I do not see how there could be any objection to that. If the provisions were not so and the commission did not allow these proceedings to be followed, they would create great problems of their own, politically and in public relations and may ultimately have to proceed in the fashion provided here in any event. However, I still feel that, having regard to the briefs submitted to us and the concept in the minds of members of the public, they wish to see explicitly in writing the power and the authority.

Senator Buckwold: I would like to revert to the four standards for granting an order forcing sale. I am now wearing the hat of the consumer and suggest to you that it would be very difficult to prove the provision contained in (b) that the product was in ample supply. Do you mean amply supply domestically, or anywhere in the world? I suppose a supply could always be found somewhere, but might be completely non-competitive.

The Chairman: Do you mean if the product is in ample supply in the sense that it is available to be imported?

Senator Buckwold: It may be in ample supply for import, but not at competitive prices.

Mr. Davidson: The section deals with a particular market and one of the questions is whether there is sufficient competition among suppliers of the product in that market. Therefore, when we come to the question of whether supply is ample, we are refering to the same market. The intention, which I believe has been captured, by the language, is to preclude any would-be buyer from invoking this section if the suppliers in the market were having to ration the supply and there was clearly a shortage. The words were intended and, I believe, succeeded with the intention, to preclude the would-be buyer from in those circumstances invoking the provisions to obtain supply, because there is a physical shortage.

The Chairman: Supposing the physical shortage existed only because available sources of supply at competitive prices existed abroad?

Mr. Davidson: If the would-be buyer could obtain supply, I read the section to say that the product is in ample supply and if he can get supply there is no shortage.

The Chairman: Anywhere?

Mr. Davidson: In the market.

The Chairman: The market could be in Toronto, in Canada, or in the United States.

Mr. Davidson: But if he is a dealer and he wishes to sell some imported goods, he has obviously not got the facilities to go to Japan to obtain those articles.

Senator Buckwold: Let us consider a practical situation: Last year it was almost impossible to buy sheets in Canada, which are made here by two manufacturers. They could have been purchased in the United States, but the cost would have been much higher.

Mr. Davidson: Yes.

Senator Buckwold: I am suggesting to you that the manner in which this provision is worded makes it impossible to protect the consumer so long as any manufacturer declared that the product could be obtained somewhere else, anywhere in the world.

Mr. Cowling: Does not "ample supply" in this provision, senator, mean that the commission would not order a given supplier to supply unless that supplier had plenty of the commodity to supply?

Senator Buckwold: I can see that interpretation, but that is sometimes difficult to prove if he is anxious to sell, or widen his distribution. I just put it in as a point which I think might be something that would hamper the activities of your group in trying to get the kind of competition policy which some of us would like to see.

The Chairman: Does it not mean, senator, that if you have two or three manufacturers who occupy the market, they have arrangements under which they direct, and they have agreements with customers under which they sell the quantities, which would about match their productive capacity? If you take that situation, how do you apply and interpret this section? You have manufacturing facilities with a capacity to supply the existing market at the time a supplier makes a complaint to the directors that he is not able to get supplies. Can you say that the inability to obtain adequate supplies is because of the inadequate degree of competition?

Mr. Davidson: No, clearly not. If you are in a period when manufacturers can supply only their existing customers, because they are right up to capacity, the reason they are unable to supply the would-be buyer is not because of the lack of competition, but simply because of the lack of capacity. They would have no problem.

The Chairman: The inability to obtain adequate supplies is tied in with the fact that it is because there is lack of competition.

Mr. Davidson: That is right.

The Chairman: Obviously when another supplier wants to come into the market, and the productive capacity for the product is not great enough to take care of another dealer or businessman, the commission could not make an order. As I interpret it—I would like to know if you have a different view—does it mean that the commission could make an order prorating supplies?

Mr. Davidson: No, it does not, Mr. Chairman, because they could not make an order at all if there is a shortage.

Senator Everett: Could I follow up that point? It is an interesting point. Let us assume that no one dominates the market, that there is ample supply, and the person seeking the supply goes to one and is turned down, he goes to another, then to another, and another. In a definable market area he is turned down by everyone who can supply. My question is, does he have a case, and, if he does, which supplier is tapped?

Mr. Davidson: In reply, it is not clear. One would have to investigate to find out whether or not refusal to supply was due to inadequate competition, because normally, if there is ample supply and suppliers are competing, someone would want to sell to a new customer.

Senator Everett: There have been cases where that has not been so.

Mr. Davidson: It is conceivable that they might be competing and they did not want the supply to die. In that event, you would not be able to prove that the reason he could not get supplies was because of insufficient competition. So that test would not be satisfied and you could not get an order. You would have to prove that the reason he cannot get supply is because of insufficient competition among suppliers. You would have to have evidence that that was the reason he could not get supplies. If you did prove there was not sufficient competition, the question of who would have to supply—one or more people could be ordered to supply—is a judgment the commission would have to make.

Senator Everett: The offended party could not come along and say "I want that fellow there."?

Mr. Davidson: No.

The Chairman: I can see some difficulties in making such an order. Certainly, you could not make an order where the production capacity is full up. Therefore, of necessity you would have to find a manufacturer or supplier who had some excess capacity. Otherwise, you are asking him to prorate. If he has agreements covering his

whole production, then those agreements come into effect. Is that not right?

Mr. Davidson: That is right. If there is any sort of shortage, the commission cannot make an order at all.

Senator Heath: On that point, Mr. Chairman, have we taken this legislation and put a stencil, if you like, over such things as state-run monopolies for purchasing? I am thinking in terms of the British Columbia Petroleum Corporation or the British Columbia Liquor Control Board, and that type of thing.

Mr. Bertrand: Mr. Chairman, we discussed the position of regulated industries last week. Do you want me to go over that again?

The Chairman: We dealt with that subject at the last meeting, Senator Heath, and it is in the transcript.

Senator Heath: Thank you.

The Chairman: We now move to the question of appeals from orders of the commission.

Senator Cook: Speaking of appeals, we will soon be out of time.

The Chairman: That is why I am pushing things along. Do you have any comment, Mr. Bertrand?

Mr. Bertrand: The suggestion is to provide for appeals on the merits, facts and law. The argument that might be put forward in that respect is that if we are getting away from specialized tribunals, the commission being specialized in this area, and going into a general court for a straight appeal, we might as well go to the court first.

Mr. Cowling: Would you say that the National Energy Board, for example, or the Canadian Transport Commission are specialized tribunals. I presume that they are in the same way that the Restrictive Trade Practices Commission will become a specialized tribunal, especially under this new reviewable practices jurisdiction. In the cases I have mentioned, of course, there are appeal procedures provided in respect of the facts of the case as well as law.

Mr. Bertrand: I am not all that familiar with the National Energy Board. Is there a cabinet override—

Mr. Cowling: Yes, and that is the nature of the appeal on facts. As to an appeal on law, it is directly open to the Supreme Court, if I remember correctly, although the new Federal Court Act may have altered the procedure in that respect somewhat. The point is that there is the possibility of some kind of factual review with respect to the important decisions that these bodies make, whereas, as far as I can determine, there is absolutely no such review provided for in the case of the commission.

Mr. Bertrand: In so far as appeals on questions of law are concerned, do you see much of a difference between an appeal on a question of law and an appeal under section 28 of the act?

The Chairman: Yes, all the difference in the world. If you are asking for my view, I think section 28 is a very inadequate source of authority. All you have to do is read it to realize that. That is why we have inserted this. We have dealt with section 28 before. It has always been said that there is a right of appeal under that section, but if you read it carefully you will realize that it is very limited. Really the body being appealed from would have to behave in the oddest manner one could possibly conceive.

Mr. Cowling: I think the Chief Justice of the Federal Court has said himself that it is not really an appeal. He described it in some other way.

Mr. Bertrand: Depending on the ground. I understand the first ground is that the commission has made a mistake in a point of law, has misinterpreted the law. What is the difference between saying that the Federal Court could review if there is a mistake in law and saying there is an appeal in law to a court?

The Chairman: Except that you could have your rights of appeal in one basket.

Mr. Cowling: I would agree, there may not be that much distinction on the straight legal side; I think I would concede that.

Mr. Bertrand: You have an appeal on a question of law, and then you only have a question of appeal on a question of fact.

Mr. Cowling: That is pretty important.

Mr. Bertrand: An interpretation of fact.

The Chairman: It may present all kinds of problems to say, "I appeal on a question of law under section 28 to the Federal Court, and I appeal under section so-and-so of this bill to the Federal Court on a question of fact." It may very well be that the court dealing with the appeal wants to have full opportunity to study the law and the facts to see how the facts have been applied and interpreted in relation to the law. I should think you would want to get before the same body to deal with the whole question, and therefore you should not split your rights of appeal.

Mr. Cowling: It seems to me that there should be some possibility of factual review, as it were, hanging over the head of the commission. It might not be invoked very often, but the mere fact it was there might have an effect on the way the commission administered its duties.

Senator Cook: You are not going to appeal on a question of fact out of pure whim, because if you do you are likely to be penalized by costs, and so on, so it has its own sanctions in itself.

The Chairman: That is right.

Senator Cook: The more and more boards you have, the more and more you extend the government, I think the more and more should innocent citizens be able to go to the courts. The court should be there all the time.

The Chairman: You have raised some questions on this, Mr. Bertrand. You have not indicated whether or not you think it is a good provision in the interests of those who may be affected by orders of the commission.

Mr. Bertrand: That is right, I have not indicated that.

Senator Macnaughton: Is that an answer?

The Chairman: You have not indicated that?

Mr. Bertrand: Right.

The Chairman: What I am asking is: do you feel you can indicate it?

Mr. Bertrand: My minister would have to decide that issue. My own personal feeling is that there are some appeals on some aspects under section 28 on a question of fact, if the commission had made some gross misinterpretation of the facts, or did not find the facts, or could not justify its finding.

Mr. Cowling: Wilfully, capriciously, or something like that.

Senator Cook: Perversely.

Mr. Bertrand: There are some aspects of the facts that could be reviewed independently of the act. There remains, as you pointed out, the situation where there is simply a disagreement. On the same facts found by both courts there is a disagreement on which conclusion to reach. In that case, how far should we go? Should we have a third court, a third decision? We already have two.

The Chairman: You start off with section 28, and it imposes too great a burden on any person who wants to appeal.

Mr. Bertrand: But some of the area of the appeal on fact would be covered by that.

The Chairman: Some but not all. I do not know that it would, having regard to the basis. What is the language they use?

Mr. Cowling: Paragraph (c) says:

> based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Mr. Bertrand: But you must say that some disagreement on the facts could be covered by that.

The Chairman: No. Your appeal would have to be based on an erroneous finding of fact that the board made in a perverse or capricious manner or without regard for the material before it. In other words, tu use an expression, they might have said "to h . . . with the fact."

Mr. Cowling: All the evidence said it was black but they said it was white.

The Chairman: How do you fit yourself into that? It would be utterly impossible?

Mr. Bertrand: I am very glad to hear that the commission will never make such a mistake, to be appealable on that one.

Senator Cook: Not the present commission, anyway.

The Chairman: With the personnel I have found, I would not think that was possible, so really it is the occasion of an appeal on fact, if I have to fit myself into that.

Mr. Bertrand: If we try to put the appeal in its proper perspective, in any event this is to be taken on the basis of fact, whatever it is. If we say it is taken to the commission, then it is an authority. If we say it is an appeal to the court, it is an authority also. A businessman himself would not be against or in favour of an appeal. To him what is important is the decision, no matter who is speaking. However, when we look at the legal profession, those are the people interested in having an appeal. I am not convinced that many of the briefs that outline the need for an appeal on the fact were not written by members of the legal profession where it is a primary concept.

Senator Cook: But when there is a need to appeal, there is a very great need.

Mr. Bertrand: But from the businessman's point of view the important thing is to get a decision.

Mr. Cowling: A lay member of the House of Commons committee the other evening was pressing very hard for an appeal. I do not think Mr. Ritchie is a lawyer.

Mr. Bertrand: I do not think so.

The Chairman: We have had laymen in our briefs saying they want a right of appeal. If they are not familiar with the law or legal procedures they see a great merit in having an escape hatch in whatever the decision is on the question at issue. But a lot of these briefs are written by lawyers.

Senator Cook: I do not think the courts should be shut out except for very clear and cogent reasons.

Mr. Cowling: Justice must be seen to be done, as they say so often.

Senator Macnaughton: Let us take the alternative and put it the other way. Let us have no appeals at all. Then we are stuck with any decision from any commission. That is not our system and I hope it never will be.

The Chairman: The commission itself should be the last to resist having any of its orders dealt with on appeal.

Senator Macnaughton: But even commissions make mistakes.

Senator Cook: Do you want the matter disposed of or do you want justice done?

Mr. Bertrand: I cannot help relating this section 28 with the similar type of provision that exists in England in matters of taxation, about the appeals from the commissioner taken to the court. The appeal there under the act is only on a question of law or on a mixed question of law and fact. It is never on fact alone. The commissioners are masters of fact. However that type of provision has been in force for a number of years now.

The Chairman: You are dealing with a subject matter that is entirely different.

Mr. Bertrand: I raise the point not because of the subject matter but because of the attitude of the tribunals, the courts, following that time. The courts over the years have developed a doctrine for jurisprudence about what is law and what is fact. When you look at those decisions, with the number of years that have followed, and try to make sense out of them, you reach the inescapable conclusion that when a court feels it has to intervene it will classify the matter as a question of law or a question of mixed fact and law.

The Chairman: I take it that your view is such that you would be personally opposed to the right of appeal we are proposing.

Mr. Bertrand: I think it would lengthen the procedure. If we are really serious about the right of appeal to the Federal Court, I would question the usefulness of the commission itself. What is the purpose of having the com-

mission if we must have all the facts reviewed and start all over again?

The Chairman: No, that is not the case. The basis of the appeal would be the transcript of the facts as presented to the commission and the commission's conclusions on those facts. The court would not be hearing the witnesses again. That would not be the basis for an appeal.

At any rate, all I am trying to do is ascertain your views. Your views are important to us and important in ways that you may not quickly realize. We have to make an assessment of how we think the provisions of this act are going to be administered, and what approach those who are in charge will take. You are the one who is going to be the director; therefore, it becomes important that we determine how we think the procedures are going to be and what the attitudes are going to be. In saying that, I intend no reflection on you.

We must weigh all these things. When we are told not to ask for an appeal on the facts, my own feeling is that that in itself would support my view that I would want an appeal. There may not be many appeals, but the right should be there.

Senator Cook: The right should be there starting off. It would be curtailed in the future, if there were abuses.

The Chairman: The courts have a very effective way of assessing costs.

Senator Macnaughton: I assume you make that last statement on the basis of your many years of trial experience.

The Chairman: I have had a lifetime of experience in courts; I have had years of litigation and years of reviewing legislation here. I always get bothered a little bit when I find the answer being made: There is no reason for appeal—in other words, that the commission would be a useless body to give this responsibility to if there were to be an appeal from its order. Frankly, that upsets me, not that that is too important so far as you are concerned. But it does affect my viewpoint.

Mr. Bertrand: Mr. Chairman, you must realize that in matters where there is to be an appeal the decision rests with the minister.

The Chairman: Well, all you had to say to me in the first place was that this was a question of policy, and I would have said, "Mr. Director, you don't have to make any further answer."

Mr. Cowling: I think we can take it that that has been said, Mr. Chairman.

The Chairman: Then we do not ask you any more questions on it. We have just told you what our viewpoint is.

Senator Macnaughton: Mr. Chairman, it has been useful to be able to talk to the Assistant Deputy in this way.

The Chairman: Yes.

Senator Machaughton: It has been a free-wheeling discussion and exchange of views, and that is helpful.

The Chairman: I do not think our attitude would be any different, even if the minister made the statement.

Senator Cook: Mr. Chairman, I think we have had a hard morning's work. If it is in order, I would move the motion of adjournment.

The Chairman: I think a motion to adjourn is in order.

I think we have finished practically everything of importance. There may be one or two things that you may wish to speak to me about, Mr. Bertrand, that we have not been able to develop, but I cannot have these people go hungry, or have you go hungry. Furthermore, there is a motion to adjourn, which is not debatable, and so we have to adjourn.

Senator Macnaughton: We could say thank you to our witnesses.

The Chairman: Yes, indeed.

The Committee adjourned.

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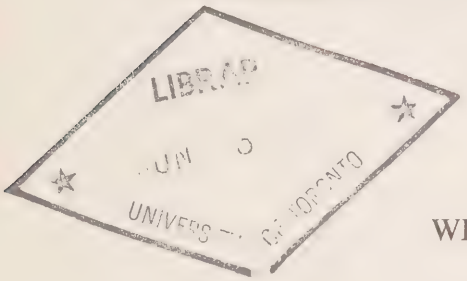
THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable ALAN A. MACNAUGHTON, P.C., *Acting Chairman*



Issue No. 36

WEDNESDAY, APRIL 30, 1975

Complete Proceedings on Bill C-13, intituled:

"An Act to amend the Northern Canada Power Commission Act"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

28846—1

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

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Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macdonald (*Cape Breton*)
Cook	Macnaughton
Desruisseaux	McIlraith
Everett	Molson
*Flynn	*Perrault
Gélinas	Sullivan
Haig	Walker—(20)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, April 23, 1975:

"Pursuant to Order, the Senate resumed the debate on the motion of the Honourable Senator Bourget, P.C., seconded by the Honourable Senator Petten, for the second reading of the Bill C-13, intituled: "An Act to amend the Northern Canada Power Commission Act".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Bourget, P.C., moved, seconded by the Honourable Senator Petten, that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative"

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, April 30, 1975.
(49)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade & Commerce met this day at 9:30 a.m.

SUBJECT: Bill C-13 "An Act to amend the Northern Canada Power Commission Act"

Present: The Honourable Senators Barrow, Beaubien, Buckwold, Connolly, Cook, Desruisseaux, Flynn, Haig, Laird, Macdonald (*Cape Breton*), Macnaughton, Molson and Walker. (13)

Present, not of the Committee: The Honourable Senator Cameron. (1)

Upon motion of the Honourable Senator Connolly, the Honourable Senator Macnaughton was elected *Acting Chairman.*

WITNESSES:

Department of Indian & Northern Affairs:

Dr. Pierre E. Côté, Senior Adviser, Northern Affairs Program.

Mr. J. F. Parkinson, Member of the Commission.

After discussion, and upon motion of the Honourable Senator Laird, it was *resolved* to amend Clause 1(2) of the said Bill. (The full text of the amendment appears by reference to the Report of the Committee immediately following these minutes).

The question being put, it was *resolved* to report the said bill as amended.

At 10:45 a.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, April 30, 1975.

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-13, intituled: "An Act to amend the Northern Canada Power Commission Act", has in obedience to the order of reference of Wednesday, April 23, 1975, examined the said Bill and now reports the same with the following amendment:

Page 1: Strike out lines 22 to 27, inclusive, and substitute therefor the following:

"(7) A meeting of the members of the Commission may not be held unless

(*a*) notice of the meeting is given to each member of the Commission at his ordinary place of residence one clear day before the meeting; or

(*b*) all the members of the Commission are present and waive notice of the meeting."

Respectfully submitted,

Alan A. Macnaughton,

Acting Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, April 30, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-13, to amend the Northern Canada Power Commission Act, met this day at 9.30 a.m. to give consideration to the bill.

Senator Alan A. Macnaughton (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, I have to report that our chairman, Senator Hayden, is ill, but he is on the road to recovery and should be here next week.

This morning we have only one bill to consider, and that is one to amend the Northern Canada Power Commission Act. We have as our witness Dr. Pierre E. Côté, Senior Advisor, Northern Affairs Program, Department of Indian and Northern Affairs, and he has with him Mr. J. F. Parkinson, member of the commission, and who is also attending as a witness.

Mr. Côté, do you have a short explanation of this bill?

Dr. Pierre E. Côté, Senior Advisor, Northern Affairs Program, Department of Indian and Northern Affairs: Yes, Mr. Chairman. I might complement the remarks made in the Senate by Senator Bourget with a few introductory remarks, and then go on to a very brief review, clause by clause, of the amendments proposed in the bill.

I might first mention, honourable senators, that contrary to the appearance of the name, the Northern Canada Power Commission is not a regulatory body and is in no way similar to the Canadian Transport Commission, but is a (C) type crown corporation, an agency-type corporation. Its purpose and function is to generate, transmit and distribute electrical power north of the 60th parallel. It has 57 communities to which it distributes or supplies power, to be more precise, and as things stand prior to the passage of this bill the supplying of power to each of these 57 communities is to be done individually and on a non-profit basis for each community. North of the 60th parallel it generates 80 per cent of the power, and it also has the possibility of handling other utilities such as water, heat and sewage in particular and this is done at Frobisher and Inuvik.

Two or three historical notes. The commission was formed in 1948 by act of Parliament. You may recall that this was due to the need on the part of the Giant and Ry-con Mines in Yellowknife needing power, and the question of building a hydro site on the Snare River. They needed assistance, and the first purpose of the commission was to build this site and supply both the town of Yellowknife and the mines.

Senator Connolly: Is the Snare River site the only source of power?

Dr. Côté: It was at the time of inception. Today there are five hydro sites and something of the order of 50 thermal generating sites spread throughout the north.

In 1952 the act was revised, mainly to include the Yukon and to make a few housekeeping changes. In 1956 there was a new revision of the act under which the name was changed from that of the Northwest Territories Power Commission to the Northern Canada Power Commission and that was mainly a housekeeping change. Since 1956—and that is 19 years ago—there have been no changes until the recent one. The present bill has had a somewhat varied career in that it went through four different stages—Bill C-193, Bill C-3, Bill C-31 and the most recent, Bill C-13, which happened to be the lucky number in that it passed in the House of Commons in April, 1975.

This bill has only two substantial changes, but there are quite a few housekeeping changes, and these housekeeping changes are mainly related to the updating of the bill to fit in with the Financial Administration Act.

If it is your pleasure I could review the bill clause by clause and make just a few remarks.

Senator Buckwold: Why not give us the two major changes so that we can keep them in mind?

Dr. Côté: All right. The first is in clause 1 which increases the membership of the commission from three to five, and these two added members are to be nominated by each of the northern territories. This will have the effect of giving more northern input. I believe you are familiar with the fact that recently the minister named Commissioner Smith as the new chairman of the NCPC, and that means that with these two additional seats for northerners there will be altogether three northerners on the commission.

Senator Molson: Are they paid?

Dr. Côté: Normally they are not paid. If they are from the private sector, they get an honorarium for each meeting of $150, and they are paid for their expenses. This is part of the amendment that comes in under clause 1 to clarify the point that expenses are to be paid to members of the commission. The other more substantial change is in clause 4.

As I mentioned to you a few minutes ago, at present there are 57 plants, and the commission must work on a non-profit basis, and this must be done on the basis of each of the 57 plants, whether at Tuktoyuktuk or Lake Harbour, where they have to close the books on a yearly basis or otherwise they have to raise the rates. Now they intend forming two, three or perhaps four zones, but a minimum of two, one zone being for the Yukon and one or more zones for the Northwest Territories, and the rates will be uniform within each given zone.

Those are the two substantial changes.

Senator Cook: I wonder, Mr. Chairman, since we had a very clear explanation of the bill in the Senate, and since the two major changes have been gone over, if we are really interested in the housekeeping items. Do we have to go through them?

The Acting Chairman: It is up to the committee, but I would not think so; they are consequential changes.

Senator Walker: We have had second reading here, we have gone into detail, and what you have said so far is very helpful, particularly what you are about to tell us now about the rate changes. Would you just go into that now?

Dr. Côté: I do not know that there is very much to add to what I have said.

Senator Walker: I mean the reason for the rate changes.

Dr. Côté: The reason for the rate changes is based on the fact, as I mentioned a minute ago, that they now have 57 different areas that have to break even on a yearly basis, and it means that, in effect, they have something similar to 57 different businesses. This makes it very unwieldy. They are heading towards the system concept, similar to that used by the Ontario Hydro, Quebec Hydro or Hydro Manitoba. It may not be possible to do that in the north, because you have some remote areas, for example the eastern Arctic, where conditions are very different from conditions in the south-west in the vicinity of Yellowknife, Hay River, and so on, where you have greater concentrations, where you do have hydro power and where you have a grid. This will also allow them to develop a grid system, with rates that are more equitable.

Senator Desruisseaux: Just as a matter of curiosity, are the rates comparable to some of the rates we have now in other places?

Dr. Côté: Certainly Senator, the rates vary. In the Yukon, for example, at Yellowknife, the rate is lower than at Montreal, Toronto, Brandon, Oshawa or Red Deer, nearly all of the larger centres.

Senator Desruisseaux: Who absorbes the difference?

Dr. Côte: It is accomplished by a series of subsidies. These are not governmental subsidies, but at the Commission one must make a distinction. However, it is not from the Consolidated Revenue Fund.

The government consumers in the north pay at a much higher rate than do the private consumers, and that is the main assistance that the private consumer gets.

Senator Laird: Mr. Chairman, it might help the cause if at this time, because some astute member of this committee—and they are all astute—is going to discover a couple of discrepancies in clause 1, to move an amendment which has already been approved by the department, and by the minister, in particular; so that if members of the committee will turn to clause 1, and then move down to subclause 2, I will draw to your attention two things. The first is that the use of the word "quorum" there is improper. What is meant is "a meeting", of course. The second discrepancy is further down, where there is reference to "twenty-four hours' clear notice". It was felt that it would be better to make that "one clear day's notice", because, as you know, there is a difference.

I move the following amendment to clause 1(2):

"(7) A meeting of the members of the Commission may not be held unless:

(a) notice of the meeting is given to each member of the Commission at his ordinary place of residence one clear day before the meeting; or

(b) all the members of the Commission are present and waive notice of the meeting."

Senator Connolly: Could I ask the mover about this amendment? Does he know where the members of the commission live? This is a big territory. Can they all be brought together on 24 hours' notice? I am putting my question to the sponsor of the amendment.

Senator Laird: And I, in turn, am going to ask the witness.

Dr. Côté: There are two members who live in Ottawa. The third one lives in Whitehorse. Two additional members will be named from the north, so we can presume that one will be from Whitehorse and the other from Yellowknife.

Senator Walker: That is not much notice.

Dr. Côté: It says, "a minimum of". "One clear day" would mean that they would get the notice on one day, have the clear day, and then meet the following day.

Senator Connolly: Can they get there from here?

Dr. Côté: It is possible.

Senator Desruisseaux: Is it not possible to say, for instance, three clear days?

Dr. Côté: This was a matter that was discussed in the house. One side, I believe, preferred three clear days, and the other side, the mover of the amendment, was insisting on keeping it down to the minimum. The main purpose of this was to make sure that you could not have a cabal; you could not have a little meeting of two or three members, on the side, without notification to the others.

Senator Walker: It looks to me as if that is one way you could have a cabal; that is, if you just give one clear day's notice, the people down here could turn up and do their stuff without some of the more important members having a chance to be present.

The Acting Chairman: Honourable senators, I understand this amendment originated with Mr. Nielsen. Is that correct?

Dr. Côté: That is correct, yes.

The Acting Chairman: I understand also that the amendment has been redrafted by the Minister of Justice and his departmental officials. It is acceptable to your minister and to Mr. Nielsen, Dr. Côté. Is that right?

Dr. Côté: That is correct.

Senator Buckwold: I certainly support this wording. If you gave any further extension of time you would make it very difficult, in the case which often happens in a power commission, of some kind of emergency meeting. If you were to make the time three days, the situation could have deteriorated during that period. There is also notice of waiving, which is, I think, good. So, I believe, in the interests of efficiency, this is the best way to do it.

Senator Connolly: You say that three commissioners live in the north. Do they live close to each other?

Dr. Côté: Well, there are two in Whitehorse. Two are as yet unnamed, of whom we are assuming that one will be named from Whitehorse and the other from Yellowknife. In those circumstances you would have two in Whitehorse and one in Yellowknife.

Senator Connolly: How long does it take to travel between the two places?

Dr. Côté: By private plane, a matter of two hours. By regular plane you have to come through Edmonton.

Senator Molson: Has there ever been a snow storm lasting longer than 24 hours in that area?

Dr. Côté: Yes, surely; but it was the emergency angle mentioned by the honourable senator that was the main reason why in the house it was cut back from 3 days to 24 hours.

Senator Buckwold: Is it possible, in order to allay the kind of fears that we are hearing expressed, to have some sort of telephone or radio communication with a member if he finds it impossible to be there? In other words, so that somebody would actually, legally, have to communicate with him, if possible.

Dr. Côté: Well, he would get his message by telephone or telegraph. If he cannot come down and wishes to express a given view, he certainly can do so, and that frequently does happen.

Senator Buckwold: I personally served on a power board, I know the problems that arise and I know how often an emergency meeting is called. It was usually handled by telephone, the members were communicated with and were asked whether it was okay to take this particular action. That is how it was done, in a fairly widespread province.

Senator Connolly: But you are doing it there without really having a legal meeting. What we are concerned about here is putting a provision into the act that is going to hold up legally. I know that the informal arrangement works fine when everyone agrees; it presents no problem; but it is different if you have a real problem and there is a difference of view and people cannot get to the meeting. You see, the second part of this amendment says:

> (b) all the members of the Commission are present and waive notice of the meeting.

Of course, if you can get them there that is fine, but if you cannot get them there and have to do something within the legalities of the situation, you are in a bind.

The Acting Chairman: We have Commissioner Parkinson here and perhaps he would have a comment on that.

Mr. J. F. Parkinson, Member of the Northern Canada Power Commission: Mr. Chairman, what the honourable senators have said already has a certain validity. I should point out that the requirement is a minimum of one day, to prevent the sudden calling of a minority of members. Normally one gets a week's notice. In my experience, one gets lots of notice. It is only in the rare, sudden instance that one would really take recourse to the one-day minimum requirement. I think you would all agree that if the emergency is strong enough and severe enough to require that only one day's notice be given, then that is legitimate and sensible and it would be foolish to waste three or four days, which is the normal period of notice.

Senator Molson: What is the quorum?

Dr. Côté: The quorum is not mentioned in the act. As a matter of fact, it was removed from the act because it comes under the Canada Interpretation Act. It is the next whole number above half—in this case, three.

Senator Connolly: What do the by-laws provide about regular notice of meetings?

Dr. Côté: I do not know that there is a specific notice provided in the by-laws.

Senator Connolly: Not in the by-laws?

Mr. Parkinson: In the 20 years in which the commission has been in operation, I think the commission has never had difficulty of that kind. Notice is usually as much as a week or ten days and that is to have the meeting to accommodate all the members, to get as many members present as possible. I do not believe that there is any formal by-law to that effect.

The Acting Chairman: Honourable senators, you have heard the amendment. Will the amendment carry?

Senator Walker: Is it seconded?

Senator Buckwold: I second the motion.

The Acting Chairman: It is seconded by Senator Buckwold—although I understand we do not need a seconder. That is just to make it doubly sure. Shall the amendment carry, honourable senators? Those in favour? Those against?

The amendment is carried.

Senator Connolly: Mr. Chairman, I think it is all right to do it this way at this time, but I do not think this committee really likes this kind of proposal and, in the interests of the commission, it should be reconsidered. As a matter of fact, I would think that the matter of notice of meeting is a matter that could very well be put into the by-laws, and leave the responsibility to the commission to decide what notice should be given, even for emergencies.

Senator Desruisseaux: I have the same views, Mr. Chairman. My reaction is that it does not appear fair.

The Acting Chairman: Honourable senators, are there any further questions?

Senator Walker: On what?

The Acting Chairman: On the bill.

Senator Walker: Yes, Mr. Chairman. On page 2, clause 4, dealing with section 10 of the act, in subsection (3) you are protecting against what the commission might do, are you not, by stating at the bottom there that the "schedules shall not be less than the estimated cost to the Commission, as determined by it, of supplying the public utility in the rate zone . . ." You are protecting the public by insisting that at least the rates should be not less than the cost. Is that correct?

Dr. Côté: That is correct.

Senator Walker: Has that not always been so?

Dr. Côté: That has always been so, but on a plant-by-plant basis. There were 57 different rates and now there will be as many different rate schedules as there are zones. They may vary somewhat within zones, but this is exactly the same as it was before, except that now instead of saying by on a plant-by-plant basis they are saying on a rate zone basis.

Senator Walker: Which is more simple.

Dr. Côté: Yes, it is simpler and will provide for a certain amount of equalization.

Senator Molson: Mr. Chairman, may I turn to page 4, clause 7? This is one of those cases where considering a bill here without any explanatory notes is not really very satisfactory. May I ask the witnesses, Mr. Chairman, what the changes in section 15 of the act are as a result of this amendment in clause 7?

Dr. Côté: Mr. Chairman, this actually is just an updating of the bill to fit in with the Financial Administration Act. Earlier, all payments were made with approval of the Governor in Council. With the change in the Financial Administration Act in the 1960s, these Governor in Council responsibilities were passed on to the present Treasury Board.

The other change in this particular section—which, by the way, is referring to the unappropriated moneys in the Consolidated Revenue Fund, in other words, additional money if they run short of their budget within a given year—changes the word "advances" to "loans".

A further change in here is, I think, an improvement. Hidden in the text of this long paragraph is the fact that these additional loans, on top of the budget of unappropriated funds, can total only $1 million at any given time. This is pulled out as a separate subsection (3).

Senator Molson: It does not exist under section 15?

Dr. Côté: It was hidden in the text. It did exist. There is no change in substance. The only real change is in changing the word "advances" to "loans" and changing "Governor in Council" to "President of the Treasury Board".

Senator Buckwold: I was going to ask about the $1 million. I did not realize it is unappropriated money. In addition to this, the major capital expenditures that require long term financing are financed by the Government of Canada, I presume?

Dr. Côté: That is correct.

Senator Buckwold: And these would be substantial?

Dr. Côté: Yes, they are.

Senator Buckwold: What would be the net debt presently?

Dr. Côté: I do not know at the moment.

Mr. Parkinson: It is probably a little in excess of $100 million, because that is the value of the total capital investment.

As to the capital investment today, if I may answer this question, Mr. Chairman, with the larger hydro plants being put up in the north and with inflation, capital investments today are running as high as $30 million per annum.

Senator Buckwold: Is the rate structure such that the complete amortization of capital and interest is covered?

Mr. Parkinson: Yes.

Senator Buckwold: How long a period of time is the pay-out of these loans?

Dr. Côté: That varies with each project. Some may be 40 years, others 30, others 20, others 15.

Senator Buckwold: What policy do you have in the far North with respect to supplying the major power requirements for oil exploration and that sort of thing? Are you expected to supply the power or is it left to the companies to fill their own electrical energy needs?

Mr. Parkinson: First, let me say that the single biggest industry in the north requiring electricity, and which gets its electricity from this commission, is the mining industry. In the case of a new mine about to establish itself, you can be sure that that mine, knowing that the NCPC is paramount in the region in the production of power, would discuss the possibility of the commission's providing the power supplies. Of course, senator, you know that the government has announced that its objective for this commission is that the commission shall be the main producer-generator of power in the north from now on. It is still the biggest, but it is not the only supplier. There are some private enterprises. Normally, an enterprise would discuss the need for power with the commission and in normal circumstances the commission would, assuming the economics are appropriate, set about providing that power having regard to the fact that it is also going to serve the town sites and possibly use that same power to serve adjacent communities now operating on thermal power, on diesel plants. That would be the normal process.

Senator Buckwold: Have you ever rejected a mining company's application?

Mr. Parkinson: Not that I recall.

Dr. Côté: No, I do not think so.

Senator Buckwold: Have you ever put in a plant the requirements for which have petered out, leaving you with a plant which is not useful?

Dr. Côté: That has not happened. I should mention that thermal plants—diesel plants—do shift from one area to another, but that is for upgrading. I cannot think of a case where there has been a downgrading of a given plant, as you suggest.

Senator Buckwold: I am sure you can tell from the questions that we are all interested in the north and realize the kind of power requirements that are essential for the north. It is my guess that before very long the Government of Canada will be investing hundreds of millions of dollars in the Northern Canada Power Commission in order to meet those needs.

Dr. Côté: The budget forecast predicts that in the next six years there will be one-third of a billion dollars in capital expenditures, senator.

Senator Buckwold: I understand that the members of the commission are paid an honorarium. Is that provided for in the original act?

Dr. Côté: No, it is not provided in the act itself. It has been cleared through the Governor in Council.

Senator Buckwold: What you say in the bill is that the members of the commission may be paid "such reason-

able travelling and living expenses," which, in my interpretation, would not include an honorarium.

Dr. Côté: It may be stretching a point, but according to clause 2 of the bill:

> 5. The Commission may employ such officers and employees as it considers necessary to conduct the business of the Commission at such rates of remuneration and on such terms and conditions of employment as the Commission may determine.

However, the business of honorarium has been cleared through a submission to the Governor in Council.

Senator Buckwold: Are you satisfied that that is sufficient authority?

Dr. Côté: I believe it is, yes. Actually, it falls under the Financial Administration Act and it applies to several different corporations.

The Acting Chairman: And it has been paid.

Dr. Côté: As a matter of fact, it is a very recent request, and it comes under the Financial Administration Act.

Senator Buckwold: No one would object to your receiving the honorarium, but we should make sure that it is legal.

Senator Desruisseaux: What was the actual revenue of the Commission last year?

Dr. Côté: By definition the commission has no profit as such, but the gross sales amounted to $18 million in 1973 and $24 million in 1974.

Senator Walker: How would you amortize a debt of $100 million with sales of only $18 million?

Dr. Côté: Very slowly.

Senator Walker: Are you sure you are doing it?

Dr. Côté: The other day the President of Air Canada mentioned how they were experiencing difficulty with the huge payments they have to make on principal and interest. Similarly, the Northern Canada Power Commission in a smaller way is faced with the same problem. Its greatest expense is interest on principal, but it is meeting that expense and making the payments on a yearly basis.

Senator Desruisseaux: What is the present population of the territories covered by the commission?

Dr. Côté: I would have to "guesstimate" that.

Senator Desruisseaux: That is all we need.

Dr. Côté: I would say in the order of 30,000.

Mr. Parkinson: I believe it is 30,000 in the Yukon alone. I cannot recall the figure for the Northwest Territories.

Dr. Côté: It would be considerably more.

Senator Buckwold: It would be about 40,000. Yellowknife alone is 12,000 or 13,000.

Dr. Côté: Right.

The Acting Chairman: Honourable senators, if there are no further questions, shall we report the bill as amended?

Hon. Senators: Agreed.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable ALAN A. MACNAUGHTON, P.C., *Acting Chairman*

Issue No. 37

WEDNESDAY, MAY 21, 1975

First Proceedings on Bill C-32, intituled:

"An Act to impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain petroleum costs and to regulate the price of Canadian crude oil and natural gas in interprovincial and export trade."

(Witnesses: See Minutes of Proceedings)

28848—1

THE STANDING SENATE COMMITTEE ON
BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker—(19)
Haig	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 20, 1975.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Hays, P.C., seconded by the Honourable Senator Macnaughton, P.C., for the second reading of the Bill C-32, intituled: "An Act to impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain petroleum costs and to regulate the price of Canadian crude oil and natural gas in interprovincial and expert trade".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Hays, P.C., moved, seconded by the Honourable Senator Macnaughton, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, May 21, 1975
(51)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: *Bill C-32 "Petroleum Administration Act".*

Present: The Honourable Senators Beaubien, Buckwold, Cook, Desruisseaux, Flynn, Hays, Laird, Lang, Macnaughton, Molson, Sullivan and Walker. (12)

Present, not of the Committee: The Honourable Senator Heath (1).

Upon motion of the Honourable Senator Molson, the Honourable Senator Macnaughton was elected Acting Chairman.

WITNESSES:

TransCanada Pipelines:

Mr. James M. Cameron, Executive Vice-President; and
Mr. John K. Archambault, General Counsel.

Parliamentary Secretary to the Minister of Energy, Mines and Resources:

Mr. Maurice Foster, M.P.

Department of Energy, Mines and Resources:

Mr. James T. Lyon, Senior Legal Adviser.

The witnesses from TransCanada PipeLines read to and explained to the Committee two amendments respecting Section 53(1)(*b*)and adding a new Subsection (4) to Section 64. Following discussion thereon, consideration of the above amemdments was deferred to a later date.

Following discussion and explanation given by Mr. Lyon, the following amendments were duly move and *carried.*

1. *Page 2:* Strike out lines 23 and 24 and substitute therefor the following:

"for delivery outside Canada or for use as bunker or aircraft fuel outside"

2. *Page 15:* Strike out line 9 in the French version and substitute therefor the following:

"jours de sa signature ou, si le Parlement ne"

3. *Page 20:* Strike out line 27 in the French version and substitute therefor the following:

"gaz, le fait de l'utiliser comme"

4. *Page 22:* Strike out line 41 in the French version and substitute therefor the following:

"doivent être vendues ou livrées dans les régions ou les"

5. *Page 23:* Strike out line 6 in the French version and substitute therefor the following:

"jours de sa signature ou, si le Parlement ne siège"

6. *Page 42:* Strike out line 29 and Substitute therefor the following:

"95.(1) Part I of this Act shall be deemed"

Page 42: Immediately after line 31 add the following:

"(3) Sections 53 to 65 do not come into force until such time as the Governor in Council acquires power under subsection 51(1) or 52(1) to prescribe prices at which various kinds of gas to which Part III applies that are produced, extracted, recovered or manufactured in a producer-province within the meaning of that Part are to be sold on or for delivery in any areas or zones in Canada and outside that province or at any points on the international boundary of Canada."

At 10:45 a.m. the Committee deferred further consideration of the said Bill until 9:30 a.m., Wednesday, May 28, 1975.

ATTEST:

Frank A. Jackson,
Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Wednesday, May 21, 1975

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-32, to impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain petroleum costs and to regulate the price of Canadian crude oil and natural gas in interprovincial and export trade, met this day at 9:30 a.m. to give consideration to the bill.

Senator Alan A. Macnaughton (*Acting Chairman*): in the Chair.

The Acting Chairman: Honourable senators, I have to report that the chairman is indisposed, but expects to be here next week. I understand that officials of TransCanada PipeLines Limited asked the chairman if one or two witnesses could be produced on behalf of TransCanada PipeLines in connection with Bill C-32, and, it being a public bill, the chairman, with your consent, felt that every opportunity should be provided to hear witnesses for and against.

Should the department require further time to answer any arguments adduced, the committee will then have to consider whether it will proceed with the bill or adjourn consideration to a later date, although that may not be necessary.

I further understand that the department has six amendments, five dealing with translation corrections in the French version and one to improve the English version.

I should also mention that by sheer accident I was sitting beside Senator Hays, the sponsor of this bill in the Senate, and my name appears as seconder of the motion for second reading of Bill C-32. I want to declare that I have no interest whatsoever in this bill. I do not even know the parties. I think that statement should be put on the record.

Am I correct in assuming that the representatives of TransCanada Pipelines Limited are here and wish to be heard?

Mr. James M. Cameron, Executive Vice-President, TransCanada PipeLines Limited: Yes, Mr. Chairman.

The Acting Chairman: Mr. Cameron is Executive Vice-President, and Mr. Archambault is Vice-President and General Counsel for TransCanada PipeLines Limited. Mr. Cameron, do you have a statement or do you wish to make some remarks?

Mr. Cameron: Yes, Mr. Chairman, if I may. I may say at the outset that we have two amendments to propose for your consideration. I understand they have gone over to the Department of Justice for scrutiny there, to see how they would fit into the scheme of things. Hopefully they will be back and we will hear from them before too long.

In our view, both our proposed amendments are entirely within the spirit and intent of the bill. However, in our opinion they are required to avoid problems that could arise for transmission companies under the present wording. I should add that our comments relate only to Part III, with respect to gas. We have nothing to say about the oil provisions.

The first proposed amendment relates to clause 53(1) which presently provides that:

> No person shall
>
> (a) move any gas outside its province of production for consumption elsewhere unless the price paid to acquire that gas is a price approved by special or general orders of the Board.

The board there is the National Energy Board.

Under paragraph (b):

> No person shall—
>
> (b) acquire from within a producer-province any gas for consumption outside that province unless the price paid therefor is approved by the Board.

Paragraph (c) is not material to our problem.

It will be noted that there is no prohibition against the making of a sale of gas in a producer-province for consumption outside that province. This creates a problem for transmission companies, such as TransCanada, who purchase gas from producers and transport that gas to markets outside the producer-province. By contract, TransCanada is required to pay the producer the price applicable under the contract, and on November 1, 1975, as I am sure you all know, that price will be $1.15 per mcf.

Under clause 53(1)(b) as presently worded, we would clearly be prohibited from acquiring gas under the contract and removing it from the producer-province. The producer, on the other hand, is not prohibited from selling the gas, and may well take the position that TransCanada must honour its obligation to purchase the gas, whether or not we are at a later date able to remove that gas from the province. They say, "You must buy the gas. It is your problem after that what you do with it. Sell it in Alberta as petro-chemical feedstock if you will." It is to avoid that suggestion that we have put forward this first amendment, which proposes that subsection (1)(b) would, as amended, read:

> No person shall—
>
> (b) sell, purchase or acquire in a producer-province any gas for consumption outside that province unless the price paid therefor is approved by the Board; or

The difference is that as presently worded the clause simply says that no person shall "acquire from within a producer-province." We are adding the words "sell, purchase."

I would point out to honourable senators that in the oil section, Part II, clause 24, the bill prohibits the sale, acquisition or purchase. I think our recommendation would make the gas section parallel completely the provisions in the oil section.

Senator Molson: There the price paid is no greater than clause 24.

Mr. Cameron: That is true. It is a variation in that sense, but the prohibition nevertheless remains against the act of selling the product unless it corresponds with or does not exceed a price which has been prescribed.

Senator Molson: I do not see why they should not be the same.

Senator Buckwold: Is there any constitutional problem in this so far as concerns the relationship with provinces and inter-provincial trade? Would this be one of the reasons this difference is here?

The Acting Chairman: I may say, honourable senators, the departmental officials are here and are listening to this. If they require time to answer, I am sure you will give it to them. If they do not require time, they can answer later this morning.

Senator Buckwold: Mr. Cameron may have some comment.

Mr. Cameron: I cannot imagine that there would be any different constitutional question raised so far as gas is concerned from those that apply in the case of oil. I would think the situation is the same.

Senator Buckwold: I am trying to figure out why they would differentiate. There must be some reason. Is it because gas is acquired and stored whereas oil, is purchased?

Mr. Cameron: Frankly, I know of no reason for making the distinction.

Senator Buckwold: Were these amendments proposed to the House of Commons committee that studied the bill?

Mr. Cameron: No, sir, they were not.

Senator Lang: Does TransCanada acquire gas within the producer-province when it has not at that time determined whether it will sell it within the province or outside the province?

Mr. Cameron: Most of the gas we purchase is for resale outside the province. We are required under the terms of the permit granted to us under the Gas Resources Preservation Act of Alberta to make gas available to consumers in the province if they require it. In that sense there are occasions when we make sales in Alberta. Primarily the gas we purhcase is for use outside the province.

Senator Lang: But it could be diverted to someone in the province by the Alberta government?

Mr. Cameron: Yes, sir. As I say, it is a condition of the permit granted to us by the Energy Resources Conservation Board, with the approval of the Lieutenant Governor in Council.

The acting Chairman: Mr. Archambault, are you in a position to answer the constitutional question asked by Senator Buckwold?

Mr. John K. Archambault, Vice-President and general counsel, TransCanada PipeLines Limited: In our review of the bill we have determined that as it is written and as it is proposed to be changed in clause 53, the bill certainly stipulates that what the federal government is here regulating is gas or oil in inter-provincial trade, and as such we certainly do not see any infringement upon provincial rights. Therefore, we basically think the bill would stand any test with respect to its constitutionality.

Mr. Cameron: I might add that what we really are suggesting is that the other side of the same transaction be caught under the provisions of clause 53. Now the prohibition is only against the purchaser, not against the seller. The transaction takes place within the province and it is the same transaction.

Senator Molson: Could we perhaps ask the government departmental officials why clause 53 should not have been worded similar to clause 24?

The Acting Chairman: Would you like the answer now or should we wait until we call them?

Senator Molson: It is entirely up to you, Mr. Chairman.

The Acting Chairman: I suggest that we wait. They are considering it very carefully at the moment and hope to have some word from the Department of Justice in a very short time.

Senator Molson: Incidentally, you will notice the heading over clause 24. It says "Applying Prescribed Price" and it is the same principle but it uses the term "prescribed price" there, and then in the last paragraph, in clause 24, where it says "no greater than the prescribed price".

The Acting Chairman: Senator Molson, the departmental officials are here and they are listening and we propose to have them as witnesses right after this.

Senator Buckwold: Does paragraph (c) cover what you are trying to get at in (b)? Is it to be an all-inclusive kind of clause? I am talking of clause 53 (1) (c).

Mr. Archambault: Mr. Chairman, if I may answer that: clause 53(1)(c) contemplates the prohibition of either sale or purchase of gas outside the province of production, whereas clause 53(1)(a) refers to the movement of gas from within a province of production unless the price paid for that gas, which means a transaction inside, is approved; and clause 53(1)(b) stipulates a prohibition to acquire gas in the province of production, as distinct from the acquisition or selling of gas under paragraph (c), which is outside the province of production.

Senator Buckwold: But (b), the acquiring, is acquiring of gas for consumption outside the province. I am trying to relate (c) as being that much different.

Mr. Archambault: This is why we are suggesting that (b) track somewhat the language of (c), and we have added the word "acquiring"—sell, purchase or acquire—and of course acquisition is simply the legal terminology, the word used when title to goods passes from one person to another, whereas the selling is really a contract of sale. Acquisition is a wider term.

The Acting Chairman: Are there any other questions on this particular suggestion? Have you anything to add, Mr. Cameron or Mr. Archambault, on your first amendment?

Mr. Archambault: No.

The Acting Chairman: Not at this time. Now you have amendment No. 2.

Mr. Cameron: Amendment No. 2 concerns section 64 of the act.

Section 64(1) provides that where a purchaser of gas in a producer province transports and sells that gas outside the province of production, the purchaser must distribute to producers any excess of the revenue received by that purchaser on the resale of the gas over the purchaser's cost of service as determined by the National Energy Board.

The purpose of that subsection is to ensure that a transmission company such as TransCanada, does not obtain an extra profit as a result of selling gas at prices that have been prescribed under section 51 or section 52 by the Governor in Council.

Now, we have no quarrel with that concept. TransCanada rates and tolls are now set by the National Energy Board and our profit is regulated today in that fashion.

Our concern is simply to ensure that the National Energy Board, in determining that "cost of service" under section 64(1)(b), makes such determination in the same way the board would make a determination under Part IV of the National Energy Board Act itself.

I should explain that Part IV of the National Energy Board Act gives the National Energy Board its jurisdiction to determine the rates and tolls which are presently charged by TransCanada and other transmitting companies which are subject to the National Energy Board Act. As the first step in setting rates, the National Energy Board determines TransCanada's cost of service. So there is the link between the National Energy Board Act Part IV and the provisions of the Petroleum Administration Act. We simply want to ensure that the National Energy Board, in making a determination of TransCanada's cost of service under the Petroleum Administration Act, proceeds in the same fashion as it would when proceeding under Part IV of the National Energy Board Act.

Again, we believe that this is entirely within the intent of the act, because utter chaos could develop if the board were to proceed in a different fashion under each of the two acts. However, the Petroleum Administration Act itself does not give the National Energy Board any direction in that regard and we think therefore that it would be appropriate to move the second amendment.

Before reading the second amendment to you, I should point out that subsection (2) of section 64 is a similar provision, but that subsection deals with the case where the gas is transported by someone other than the parties who purchased the gas in the first instance. Sometimes they buy gas in the field and move it to market. At other times it is purchased by somebody else and it is delivered to us in Saskatchewan and there is simply a transportation service provided by us.

Our proposed amendment is designed to deal with both of these situations.

Our suggested amendment is to add a new subsection (4) to section 64, which would read:

> (4) In determining a purchaser's cost of service under subsection (1) hereof or a purchaser's cost in respect of the acquisition and transportation of gas under subsection (2) hereof the Board shall apply principles which are not inconsistent with the principles applied by the Board in determining such purchaser's cost of service or cost of acquisition and transportation for the purpose of making orders with respect to traffic, tolls or tariffs under Part IV of the National Energy Board Act. In making such determinations the Board shall have the authority and exercise the powers given to it under Part IV of the National Energy Board Act and such determinations shall be deemed to be orders made by the Board under Part IV of the National Energy Board Act.

As I said, it is designed to ensure that there is uniformity in procedure by the National Energy Board in performing its functions under these two acts.

Senator Hays: If the act is not used, what is the situation then with respect to these clauses?

Mr. Cameron: If the act is not used, sir, then we would proceed as we do today. We would simply apply to the National Energy Board under Part IV of the national Energy Board Act and ask them to set our rates and tolls.

Senator Hays: What you are asking for in these amendments is a situation which exists today but which you do not believe will exist under the new act.

Mr. Cameron: Not quite, sir.

Senatory Hays: Are we changing the ground rules, then?

Mr. Cameron: I do not think so. The act, as presently drafted, is silent in that it does not give the National Energy Board any direction and, if the National Energy Board is to carry out its functions in setting tolls and tariffs of transmission companies, we think it is imperative that it use the same criteria, whether it is acting under the National Energy Board Act or under the Petroleum Administration Act.

Senator Hays: So you want something in here that will not be in here if the act comes into play?

Mr. Cameron: That is correct, sir.

Senator Lang: Mr. Cameron, does Part IV of the National Energy Board Act use the words "cost of service" and/or the words "cost of acquisition"?

Mr. Cameron: No, sir, it does not. Part IV of the National Energy Board Act is very broad in its wording and simply empowers the National Energy Board to make orders respecting traffic, tolls and tariffs. But in carrying out its responsibilities under that act and in fixing rates, tolls and tariffs, the board as a first step determines the cost of service which is encountered by companies, such as TransCanada, in performing their services, and having done that they then set rates which will generate sufficient revenues to equal that cost of service.

Senator Lang: So it has a meaning in law.

Mr. Cameron: "Cost of service" is certainly an expression of art so far as utility operations are concerned.

Senator Lang: And, presumably, "cost of acquisition" also is.

Mr. Cameron: "Cost of acquisition" not so much. Certainly, in determining rates the board always has to determine what it has cost TransCanada to acquire these.

Senator Lang: I assume cost of service includes profit.

Mr. Cameron: Yes, cost of service includes the rate of return which is also set by the National Energy Board as part of its duties in determing the total cost of service.

Senator Lang: Your proposed amendment is to make doubly sure that those words are applied consistently in both areas of activity.

Mr. Cameron: That is correct.

Senator Hays: You have three functions: you buy, carry and sell. You feel that you can accomplish all of these things under the new provisions, if need be?

Mr. Cameron: That is correct. We also provide purely a transportation service in other instances.

Senator Hays: When you presented these amendments to the department, did they make any comment at that time? Did they agree or disagree with you?

Mr. Camerson: I do not believe the department does disagree with what we are saying, Senator Hays, but, with respect, sir, I do not feel I can speak for them. In fairness to them, we did not present these amendments to them very far in advance of this morning's session. We were caught a little off base in our timing.

The Acting Chairman: The department saw these amendments for the first time this morning, is that not correct?

Mr. Cameron: Yes.

The Acting Chairman: Mr. Archambault, have you anything to add?

Mr. Archambault: Just a short comment in answer to Senator Hays' query as to whether or not we intended to modify the ground rules, Mr. Chairman. In fact, we are trying to keep the same ground rules in both acts, in Part IV of the National Energy Board Act and in the Petroleum Administration Act, inasmuch as they affect the cost of service.

Senator Hays: Are you afraid of the interpretation of the wording?

Mr. Archambault: It is silent. That is what worries us.

Senator Buckwold: Mr. Chairman, I am slightly confused by the variety of terms used in the bill with respect to costs. For example, in clause 64(1)(b) I find "purchaser's cost of service," which you have outlined as being all the cost including profit; while, on the other hand, in clause 64(2)(b) the purchaser's cost is referred to as being the acquisition and transportation, which is different from the cost of service. Then the bill goes on to define the cost of gas, which is really just the wellhead price or the price computed by such other means as the board prescribes. But wellhead price is specified. Is this what is leading to the confusion in this whole business which you are trying to correct in your amendment?

Mr. Cameron: No, sir, that is not the case. The reason that you have the variety of terms and the multiplicity of situations covered simply results from the fact that business is done in many different ways by different transmission companies. The aim is to provide for the different types of transaction. For example, we purchase gas directly in fields in Alberta; we have that gas transported by the Alberta Gas Trunk Line to the Saskatchewan border; we have it delivered to us and we then move it eastwards and sell it to our various distribution companies. That is one way of doing business. Another way we do business is this. We purchase gas just inside the Alberta-Saskatchewan border from another company which has purchased that gas from producers and who then delivers that gas to us. In that case we actually buy the gas from them but we transport it as our own, just as in the first instance. A third method is this. Some of our customers go out in the field and buy the gas for themselves. They have it delivered to us inside the Saskatchewan-Alberta border and we then simply transport it for them. In that case we are just providing the transportation service for them. You can see that there are so many different ways and it is just necessary for the draftsman to try to cover them all.

Senator Hays: Did you mention surplus gas that you carry?

Mr. Cameron: No, sir.

The Acting Chairman: Are there any further questions at this time? If not, I would suggest that our witnesses stand aside and we will hear from the departmental experts now.

Thank you very much Mr. Cameron and Mr. Archambault.

Mr. Cameron: Thank you, Mr. Chairman.

The Acting Chairman: Honourable senators, to my far right is Mr. Maurice Foster, M. P., Parliamentary Secretary to the minister. The minister cannot be here this morning. He is either on his way overseas or out west.

Mr. Maurice Foster, M. P., Parliamentary Secretary to the Minister of Energy, Mines and Resources: Calgary a good place to be.

Senator Lang: Don't let anybody know.

The Acting Chairman: And to my immediate right is Mr. James T. Lyon, Senior Legal Adviser to the department.

Mr. Lyon, you had certain technical amendments you wanted to bring before the committee.

Mr. James T. Lyon, Senior Legal Adviser, Department of Energy, Mines and Resources: Yes, sir. I think copies have been circulated to honourable senators.

The Acting Chairman: Have all honourable senators received copies of the technical amendments suggested by the department?

Senator Hays: I do not think so.

The Acting Chairman: We will have them ready shortly.

Senator Hays: They are just being distributed.

The Acting Chairman: Mr. Lyon?

Mr. Lyon: Mr. Chairman and honourable senators, the first amendment proposed is to clause 4 of the bill, under the definition of "Export", and in particular with respect to subparagraph (b). At present clause 4(1)(b) reads:

> (b) where oil is transported by any other means to send it from Canada for delivery outside Canada or to use it as bunker or aircraft fuel outside Canada by such persons in such circumstances as may be prescribed by the regulations;

The amendment, if accepted, would make it read thus:

"export" means—

(b) where oil is transported by any other means, to send it from Canada for delivery outside Canada or for use as bunker or aircraft fuel outside Canada by such persons in such circumstances as may be prescribed by the regulations;

The intent of this proposed amendment is simply a grammatical one. I fear that in the drafting of an earlier amendment grammatical hormony was not completely achieved, and I think that the amendment now proposed does that. I could, if you like, show where it was not previously achieved.

The Acting Chairman: Are there any particular questions on this?

Senator Hays: Do you want to handle the amendments as we go along?

The Acting Chairman: I thought so. Does someone care to move it?

Senator Hays: I so move.

Senator Buckwold: There is no use for this oil other than as aircraft or bunker fuel? You have limited yourselves strictly to bunker or aircraft fuel. What if they found that there were other uses for this oil? Why would you limit yourselves to those two uses?

Mr. Lyon: This particular part of the definition is not looking to the nature of the oil, but to the use to which it is put. "Export", in general terms, means to transport it by pipeline outside the country. However, there are some circumstances in which Canadian source crude may be used as bunker fuel or aircraft fuel at points in Canada by airlines of other nationalities, which could result in lower prices being made available to foreign nationals than would otherwise be the case. It is to prevent an abuse which might conceivably arise, in terms of which a foreign aircraft might come into Canada and load up their tanks for domestic transportation in other countries.

Senator Lang: That has been happening, I gather from press accounts, has it not?

Mr. Lyon: I understand so. There has not been any very great abuse so far, but the intention here is to prevent it by regulation if it becomes a gross abuse.

Senator Desruisseaux: Can bunker oil be converted into some more highly refined oil, or something more usable?

Mr. Lyon: Senator, such knowledge as I have extends to the law and not to the conversion of oil from one kind to another. I am sorry, but I cannot answer that.

The Acting Chairman: You are extremely well advised, sir.

Senator Flynn: This amendment is to the English version, and some of the amendments which will be proposed are to the French version. Does that mean you do not have to change the French version here?

Mr. Lyon: I am sorry, senator, but—

Senator Buckwold: On this particular clause it is just the English version.

Senator Lang: The French version is in English.

Senator Flynn: That is why I was wondering whether it was correct in French, and whether you did not need to make any amendment. We have the same problem in reverse, of course, with the coming amendment to the French version.

Mr. Lyon: I apologize on behalf of myself and my colleagues. We will give you another example in French.

Senator Flynn: That is not where my problem lies. I was just wondering whether you had to change the French version.

Mr. Lyon: Yes.

Senator Flynn: You will have to change it accordingly.

Mr. Lang: Yes. And I will accept that motion now.

The Acting Chairman: I am told, honourable senators, that in order to speed up the translation of the English into French, in the past the custom was to pass it in English where we did not have the French—

Senator Flynn: Or in French, and have a translation made afterwards.

The Acting Chairman: Yes. To have the translation and technical explanation made later.

It has been moved by the Honourable Senator Hays that paragraph 4(1)(b) be amended as stated. Those in favour?

Hon. Senators: Agreed.

The Acting Chairman: Carried.

Your next amendment is to clause 35(2), on page 15.

Mr. Lyon: Yes, Mr. Chairman. This amendment is purely to the French version. The proposal is that line 9 be deleted and replaced in French by the words,

—jours de sa signature ou, si le Parlement ne—

This is to correct an error in the translation.

The Acting Chairman: Is there a mover of this?

Senator Hays: I so move.

Senator Buckwold: Our French expert moves it!

The Acting Chairman: Would you care to delegate your powers to our friend, Jacques, Senator Hays?

Senator Hays: Yes, of course.

Senator Flynn: I was just trying to find out what was said in the English version which would not require the amendment.

—not later than fifteen days after its issue,"

and you translate that by "signature"?

Mr. Lyon: I did not translate it, senator. I am merely carrying it. I am told that this correctly reflects, in the French text, that which is expressed in the English text.

Senator Flynn: It does not appear to be very important, and I move the amendment.

The Acting Chairman: It has been moved by Senator Jacques Flynn. Shall the amendment carry?

Hon. Senators: Agreed.

The Acting Chairman: Page 20, clause 47.

Mr. Lyon: The amendment proposed here, honourable senators, is again to the French text only. It proposes that line 27 be deleted and replaced by the words:

gaz, le fait de l'utiliser comme

I think there we can fairly rapidly see what the error was because we were speaking of "pétrole brut" and not "gaz".

Senator Flynn: "Pétrole brut" does not mean the same thing as "gaz".

Mr. Lyon: This whole Part III of the bill is intended to regulate gas only and not crude petroleum.

Senator Flynn: I move the amendment.

The Acting Chairman: Is it agreed, honourable senators?

Hon. Senators: Agreed.

The Acting Chairman: Then, honourable senators, we come to page 22.

Mr. Lyon: Again, honourable senators, the change proposed here is only to the French text and for the same reason as before. The proposal is that line 41 on page 22 be deleted and replaced by the following:

doivent être vendues ou livrées dans les régions ou les

Senator Flynn: The French version was not mentioning delivery. I will move this amendment.

The Acting Chairman: Is it agreed, honourable senators?

Hon. Senators: Agreed.

The Acting Chairman: Then we move to page 23, line 6.

Senator Flynn: Is this the same as the amendment that was made before?

Mr. Lyon: Yes, and for the same reason.

Senator Flynn: Then I will move it.

The Acting Chairman: Is it agreed, honourable senators?

Hon. Senators: Agreed.

Senator Hays: Will you explain it in the house this afternoon, Senator Flynn?

The Acting Chairman: Is there a further amendment, Mr. Lyon?

Mr. Lyon: Yes, there is one further amendment.

This change is an addition to clause 95 by the addition of subclause 95(1). It refers back to Part III of the bill again, the gas part, which has been dealt with already this morning. If I may just recapitulate for a moment, there are three possible situations that could arise. The first is that by agreement between a producer province and the federal government there is a regime of prescribed prices in effect, and these prescribed prices are implemented by Order in Council. That comes under clause 51. Then in clause 52 the situation is contemplated in which there is no such agreement, or there has been such an agreement and it has failed, or for one reason or another, as set out in the bill, the federal government is unilaterally prescribing prices. Then there is a third situation possible, and that is the one in which there is neither the situation as contemplated in clause 51 nor the situation as contemplated in clause 52—that is to say, there has neither been an agreement nor has there been a unilateral prescription of prices. This could happen, for example, before there was an agreement and in the absence of a unilateral prescription. In an attempt to condense, perhaps, the drafting of the clause as much as possible, the, what I might call regulatory clauses, from clause 53 to clause 65, are not stated to come into effect only when one or other of the prescriptIon regimes is in effect. So that if the bill were passed in its present form, clauses 53 to 65, which were intended to police the mechanisms for Prescription, created pursuant to clauses 51 and 52, would be in effect before the policy clauses themselves on which this hinges were in effect, and the intention of this amendment is to ensure that this does not happen. In other words, the effect of the new clause 95(1) would be to bring into effect the policing or administrative clauses only when there is a price prescription regime under either clause 51 or clause 52.

Senator Flynn: But if there is no agreement in effect, what then would be the practical result?

Mr. Lyon: If there is no agreement, senator, and if there is no prescribed regime of prices, then the whole Part itself would not come into effect.

Senator Flynn: But what would be the practical consequence of these clauses?

Mr. Lyon: The practical effect of their not coming into effect? If they did not come into force what would happen would be that industry would not be under an administrative regime which it really could not work to. If these clauses are allowed to continue, then there would have to be some other device used to allow industry to continue in operation without great inconvenience.

Senator Flynn: But you would have this power under the act.

Mr. Lyon: If clauses 53 to 65 pass as of the moment, yes.

Senator Flynn: But if they remain inactive because no agreement takes place, what other means would there be then?

Mr. Lyon: That is exactly the point, senator. If there is no agreement and if this clause does not come into effect, then there would be considerable inconvenience to industry, and it is to remove this inconvenience, which would be caused by the coming into effect of the administrative requirements of clauses 53 to 65, that we are excluding this until there us a prescription regime. I know it seems rather complicated.

Senator Flynn: I am just trying to understand the situation if there were no agreement.

Mr. Lyon: If there is no agreement to prescribe prices and if we have this amendment in place, then industry would carry on under its present circumstances.

Senator Flynn: But this amendment has the effect of rendering inoperative these clauses without prior agreement.

Mr. Lyon: Without prior agreement, or failing agreement on the prescription under the mandatory agreement in 52 by the federal government.

Senator Flynn: That is what I am saying. Supposing you do not have either one or the other, then these clauses would remain inactive. What would be the situation then?

Mr. Lyon: If they were to remain inactive, there would be no problem. But the problem is that as drafted they will become active before the agreement and before the prescription, and that will cause, at best, a great inconvenience to industry.

Senator Hays: Can you give us an example of how it would affect industry?

Mr. Lyon: Supposing we had neither prescription of price pursuant to agreement under clause 51 or by the federal government acting unilaterally under clause 52, then we can look at clause 55 on page 24 which says:

> 55. Every person who engages in a transaction described in section 53 shall keep records and books of account at his place of business in Canada, or elsewhere in Canada as the regulations may require, in such form and containing such information as will enable a determination to be made of the price at which any gas was purchased or sold in the course of the transaction.

This all relates to a scheme which would not come into effect. But it will put upon industry the burden of maintaining certain records and doing certain things which right now they do not have, and until there is a prescription regime there is no need for it there.

Senator Hays: Can you give me an example of how industry would be affected so that industry will know what is taking place?

Senator Heath: Mr. Chairman, it is awfully difficult to hear.

The Acting Chairman: I think, senator, you have made your point.

Senator Hays: Would you give an example of how the industry would be affected?

Mr. Lyon: If you refer to clause 53, which is the one we were examining earlier today, this provision, assuming it were to be passed in its present form, putting aside the concerns of TransCanada, would provide a prohibition on industry from doing certain things which are set out in clause 53.(1)(a), (b) and (c).

It would not have the prescription regime which this is really intended to complement, so they would be really acting in a vacuum, I believe it would be fair to say.

The Acting Chairman: Are you sponsoring this proposed amendment, Senator Hays?

Senator Hays: I wish to be damned sure first; I am just a farm boy and I must have it explained very clearly so as to get it through my thick head.

Mr. Lyon: I would be very happy to go through all the clauses from 53 to 65.

Senator Hays: You had some discussions with TransCanada and Westcoast Transmission with regard to these clauses, is that not true?

Mr. Lyon: That is correct.

Senator Hays: And subsequent to this they felt that they needed more clarification in so far as they were concerned.

Mr. Lyon: We have had discussions over a period of many months with TransCanada and other companies in the industry. The particular amendments which were proposed this morning I received in writing in the corridor before I entered the room, and the gist last night by telephone, and I have had no opportunity to study them. That does not apply to this particular amendment. I believe, Mr. Cameron, it is fair to say we did not have a great deal of time to look at them, only approximately five minutes.

The Acting Chairman: But this amendment you had had previously?

Mr. Lyon: Yes, sir.

The Acting Chairman: Is there a sponsor for this amendment?

Senator Hays: Yes, I am the sponsor.

Senator Flynn: Mr. Chairman, I do not believe this amendment does too much, but is probably to make doubly sure, because clause 48 provides:

> This Part applies to gas that enters into interprovincial or international trade.

It seems to me that there must be an agreement, in any event, before this Part would apply.

Mr. Lyon: No, sir; if I could just speak to that. That is not quite correct. The prescription of prices for gas which enters interprovincial and international trade comes into effect when there is an agreement pursuant to clause 51, or a unilaterla—

Senator Flynn: Clauses 50, 51 and 52?

Mr. Lyon: Yes.

Senator Flynn: The agreement must exist before the remainder goes into operation. In any event, if it makes it clearer, I have no objection. I was simply attempting to ascertain the importance of the amendment.

Senator Hays: I so move.

The Acting Chairman: Honourable senators, you have heard the motion by Senator Hays—

Senator Buckwold: Mr. Chairman, before you put the question, I wonder if the Chair would allow us to hear as to Mr. Cameron's reaction to the amendment.

Mr. Cameron: I can tell you, senator, that we support the amendment which Mr. Lyon has outlined to you and which has been moved by Senator Hays.

The Acting Chairman: You have heard the amendment, honourable senators. Agreed?

Hon. Senators: Agreed.

Senator Molson: Could we inquire as to why clauses 24 and 53 are couched in different terms?

The Acting Chairman: Yes. Would you answer that question from Senator Molson please, Mr. Lyon?

Mr. Lyon: Yes, Mr. Chairman. I am casting my mind back through the mists of time to when this legislation was first drafted as Bill C-18 during the last Parliament. It did not contain a gas Part; it dealt only with oil. As I recall, we received our drafting instructions from entirely different

people, some looking after the oil industry and others the gas industry. You will see that the structures of Parts II and III are somewhat different. These differences were dictated largely by what I understand to be differences in practices of the two industries. The text of the one was not followed slavishly in the text of the other. The new text was prepared *de novo*, to meet the instructions which we received for the governance of this particular endeavour. That is my recollection of the reasons; there was no intent to be the same as or different from, but only to cover the particular situation.

Senator Molson: It seems to me that a fair amount of similar legislation arrives here in which the issue is not particularly clarified. If anything, it is slightly befogged by the use of different phraseology to apply to the same principle. It would seem to me that in introducing a fairly substantial piece of legislation to amend another act it would not be unreasonable to re-word one of the clauses to conform to another so that each one does not have to be interpreted, possibly differently, as it arises. As a layman, I am a little puzzled. It seems to me that we receive a great deal of this type of thing in legislation.

Mr. Lyon: I am not quite sure whether this is an observation or a question, and perhaps I should not say anything until I am asked a question.

Senator Walker: No; do not be so cute. He asked a question.

Senator Molson: Can you discern a question in what I said?

Mr. Lyon: I think I get the message, senator.

Senator Molson: Would it not have been possible to make one of these clauses conform to the other in phrasing without undesirable effects?

Mr. Lyon: Yes. There are substantial differences in the two industries.

Senator Molson: I am not quarrelling with that; I know the industries are different, but I am just dealing with these two particular clauses. I cannot understand why they should not be the same.

Mr. Lyon: Perhaps I could take note of that, senator.

Senator Molson: Thank you.

The Acting Chairman: Honourable senators, we are now ready to hear our learned friend to my right. The matter before us is the discussion on the proposed amendments, numbers one and two, by officials of TransCanada Pipelines Limited.

Mr. Lyon: Mr. Chairman and honourable senators, I would be most happy if I could have an opportunity to take the amendments proposed by TransCanada Pipelines back to my clients for some study, and to again bring them forward for discussion at a time when those instructing me have had a chance to consider the ramifications of the bill. We have had very little time to examine them. As has been commented, it is a very complex bill, it is a complex industry, and I would rather not be premature.

The Acting Chairman: What is the name of your client?

Mr. Lyon: The Minister of Energy, Mine and Resources.

Senator Molson: Spoken like a true lawyer!

The Acting Chairman: Honourable senators you have heard the request from Mr. Lyon, which is surely a reasonable one in the circumstances. May I suggest that this matter be adjourned until the next sitting of this committee, which will be next Wednesday, May 28. Is that agreed?

Hon. Senators: Agreed.

Senator Buckwold: Mr. Chairman, I gather that at the next meeting we will consider the reply with regard to the amendments. Are there any other items in the bill which any member might wish to discuss now, other than those which have been raised by the witnesses? Has the Chair anything to draw to our attention?

The Acting Chairman: Yes. Senator Molson made some suggestions this morning, which were carefully listened to by our friend to the right. Now that he has a week's delay, he may have an opportunity to examine the matter. Is there a motion for adjournment?

Senator Molson: Yes.

Hon. Senators: Agreed.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable ALAN A. MACNAUGHTON, P.C., *Acting Chairman*

Issue No. 38

WEDNESDAY, MAY 28, 1975

Second and Final Proceedings on Bill C-32, intituled:

"An Act to impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain petroleum costs and to regulate the price of Canadian crude oil and natural gas in interprovincial and export trade"

REPORT OF THE COMMITTEE

(Witnesses: See Minutes of Proceedings)

28850—1

THE STANDING SENATE COMMITTEE
ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators,

Barrow	Hayden
Beaubien	Hays
Blois	Laird
Buckwold	Lang
Connolly (*Ottawa West*)	Macnaughton
Cook	McIlraith
Desruisseaux	Molson
Everett	*Perrault
*Flynn	Sullivan
Gélinas	Walker—(19)
Haig	

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 20, 1975.

"Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Hays, P.C., seconded by the Honourable Senator Macnaughton, P.C., for the second reading of the Bill C-32, intituled: "An Act to impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain petroleum costs and to regulate the price of Canadian crude oil and natural gas in interprovincial and expert trade".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.
The Bill was then read the second time.

The Honourable Senator Hays, P.C., moved, seconded by the Honourable Senator Macnaughton, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, May 28, 1975
(52)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m. to further consider the following:

SUBJECT: *Bill C-32—"Petroleum Administration Act"*

Present: The Honourable Senators Macnaughton, (*Acting Chairman*), Beaubien, Buckwold, Connolly, (*Ottawa West*), Cook, Desruisseaux, Hays, Laird, Macdonald, (*Cape Breton*), McIlraith, Molson and Walker. (12)

In Attendance: Mr. R. du Plessis, Legal Adviser to the Committee.

WITNESSES:

Parliamentary Secretary to the Ministry of Energy, Mines and Resources:

Mr. Maurice Foster, M.P.

Department of Energy, Mines and Resources:

Mr. James T. Lyon, Senior Legal Adviser.

TransCanada PipeLines:

Mr. John K. Archambault, General Counsel.

Mr. Lyon explained to the Committee the purposes of amendment to Clauses 53 (1)(*b*) and the addition of subclause (4) to Clause 64. Upon motion of the Honourable Senator Hays, the above amendments were *carried*.

NOTE: (*The full text of the above amendments appears by reference to the Report of the Committee immediately following these minutes*)

Following discussion and upon motion duly put, it was *Resolved* to report the said Bill as amended.

At 9:50 a.m. the Committee adjourned to the call of the Chairman.

ATTEST

Frank A. Jackson,
Clerk of the Committee.

Report of the Committee

Wednesday, May 28, 1975

The Standing Senate Committee on Banking, Trade and Commerce to which was referred Bill C-32, intituled: "An Act to impose a charge on the export of crude oil and certain petroleum costs and to regulate the price of Canadian crude oil and natural gas in interprovincial and export trade", has, in obedience to the order of reference of Tuesday, May 20, 1975, examined the said Bill and now reports the same with the following amendments:

1. *Page 2:* Strike out lines 23 and 24 and substitute therefor the following:

"for delivery outside Canada or for use as bunker or aircraft fuel outside"

2. *Page 15:* Strike out line 9 in the French version and substitute therefor the following:

"jours de sa signature ou, si le Parlement ne"

3. *Page 20:* Strike out line 27 in the French version and substitute therefor the following:

"gaz, le fait de l'utiliser comme"

4. *Page 22:* Strike out line 41 in the French version and substitute therefor the following:

"doivent être vendus ou livrées dans les régions ou les"

5. *Page 23:* Strike out line 6 in the French version and substitute therefor the following:

"jours de sa signature ou, si le Parlement ne siège"

6. *Page 24:* Strike out lines 1 to 4, inclusive, and substitute therefor the following:

"(*b*) purchase or otherwise acquire from within a producer-province or sell within a producer-province any gas for consumption outside that province unless the price paid therefor is a price approved by special or general orders of the Board; or"

7. *Page 28:* Insert immediately after line 17 the following:

"(4) In determining a purchaser's cost of service for the purposes of subsection (1) or a purchaser's cost in respect of the acquisition and transportation of gas for the purposes of subsection (2), the Board shall be governed by the principles applied by it in determining those costs for the purposes of making orders with respect to traffic, tolls or tariffs under Part IV of the National Energy Board Act."

8. *Page 42:* Strike out line 29 and substitute therefor the following:

"95. (1) Part I of this Act shall be deemed"

9. *Page 52:* Add immediately after line 31 the following:

"(2) Sections 53 to 65 do not come into force until such time as the Governor in Council acquires power under subsection 51(1) or 52(1) to prescribe prices at which various kinds of gas to which Part III applies that are produced, extracted, recovered or manufactured in a producer-province within the meaning of that Part are to be sold on or for delivery in any areas or zones in Canada and outside that province or at any points on the international boundary of Canada."

Respectfully submitted,

Alan A. Macnaughton,
Acting Chairman.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, May 28, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-32, to impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain petroleum costs and to regulate the price of Canadian crude oil and natural gas in interprovincial and export trade, met this day at 9.30 a.m. to give further consideration to the bill.

Senator Alan A. Macnaughton (*Acting Chairman*) in the Chair.

The Acting Chairman: Today we are continuing with our consideration of Bill C-32, to impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain petroleum costs and to regulate the price of Canadian crude oil and natural gas in interprovincial and export trade. As you will recall, TransCanada PipeLines Limited, through Mr. Cameron and Mr. Archambault, suggested two amendments and the departmental officers wished to have time to consider those amendments. I understand they have done so and that they are now prepared to report to the committee. We have with us Mr. James T. Lyon, Senior Legal Adviser, Department of Energy, Mines and Resources, and Mr. Maurice Foster, M.P., Parliamentary Secretary to the Minister of Energy, Mines and Resources.

Mr. Lyon, have you had an opportunity to examine the suggested amendments?

Mr. James T. Lyon, Senior Legal Adviser, Department of Energy, Mines and Resources: Mr. Chairman and honourable senators, thank you very much for the week you allowed us in which to review these proposed amendments. We have indeed gone over them. We have made some changes in the text, but not in the substance. The changes in the text have been reviewed by the Legislation Section, Department of Justice. We have transmitted these texts to TransCanada, and I understand that they are in agreement with them. As I have said, the substance has not been changed. The terminology has been changed, the new terminology has been passed to TransCanada, and I understand that they are in agreement with that new terminology. I have copies here for circulation.

The Acting Chairman: I see that Mr. John K. Archambault, Vice-President and General Counsel, TransCanada PipeLines Limited, is present. Mr. Archambault, have you had a change to see these proposed amendments?

Mr. John K. Archambault, Vice-President and General Counsel, TransCanada PipeLines Limited: Yes, Mr. Chairman, and I concur with my friend Mr. Lyon. We are in full agreement with the text that has been presented to honourable senators.

The Acting Chairman: Does that apply to both amendments?

Mr. Archambault: Yes, to both amendments.

The Acting Chairman: Thank you, Mr. Archambault.

Now, Mr. Lyon, would you explain them, please? The first amendment, Mr. Lyon, is to clause 53 (1) (b), which is found at page 24 of the bill.

Mr. Lyon: The intent of clause 53, in 53(1)(a) and 53(1)(b), the material parts for consideration, is to apply the concept known as "the approved price". As presently drafted there is a prohibition on persons acquiring from within a producer-province any gas for consumption outside that province unless the price paid therefor is a price approved by the Board. The concern of TransCanada PipeLines was that there was no prohibition on persons selling to them. They could foresee the circumstance in which they might have a contractual obligation to buy but be prevented from moving it out of the province.

They propose that, in addition to there being a prohibition on acquiring and moving out of the province, there be a prohibition on the other side of the transaction—in other words, on selling. This would relieve them of the risk of being contractually bound to buy a great quantity of gas while being legally bound not to move it from the province and therefore being required to store it in the province.

The effect of the amendment is to put prohibitions both on selling and on buying. That is the problem and that is the effect of the change.

Senator Cook: It sounds reasonable.

The Acting Chairman: Are there any questions?

Senator Connolly: Mr. Lyon, your draft says: "purchase of otherwise acquire from within a producer-province or sell within a producer-province any gas for consumption outside that province—" et cetera.

Mr. Lyon: We have, in effect, run together the present concept of clause 53(1)(b) and interlined into it the amendment of TransCanada.

Senator Connolly: Are they happy with that?

Mr. Lyon: Yes, sir.

Senator Hays: I move that the amendment be adopted.

The Acting Chairman: Shall the amendment carry, honourable senators?

Hon. Senators: Agreed.

The Acting Chairman: Carried. Mr. Lyon wished to speak to a question raised by Senator Molson at the last meeting.

Mr. Lyon: Honourable senators, the matter relates, in part, to clause 53. Since we are at clause 53, this might be the appropriate time to deal with it.

Briefly, as I understood the problem, Senator Molson pointed out, quite rightly, that there are some differences between the drafting of clause 24, which deals with oil, and clause 53, which deals with natural gas. My answer at that time was in fairly general terms, that this was because of differences in the industries. In the past week I have had the opportunity to look into the reason for the differences in the texts, and, in fact, it does go to the differences between the industries. Clause 24(a) prohibits the sale, clause 24(b) prohibits the purchase, and clause 24(c) prohibits the acquisition—all three of them of crude oil for consumption outside the province of production. In this they are different from clause 24(d). The reason for clauses 24(a), (b) and (c), which impose prohibitions on certain transactions in oil for consumption, is to cover companies which purchase or acquire by exchange, for example, oil in producer-provinces for consumption outside those provinces. Clause 24(d) prohibits the sale or purchase outside the producer-province, for example in a consuming province. It would be a secondary transaction downstream from the original transaction in which oil was bought from the producer for transportation to the consuming province.

The transaction dealt with in clause 24(d) is a transaction outside the province of production. That is the essential difference between (a), (b), (c), on the one hand, and (d), on the other hand.

Senator Molson: Is there any real need for the difference in drafting between clauses 24 and 53? In clause 53 it says "sell on purchase" in one paragraph, where as you have said it in three paragraphs in clause 24.

Mr. Lyon: The price we are speaking of in clause 24 is a prescribed price, whereas the price we are speaking of in clause 53 is not a prescribed price as defined in the act.

Senator Molson: The point I would make here is that, although this is just one example, we quite often see this sort of drafting of legislation, where there are two provisions which in many ways carry out the same objective but are worked differently. At some stage each of these provisions will be interpreted by the courts, and undoubtedly they will be interpreted differently. Surely, for simplification it would be desirable, as frequently as possible at any rate, to have the wording more or less the same.

Senator Cook: Of course, Mr. Lyon is stuck with the draft as it is; there is nothing he can do about that.

Senator Molson: At any rate, thank you for the explanation.

The Acting Chairman: We will now deal with the second amendment, honourable senators, which is an amendment to clause 64. It is proposed that after clause 64(3) we insert immediately after line 17 on page 28 a new subclause which reads as follows:

> (4) In determining a purchaser's cost of service for the purposes of subsection (1) or a purchaser's cost in respect of the acquisition and transportation of gas for the purposes of subsection (2), the Board shall be governed by the principles applied by it in determining those costs for the purposes of making orders with respect to traffic, tolls or tariffs under Part IV of the National Energy Board Act.

Senator Connolly: Is this a proposal from the pipeline company?

Mr. Lyon: In substance it is, yes. The wording was reviewed by Justice, and TransCanada approved the revised wording.

The concern of TransCanada, which it was intended that this amendment would allay, was that they might find themselves with an uncertain regime for the establishment of the technical expression "cost of service". This amendment says that the National Energy Board, in determining cost of service for the purposes of clause 64(1), will apply the identical principles that the National Energy Board would apply in its normal rate-fixing mechanism under Part IV of the National Energy Board Act.

Senator Hays: I move the adoption of the amendment.

The Acting Chairman: Shall the amendment carry?

Hon. Senators: Agreed.

The Acting Chairman: Carried.

Mr. Archambault, I take it you have nothing to add?

Mr. Archambault: Nothing, Mr. Chairman, other than to repeat that we are in full agreement with the texts in both amendments as they have been carried by this committee.

The Acting Chairman: Mr. Foster?

Mr. Maurice Foster, M.P. Parliamentary Secretary to the Minister of Energy, Mines and Resources: Mr. Chairman, I think the amendments are quite acceptable to the minister.

The Acting Chairman: Are there any other questions on this bill? If not, shall I report the bill, as amended?

Hon. Senators: Agreed.

The Acting Chairman: That concludes our meeting this morning. Thank you.

The committee adjourned.

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FIRST SESSION—THIRTIETH PARLIAMENT
1974-75

THE SENATE OF CANADA

PROCEEDINGS OF THE

STANDING SENATE COMMITTEE ON

BANKING, TRADE AND COMMERCE

The Honourable SALTER A. HAYDEN, *Chairman*



Issue No. 39

WEDNESDAY, JUNE 11, 1975

First Proceedings on Bill S-24, intituled:

"An Act to incorporate the National Commercial Bank of Canada".

(Witnesses: See Minutes of Proceedings)

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE

The Honourable Salter A. Hayden, *Chairman*

The Honourable Senators:

Barrow	Hayden
Beaubien	Hays
Buckwold	Laird
Connolly (*Ottawa West*)	Lang
Cook	Macdonald
Desruisseaux	Macnaughton
Everett	McIlraith
*Flynn	Molson
Gélinas	*Perrault
Haig	Sullivan
	Walker—(19)

**Ex officio* members

(Quorum 5)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, May 27, 1975.

"The Order of the Day being read,
With leave of the Senate,

The Honourable Senator Hays, P.C., resumed the debate on the motion of the Honourable Senator Hays, P.C., seconded by the Honourable Senator McIlraith, P.C., for the second reading of the Bill S-24, intituled: "An Act to incorporate the National Commercial Bank of Canada".

After debate, and—
The question being put on the motion, it was—
Resolved in the affirmative.

The Bill was then read the second time.

The Honourable Senator Hays, P.C., moved seconded by the Honourable Senator McIlraith, P.C., that the Bill be referred to the Standing Senate Committee on Banking, Trade and Commerce.

The question being put on the motion, it was—
Resolved in the affirmative."

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Wednesday, June 4, 1975
(53)

Pursuant to adjournment and notice the Standing Senate Committee on Banking, Trade and Commerce met this day at 9:30 a.m.

SUBJECT: *Bill S-24—"An Act to incorporate the National Commercial Bank of Canada"*

Present: The Honourable Senators Hayden (*Chairman*), Cook, Desruisseaux, Everett, Flynn, Haig, Laird, Macnaughton, McIlraith, Molson, Sullivan and Walker. (12)

Present, not of the Committee: The Honourable Senator Lafond. (1)

In Attendance: Mr. R. L. du Plessis, Legal Adviser to the Committee.

WITNESSES:

Bank Canadian National:

The Hon. L. Chevrier, Legal Counsel; and

Mr. L. Hébert, President and Chairman of the Board.

National Trust Co.:

Mr. S. F. M. Wotherspoon, Q.C., Legal Counsel.

National Commercial Bank of Canada:

Mr. W. H. T. McDonald.

After hearing the objections placed before the Committee by The Bank Canadian National and the National Trust Co. with respect to the name of the National Commercial Bank of Canada, further consideration of the Bill was deferred to a later date.

At 9:50 a.m. the Committee then proceeded with the next order of business.

ATTEST:

Denis Bouffard,
Acting Clerk of the Committee.

The Standing Senate Committee on Banking, Trade and Commerce

Evidence

Ottawa, Wednesday, June 4, 1975.

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill S-24, to incorporate the National Commercial Bank of Canada, met this day at 9.30 a.m. to give consideration to the bill.

Senator Salter A. Hayden (*Chairman*) in the Chair.

[*Text*]

The Chairman: The first item of business to be dealt with concerns Bill S-24, a private bill to incorporate the National Commercial Bank of Canada. We are hearing those appearing here this morning as witnesses only with regard to the name, because, as I have told them, we had scheduled this, what I call, "educational meeting" on the bankruptcy bill and we wanted to have all the time we could for that. So we will only hear representations as to what the name may be, and then we will adjourn consideration of Bill S-24 until next Wednesday morning.

This morning we have as witnesses on this bill the Honourable Lionel Chevrier, Legal Counsel for the Canadian National Bank, and Mr. S. F. M. Wotherspoon, Legal Counsel for the National Trust Company. They have some representations to make on the name.

Anticipating what they may have to say, I have been in touch with the sponsors of the bill, and the objectionable word, I understand—and I am sure Mr. Chevrier and Mr. Wotherspoon will tell us—is the word "National". I understand from the sponsors that "National" is one word which will not be included in whatever name they settle on as the name of the bank.

Mr. Chevrier, will you come forward, please?

The Honourable Lionel Chevrier, Q.C., Legal Counsel, Canadian National Bank: Mr. Chairman and honourable senators, I appear on behalf of la Banque Canadienne Nationale, Bank Canadian National, together with Mr. Louis Hébert, who is chairman of the board.

Let me at once, Mr. Chairman, thank you for taking up consideration of this bill now in order to allow Mr. Hébert and myself to say a word or two on it. I realize what you have said earlier, and I thank you for having made the statement which you have just made, namely that the word "National" or "Nationale" will not appear in the charter, if it is given to the new bank.

However, for the purposes of the record I would like to be as brief as possible so I shall simply say this, that on May 23 I wrote to Mr. Hinds, the Assistant Director of your Committees Branch, outlining the reasons why Banque Canadienne Nationale objected, not to the granting of the charter, as the chairman said, but to the inclusion of the word "National" which is inappropriate so far as Banque Canadienne Nationale is concerned. I do not know whether honourable senators have received a copy of that letter or not, but in any event it is recorded in the files of the Senate.

The next point I would like to make briefly is that our people at the bank have prepared a memorandum, which I hold in my hand, outlining the reasons why the name "The National Commercial Bank of Canada" is inappropriate and why "la Banque Nationale de Commerce du Canada" is equally inappropriate.

The Chairman: In the circumstances, Mr. Chevrier, I suggest that in view of the progress we have already made on the question of the use, or non-use, of the word "National", it would be sufficient to have you file that brief with us.

Hon. Mr. Chevrier: I was just about to say that, Mr. Chairman. The chairman of the bank, who is with me, has 25 copies of this memorandum in French and English, and I will file them for that purpose.

I wonder if you would allow me to make two or three brief points, simply to confirm what you have said? We at la Banque Canadienne Nationale are anxious to have there points on the record. First, the word "National" in English and the word "Nationale" in French are inappropriate and objectionable because we have branches, not only throughout Canada, but agencies in many countries of the world. Then, the new bank, the National Commercial Bank of Canada, could use a symbol which would be similar to BCN, the symbol which we use both in English and French, thanks to an amendment by the Parliament of Canada in 1969. There would be nothing to stop the new bank using the symbol, were it granted the right. Then, together with three or four other banks with which we are in association, we are owners of the Chargex credit card. On that card appears the symbol BCN in addition to the words Banque Canadienne Nationale. This goes, as most of you know, through all countries of the world in which the Chargex system is used.

Finally—and this is my concluding remarks, Mr. Chairman—there is a precedent, and a very important one, before honourable senators. In 1971 what became the Unity Bank originally sought to be incorporated under another name, United Bank of Canada. After careful consideration by honourable senators and this committee, the originally proposed name was withdrawn, because it was objectionable from the point of view of the United Trust. Rather than using the name "United Bank" it became "Unity Bank of Canada".

Senator Walker: Are you satisfied with the remainder of the name, Mr. Chevrier?

Hon. Mr. Chevrier: I have no objection to the remainder of the name, but I would like to see the name as finally determined.

The Chairman: Do not worry, you will.

Hon. Mr. Chevrier: Thank you very much. That is all I have to say. I have with me the chairman of the board, and I would appreciate it very much if the committee would hear him.

The Chairman: We have no objection, except you must remember that I have a motto, "When you have sold something, wrap it up," and you have certainly done that.

Hon. Mr. Chevrier: Do you think I have wrapped it up?

The Chairman: You have made the point to the extent that the sponsors are searching for a different name. Now, you could not ask for a better performance than that.

Hon. Mr. Chevrier: Thank you, Mr. Chairman.

The Chairman: I am sure that your intervention in this matter is something that, in part at least, brought about their reconsideration of the name.

Now, if Mr. Hébert feels he wishes to say something while he is here, he may, although there is no particular necessity for him to do so.

Senator Molson: It would be nice if the members of the committee could say good morning to Mr. Hébert.

[*Translation*]

Mr. Louis Hébert, Chairman of the Board and Chief Administrator, Banque Canadienne Nationale: Mr. Chairman, if you will allow me, I shall speak in French.

I would like, honourable senators, to thank you and to explain why we were shocked that a new bank could choose a name similar to ours. For almost 50 years now, I have been pursuing the wonderful occupation of banker. I have been told that money is the blood of a nation's economy. Well I think we could add that the bank is the heart which is responsible for its circulation and thus the welfare of individuals, families, and social groups that make up the body of a nation. It is this highly social role that *Banque Canadienne Nationale* tries to play and for that matter all chartered banks. You must be aware that if they adopt a name similar to ours, it is not only to look stylish, and I hope that it is not to throw confusion into the mind of the public that knows us, particularly in the Quebec and the Lower St. Lawrence areas where we are known under the name of *Banque Nationale*. What we feel sorry about, and this concerns you, Mr. Chairman, is the following: People would like to become members of the Canadian Association of Bankers, operate with a Canadian bank charter, and live up to the social role which I have just described and that all the chartered banks try to play, and not merely join under the pretext of carrying out only some big operations—we do not like that. For example, when the Governor of the Bank of Canada convenes the chairmen of the banks and asks us to back him during the Canada Savings Bonds campaign to help serve the public, all the banks try to play their role and to help. And once more, we have no objection to the incorporation of another bank. We are not for "family planning", but I think that those who wish to join us, should provide the same social services as the present chartered banks do. Thank you!

[*Text*]

The Chairman: Thank you. In due course we will see that you are made aware of the new name and if perchance you have any further objection, we will hear it.

Hon. Mr. Chevrier: Thank you, Mr. Chairman.

The Chairman: We now have Mr. Wotherspoon, representing the National Trust Company.

Mr. S. F. M. Wotherspoon, Q.C., Legal Counsel, National Trust Company: Mr. Chairman, honourable senators, thank you for giving me the opportunity to appear.

Mr. Chairman, in view of you opening comment, plus your subsequent comment, I think all I need do is take a red ribbon and tie it around me. I have filed copies of a short written submission and I do not propose to burden the honourable members of your committee by adding to it. If the word "National" disappears, all our objections disappear. I would like to see the new name, just in case other problems of this nature arise.

The Chairman: We will notify you of the new name and if you have any objection to it you can come forward. Thank you very much.

Mr. Wotherspoon: Thank you very much.

The Chairman: Mr. McDonald, one of the sponsors, who provided me with the information I have given you, is present. It may be that you might like to see what Mr. McDonald looks like, so would you come up for a minute, Mr. McDonald?

Mr. McDonald, I understand that you do not propose to proceed for incorporation purposes with the name which includes the word "National".

Mr. W. H. T. McDonald, Petitioner, the National Commercial Bank of Canada: That is correct, sir. I might add that I hope to table the new name today. It is being checked out and has passed the scrutiny of the Inspector General of Banks. However, we are taking the precaution of asking one other bank if it has any objection to the name. They have not yet deliberated and given us an answer, but we hope to have it today or tomorrow and will certainly make the committee aware of it through the chairman immediately we know.

Senator Walker: What is the name?

The Chairman: The name they are considering, and with respect to which they are having discussions with the Canadian Imperial Bank of Commerce, is Canadian Industrial Bank of Canada. The trouble with that is that when it is reduced to initials the same alphabetical combination results as that in the case of the Canadian Imperial Bank of Commerce. If that bank, following these discussions, has no objection, it may be that this name will be proposed. If not, there will be an alternative name. However, we will not approve any name, I would say, unless we receive no further objections. Then it will be the decision of the committee as to what name should be approved. The sponsors are proceeding cautiously—

Senator Walker: And carefully.

The Chairman: Yes.

Mr. McDonald: Mr. Chairman, you stated the name the other way around. We have selected the name Canadian Commercial and Industrial Bank. In that way it avoids duplication of initials.

The Chairman: The most likely name we are thinking, is Canadian Commercial Bank.

Mr. McDonald: "Commercial and Industrial". We have not yet received clearance, so we have not made the final decision.

Senator Walker: How did you ever expect to get the name including the word "National"? Was all this necessary? Could you not have understood this beforehand?

Mr. McDonald: We had a lot of trouble selecting the name. Briefly, we went back to the first banks that were incorporated in Canada and looked at 160 different names. We thought we had steered a safe course. We felt the word "National" was not a proprietary name because it is used by many different corporations. We had to accept the views of Banque Canadienne Nationale. We were swayed by the fact that they were the product of a merger of Banque Hochelaga and Banque Nationale, so the word "National" was very strong in their minds. That is what persuaded us, that the word "National" was a name they would like to preserve.

We felt at the time we selected it that we had steered a safe course in the name. It is very difficult to get names of corporations, particularly financial corporations, as the committee is well aware.

Senator Walker: You mean it is a big enough name that when the word "National" is removed, you have quite a bit left?

Mr. McDonald: We did not want to trade on the reputation of any other bank. We felt this bank was specific enough and would build its own reputation, and its name would in time take on character. It was our strong view that we did not want to be thought of as trading on anyone else's name.

The Chairman: No decision has to be made this morning. When we see the name which the sponsors propose, we shall cosider it and shall notify those who have objected. We shall then proceed next week to deal with the bill on its merits. Is that satisfactory?

Hon. Senators: Agreed.

At 9:50 a.m. the Committee adjourned.

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